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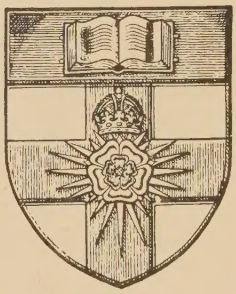

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ERRATA

Page 9, headnote, seven lines from end: Should read: "*Per* Lord Reid: It would be an innovation to require a cestui . . . "

Page 143: *Alan Orr* appeared with Gerald Gardiner Q.C. and C. F. Dehn for the defendants in *Birtley District Co-operative Society Ltd.* v. *Windy Nook and District Industrial Co-operative Society.*

Page 373, three lines from bottom: For 1957 *read* 1925.

Page 1070: *Michael Hoare* appeared with Sir Milner Holland Q.C. for the appellants in *London County Council* v. *Henry Boot & Sons Ltd.* and the instructing solicitor was *J. G. Barr* and not as printed.

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CROWN—*Servant—Dismissal—Civil servant —Temporary civil servant employed by War Office—Terms of employment laid down by regulations made by Army Council under letters patent—Purported exclusion of Crown's right to dismiss at pleasure—War Department (Outstations) Civilian Staff Regulations,* 1950 *regs,* 16, 437, 438.

Crown—Servant—Authority—Resignation of inferior civil servant—Authority to accept.

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* Riordan *v.* War Office
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3. —— —— *Removal from jurisdiction.* See Infant 2.

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* Roberts *v.* Naylor Brothers Ltd.
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2. —— —— *Special damages — Award of lump sum disablement gratuity — Proportion which had "accrued" in respect of injury benefit—Amount to be deducted from loss of earnings — National Insurance (Industrial Injuries) Act,* 1946 (9 *&* 10 *Geo.* 6, *c.* 62), *s.* 12—*Law Reform (Personal Injuries) Act,* 1948 (11 *&* 12 *Geo.* 6, *c.* 41), *s.* 2 (1).

* Perez *v.* C.A.V. Ltd.
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ECCLESIASTICAL LAW—*Faculty—Prayers for the departed — Erection of stained glass window bearing inscription "Pray for the soul of Elizabeth Smith."*

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2. —— *Tariff — "Undue discrimination" —High voltage and low voltage consumers —Differential—Fuel variation charge—High load factor consumers — Annual maximum demand charge not incorporated—Electricity Act,* 1947 (10 *& 11 Geo.* 6, *c.* 54), *s.* 37 (8).

* SOUTH OF SCOTLAND ELECTRICITY BOARD AND ANOTHER *v.* BRITISH OXYGEN CO. LTD. SAME *v.* BRITISH OXYGEN GASES LTD.
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2. —— Discretion statement as. See HUSBAND AND WIFE 17.

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* NAPIERALSKI *v.* CURTIS (CONTRACTORS) LTD. - - Havers J. 1 W.L.R. **835**

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FRAUD—Betting. See GAMING 1.

FRESH EVIDENCE — Court of Criminal Appeal. See CRIMINAL LAW 3.

FRIENDLY SOCIETY — Orthopaedic, medical and surgical treatment for members. See RATES AND RATING 6.

GAMING—*Fraud—Betting—Winning money by fraud in wagering—Gaming Act,* 1845 (8 *& 9 Vict. c.* 109), *s.* 17.

* REGINA *v.* CLUCAS. REGINA *v.* O'ROURKE
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2. —— *Lottery — Gaming machine outside shop premises—Charge under general section — Whether section creates offence — Betting and Lotteries Act,* 1934 (24 *& 25 Geo.* 5, *c.* 58), *s.* 21.

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* SALES-MATIC LTD. *v.* HINCHCLIFFE
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HIGHWAY—*Access—Adjoining owner—Proposal by highway authority to erect "refuge" at point where means of access emerged on to highway.*

Highway — "Refuge" — Power to erect — "Places of refuge for the protection of foot "passengers crossing the road"—Meaning—Whether proposed refuge within power of authority to "alter" street—Public Health Act, 1875 (38 *& 39 Vict. c.* 55), *s.* 149—*Road Traffic Act,* 1956 (4 *& 5 Eliz.* 2, *c.* 67), *s.* 45 (1).

* CHING GARAGE LTD. *v.* CHINGFORD CORPORATION
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* KELLY *v.* LOMBARD BANKING CO. LTD.
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* PRACTICE DIRECTION (APPEALS TO HOUSE OF LORDS) - - H.L.(E.) 1 W.L.R. **249**

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* EAST HAM CORPORATION *v.* MINISTRY OF HOUSING AND LOCAL GOVERNMENT
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* WOODARD *v.* WOODARD AND CURD
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2. —— *Custody—Child committed to care of local authority—Possibility of handing the child over to the mother later — Matrimonial Proceedings (Children) Act*, 1958 (6 *&* 7 *Eliz.* 2, *c.* 40), *s.* 5—*Children Act*, 1948 (11 *&* 12 *Geo.* 6, *c.* 43), *Part II.*
* F. *v.* F. (PRACTICE NOTE)
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3. —— *Divorce — Decree — Decree nisi — Application to rescind—Jurisdiction of court to hear application—"Any person"—Meaning—Whether including party to suit—Matrimonial Causes Act*, 1950 (14 *Geo.* 6, *c.* 25), *s.* 12 (2).
* SQUIRES *v.* SQUIRES
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4. —— —— *Discretion—Exercise—Previous petition dismissed — Degree of regard to be paid to adverse observations in previous judgment—Matrimonial Causes Act*, 1950 (14 *Geo.* 6, *c.* 25), *s.* 4.
* SHARMA *v.* SHARMA AND DAVIS
C.A. 1 W.L.R. **1035**

5. —— —— *Insanity—Care and treatment —Continuous — Evidence — Residence in hospital or other institution—Evidence of status thereof—Divorce (Insanity and Desertion) Act*, 1958 (6 *&* 7 *Eliz.* 2, *c.* 54), *s.* 1 (1) (3).
* TATE *v.* TATE (PRACTICE NOTE)
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6. —— —— *Re-marriage of parties to each other—Effect of re-marriage upon custody proceedings in their previous divorce suit—Matrimonial Causes Act*, 1950 (14 *Geo.* 6, *c.* 25), *s.* 26 (1).
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7. —— —— *Sodomy — Wife consenting to acts of sodomy — Subsequent intercourse — Whether consent or condonation bar to petition for sodomy.*
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* BAMPTON *v.* BAMPTON - C.A. 1 W.L.R. **842**

8. —— *Judicial separation—Form of decree —Practice—Adultery with three women found against husband — Only one of three women intervening — Direction to amend decree to show judge's findings — No valid distinction sustainable between man and woman served with proceedings and found guilty of adultery.*
Husband and Wife — Collusion — Abandonment of charge—Leaving charge in abeyance.
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* SCHLESINGER *v.* SCHLESINGER
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9. —— *Justices — Application to Divisional Court for rehearing—Transcript to be submitted to Divisional Court — Matrimonial Causes Rules*, 1957 (*S.I.* 1957, *No.* 619 (*L.* 4)), *r.* 36 (1).
* LAMBIE *v.* LAMBIE
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10. —— *Maintenance—Justices—Aggravated assault—Application by wife on ground that husband convicted summarily of an aggravated assault upon her—Husband conditionally discharged — Effect of conditional discharge upon wife's application—Summary Jurisdiction (Married Women) Act*, 1895 (58 *&* 59 *Vict. c.* 39), *s.* 4—*Offences against the Person Act*, 1861 (24 *&* 25 *Vict. c.* 100), *ss.* 20, 43—*Criminal Justice Act*, 1948 (11 *&* 12 *Geo.* 6, *c.* 58), *ss.* 7, 12.
* CASSIDY *v.* CASSIDY
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11. —— —— *Justices—Variation—Application to vary or discharge an existing order—New court — Transmission of information — Magistrates' Courts Act*, 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 55)—*Magistrates' Courts Rules*, 1952 (*S.I.* 1952, *No.* 2190 (*L.*18)), *r.* 34.
* JOHN *v.* JOHN (PRACTICE NOTE)
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12. —— *Marriage — Validity — Church of England ceremony in Iraq—No publication of banns—Marriage Act*, 1949 (12, 13 *&* 14 *Geo.* 6, *c.* 76), *s.* 25.
Husband and Wife — Practice (in matrimonial causes)—Declaration of nullity—Form —Void marriage ceremony.
* HOOPER (ORSE. HARRISON) *v.* HOOPER
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13. —— —— *Validity—Statutory requirements—Barbados—Failure to comply literally with statutory requirements—Substantial compliance—Presumption of validity—Rebuttable only by decisive evidence — (Barbados) Marriage Act*, 1904–1909, *s.* 2.
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14. —— Pleading — Belief in improper associations. See LEGAL AID.

15. —— *Practice—Children—Commencement of Act of* 1958—*Answer—Amending to allege desertion by way of cross-petition — Three years not completed at date of original answer —Proceedings begun before January* 1, 1959; *cross-petition filed thereafter—Whether Matrimonial Proceedings (Children) Act*, 1958 (6 *& 7 Eliz.* 2, *c.* 40) *applicable.*
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17. —— —— *Discretion statement — Evidence, as—Contents inadmissible until put in evidence by party concerned — Matrimonial Causes Rules*, 1957 (*S.I.* 1957, *No.* 619 (*L.* 4)), *r.* 28 (5).
* FILMER *v.* FILMER (PRACTICE NOTE)
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* PRACTICE DIRECTION (PETITION)
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19. —— —— *Pleading—Reply—Amending reply to allege desertion in answer to cross-petition — Cross-petition an amendment to answer—Three years not completed at date of petition nor of original answer.*
* THATCHER *v.* THATCHER AND GILL (WHEELER INTERVENING). (PRACTICE NOTE)
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20. —— —— *Rescission of decree—Co-respondent an infant—Guardian ad litem not appointed — Application to rescind decree — Procedure—Matrimonial Causes Rules*, 1957 (*S.I.* 1957, *No.* 619), *r.* 66 (3).
* ROBERTS *v.* ROBERTS AND PETERS
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21. —— —— *Service of petition—Service on infant personally — No service on father or guardian—Service deemed good service—Matrimonial Causes Rules*, 1957 (*S.I.* 1957, *No.* 619 (*L.*4)), *r.* 66 (3).
* WATTS *v.* WATTS
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22. —— —— *Submission of no case — Divorce—Submission of "not sufficient evi-"dence" by party cited—Election—Matrimonial Causes Act*, 1950 (14 *Geo.* 6, *c.* 25), *s.* 5.
* MEYER *v.* MEYER (HODGE CITED) (PRACTICE NOTE) Divorce Div. 1 W.L.R. **957**

23. —— *Property—Quasi-husband and wife —Quasi-matrimonial home—Parties unmarried —Division of proceeds of sale—Whether equitable principles relating to married couples applicable.*
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24. —— *Settlement — Variation — Effect—Order of Divorce Division extinguishing rights, powers and interests of wife "as if she were "now dead"—Post-nuptial settlement—Power of appointment exercisable by survivor of husband and wife—Whether husband survivor—Whether sole appointment by husband valid.*
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* *In re* POOLE'S SETTLEMENTS TRUSTS. POOLE *v.* POOLE
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2. —— Relief — Irish company. See REVENUE 2.

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* PRACTICE DIRECTION (CUSTODY)
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2. —— —— *Removal from jurisdiction—Order—Variation—Order as to custody varied by divorce registrar to give mother right to take child out of jurisdiction during school holidays without the written consent of the father—Whether registrar may dispense generally with father's written consent.*
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3. —— —— —— *Welfare officer—Reference to.*
* PRACTICE DIRECTION (CUSTODY)
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4. —— —— Re-marriage of parents. See HUSBAND AND WIFE 6.

5. —— *Guardianship — Joint guardians — Appointment of joint guardian by court — Principles applicable—Application by infant's sister for joint guardianship with father — Order by justices to enable sister to apply for custody — Guardianship of Infants Act*, 1925 (15 *& 16 Geo.* 5, *c.* 45), *s.* 4 (2).
* *In re* H. (AN INFANT)
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6. —— Service of petition. See HUSBAND AND WIFE 21.

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* SIM *v.* H. J. HEINZ CO. LTD.
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2. —— Court of Appeal — Habeas corpus. See COURT OF APPEAL 4.

JURISDICTION—*continued.*

3. —— Lands Tribunal. See LANDS TRIBUNAL 2.

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2. —— Libel—Right to. See PRACTICE AND PROCEDURE 7.

JUSTICES—*Juvenile court—Constitution—Member unable to sit—Adoption application heard by two male justices—Woman justice given notice to attend—No evidence whether absence of woman justice unforeseen—Whether court properly constituted—Juvenile Court (Constitution) Rules,* 1954 (*S.I.* 1954, *No.* 1711), *rr.* 11, 12 (1)(3).

Adoption—Appeal to High Court—Documents necessary—Reasons for decision and confidential reports—Adoption Act, 1958 (7 *&* 8 *Eliz.* 2, *c.* 5), *s.* 10—*R.S.C., Ord.* 55A, *r.* 6.

Adoption—Juvenile court—Note of evidence—Necessity for.

* *In re* J. S. (AN INFANT) Roxburgh J. 1 W.L.R. **1218**

2. —— *Plea—Plea of guilty—Notice to court—Notice to be read out—Magistrates' Courts Act,* 1957 (5 *&* 6 *Eliz.* 2, *c.* 29), *s.* 1 (2) (ii).

* REGINA *v.* OLDHAM JUSTICES. *Ex parte* MORRISSEY - - Divl.Ct. 1 W.L.R. **58**

* REGINA *v.* DAVIS, *Ex parte* BROUGH Divl.Ct. 1 W.L.R. **59n.**

3. —— —— *Plea of guilty in absence of accused—Two informations—Plea referable only to second information—Non-appearance of accused—Conviction on both informations—Certiorari—Magistrates' Courts Act,* 1957 (5 *&* 6 *Eliz.* 2, *c.* 29), *s.* 1 (1)—*Magistrates' Courts Rules,* 1957 (*S.I.* 1957, *No.* 1429), *s.* 1, *Sch.*

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* REGINA *v.* BURNHAM, BUCKS JUSTICES. *Ex parte* ANSORGE Divl.Ct. 1 W.L.R. **1041**

4. —— Rehearing—Application to Divisional Court. See HUSBAND AND WIFE 9.

LANDLORD AND TENANT—*Assignment of lease or underletting—Consent—Not to be unreasonably withheld in case of "responsible "assignee"—Proposed assignee subsidiary company—Consent subject to condition of guarantee by parent company—Large loan by parent company outstanding—Repayment on demand at any time—Whether "responsible "assignee"—Whether refusal of consent unreasonable.*

* *In re* GREATER LONDON PROPERTIES LTD.'S LEASE Danckwerts J. 1 W.L.R. **503**

2. —— Business premises (security of tenure). See LOCAL GOVERNMENT.

3. —— —— *Landlord's intention to reconstruct—"Substantial part of premises"—Meaning—Totality of proposed work to be considered—Landlord and Tenant Act,* 1954 (2 *&* 3 *Eliz.* 2, *c.* 56), *s.* 30 (1) (*f*).

LANDLORD AND TENANT—*continued.*

Court of Appeal—County court—Appeal from—Question of degree and fact.

Fact or Law—Landlord and tenant—Business premises—"Substantial part" question of fact—Landlord and Tenant Act, 1954, *s.* 30 (1) (*f*).

* BEWLAY (TOBACCONISTS) LTD. *v.* BRITISH BATA SHOE CO. LTD. - C.A. 1 W.L.R. **45**

4. —— —— *Landlord's intention to occupy for own purposes—Discovery—Cross-applications—Tenants' balance sheets and profit and loss accounts during tenancy—Landlord's income tax returns and pass sheets—Materiality—Theatre—Landlord and Tenant Act,* 1954 (2 *&* 3 *Eliz.* 2, *c.* 56), *s.* 30 (1) (*a*) (*c*) (*g*).

Practice and Procedure—Discovery—Relevance—Landlord and tenant—Business premises—Security of tenure—Means of tenant and landlord—Landlord and Tenant Act, 1954 (2 *&* 3 *Eliz.* 2, *c.* 56), *s.* 30 (1) (*a*) (*c*) (*g*).

* *In re* ST. MARTIN'S THEATRE. BRIGHT ENTERPRISES LTD. *v.* WILLOUGHBY DE BROKE Danckwerts J. 1 W.L.R. **872**

5. —— —— *Landlord's intention to occupy for own purposes—Intention—How shown—Landlord and Tenant Act,* 1954 (2 *&* 3 *Eliz.* 2, *c.* 56), *s.* 30 (1) (*g*).

* ESPRESSO COFFEE MACHINE CO. LTD. *v.* GUARDIAN ASSURANCE CO. LTD. C.A. 1 W.L.R. **250**

6. —— —— *Discovery—Landlord's intention to occupy for own purposes—Fixity of intention—Undertaking by landlord—Whether tenant entitled to discovery—Whether special circumstances—Landlord and Tenant Act,* 1954 (2 *&* 3 *Eliz.* 2, *c.* 56), *s.* 30 (1) (*g*).

Practice and Procedure—Discovery—Originating summons—Landlord and tenant—Application for new lease—Affidavit evidence—Application by tenant for discovery—Principles applicable.

* JOHN MILLER (SHIPPING) LTD. *v.* PORT OF LONDON AUTHORITY (PRACTICE NOTE) Roxburgh J. 1 W.L.R. **910**

7. —— —— *Landlords' intention to occupy for own purposes—Meaning of "the holding"—Notice of opposition to new tenancy accordingly—Landlords' subsequent intention to demolish and reconstruct—Sufficiency of landlords' notice—Landlord and Tenant Act,* 1954 (2 *&* 3 *Eliz.* 2, *c.* 56), *ss.* 23 (3), 30 (1) (*f*) (*g*).

* NURSEY *v.* P. CURRIE (DARTFORD) LTD. C.A. 1 W.L.R. **273**

8. —— —— *Notice to quit—Form—Notice of intention to demolish premises—No reference to requirement of possession in notice—Application to court for new tenancy—Sufficiency of notice—Landlord and Tenant Act,* 1954 (2 *&* 3 *Eliz.* 2, *c.* 56), *ss.* 25 (1), 30 (1) (*f*).

Practice and Procedure—Originating summons—Preliminary point of law arising—Issue of pro forma summons.

* BOLTON'S (HOUSE FURNISHERS) LTD. *v.* OPPENHEIM - Danckwerts J. 1 W.L.R. **685**

9. —— —— *Notice to quit—Form—Notice of intention to demolish premises—No reference to requirement of possession in notice—Application to court for new tenancy—Sufficiency of*

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notice—Landlord and Tenant Act, 1954 (2 *&* 3 *Eliz.* 2, *c.* 56), *ss.* 25 (1), 30 (1) (*f*).
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* Bolton's (House Furnishers) Ltd. *v.* Oppenheim - - C.A. 1 W.L.R. **913**

10. —— —— *Terms of new tenancy—Date of commencement—Date of termination of current tenancy—Term—Break to review rent —Guard against inflation—Landlord and Tenant Act*, 1954 (2 *&* 3 *Eliz.* 2, *c.* 56), *ss.* 24, 25, 26, 64.
* *In re* No. 88, High Road, Kilburn
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11. —— *Covenant—Notice of breach—Form —whether insertion of allegation of breach of non-existent covenant invalidates notice—Claim for damages—Law of Property Act*, 1925 (15 *&* 16 *Geo.* 5, *c.* 20), *s.* 146 (1)—*Leasehold Property (Repairs) Act*, 1938 (1 *&* 2 *Geo.* 6, *c.* 34), *s.* 1 (1) (*as amended by the Landlord and Tenant Act*, 1954 (2 *&* 3 *Eliz.* 2, *c.* 56), *s.* 51).
* Silvester *v.* Ostrowska
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12. —— notice to quit. See Local Government.

13. —— *Rent restriction—Costs—Court of Appeal—Jurisdiction to make order for costs—Landlord and Tenant (Temporary Provisions) Act*, 1958 (6 *&* 7 *Eliz.* 2, *c.* 68), *s.* 4 (2).
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* Spyropoulos *v.* McClelland (Practice Note) - - - C.A. 1 W.L.R. **862**

14. —— —— *Surrender of tenancy — Whether giving up of physical possession necessary for valid surrender.*
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15. —— *Rent tribunal—Furnished premises —Rent registered—Subsequent letting at increased rent—Claim for refund of overpaid rent—Rent fixed by tribunal and registered—Registered rent applicable to subsequent lettings—Furnished Houses (Rent Control) Act*, 1946 (9 *&* 10 *Geo.* 6, *c.* 34), *ss.* 2, 3, 4.
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2. —— *Costs—Husband and wife—Maintenance — Registration of orders — Maintenance Orders Act*, 1958 (6 *&* 7 *Eliz.* 2, *c.* 39), *s.* 2.
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* *In re* Water-Tube Boilermakers' Agreement - - R.P.Ct. 1 W.L.R. **1118**

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7. —— —— *Investment allowance — Shoe and slipper manufacturers—Replacement of knives and lasts — Whether "plant" — Whether expenditure on replacement of capital expenditure—Income Tax Act*, 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 10), *ss.* 137, 279, 280, 330—*Finance Act*, 1954 (2 *&* 3 *Eliz.* 2, *c.* 44), *s.* 16.

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THE
WEEKLY LAW REPORTS

Volume I

Containing those cases of value to practitioners which are not intended to be included in The Law Reports and also practice notes and directions.

[CHANCERY DIVISION.]

* HOUSDEN (INSPECTOR OF TAXES) *v.* MARSHALL.

1958
Nov. 18.

Harman J.

Revenue—Income tax—Capital or income receipt—Reminiscences of jockey sold to newspaper—Agreement to provide information and documents—Articles written by journalist—Whether sale of property or provision of services—Liability to tax—Case VI of Schedule D—Income Tax Act, 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 10), *s.* 123.

A jockey agreed to sell his reminiscences to K. Newspapers Ltd. for publication in four articles under his name. By the agreement he agreed to make available to a nominee of the company reminiscences of his life and experiences on the Turf, and to provide photographs and press cuttings. He also granted the company the first British serial rights in those reminiscences. In fact, the articles were written by a professional journalist under his name and he merely "vetted" the information which the journalist had found by his own research. Owing to a strike one article only was published and the jockey was paid £750 for it. The Crown claimed that that sum was taxable under Case VI of Schedule D of the Income Tax Act, 1952:—

Held, that no sale of any property took place under the agreement; the reminiscences comprised nothing in the nature of copyright, and the right to use the jockey's name was subsidiary to the main purpose of the agreement, which was the provision of services, and the fact that they were of a trivial nature was immaterial. The Crown's claim that they were taxable, accordingly, succeeded.

Bradbury v. *Arnold* (1957) 37 T.C. 665 applied.

CASE STATED by the Commissioners for the Special Purposes of the Income Tax Acts.

1. At a meeting of the commissioners held on November 11, 1957, the taxpayer, Bryan Marshall, appealed against an assessment to income tax made upon him under Case VI of Schedule

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D of the Income Tax Act, 1952,[1] for the year 1954–1955 in the sum of £750.

2. That sum was paid to the taxpayer by Kemsley Newspapers Ltd., under an agreement made on March 4, 1955.

3. Evidence was given by the taxpayer and there was put in evidence a copy of the said agreement.

The following facts were found by the commissioners.

4. The taxpayer was a jockey of some renown having, among other successes, twice ridden the winner of the Grand National. From 1929 until 1954 he was a jockey both in flat races and under National Hunt rules. In 1954 he obtained a licence to train racehorses, whereupon he commenced to train at Berkeley House, Lambourne, Berkshire, at the same time ceasing to ride in flat races but continuing at all relevant times to ride under National Hunt rules. As a result of his successes as a jockey he was well known in racing circles and among those of the general public who were interested in racing.

5. Early in 1955 the taxpayer was approached by a person known to him as a frequenter of racecourses who inquired whether he [the taxpayer] had ever thought of writing the story of his life. He replied that he would probably do so when he gave up any connexion with horse-racing. His acquaintance then asked him if he would be interested in receiving cash for the story of his life, which a "ghost" writer would prepare. The taxpayer said that he might be interested. About a week later, on March 3, 1955, this acquaintance telephoned the taxpayer in the evening and asked if he and the London editor of the Sunday Chronicle newspaper could come straight down to the taxpayer's house to discuss with him the publication of the story of his life. The taxpayer agreed to this suggestion with some reluctance; and late that same night the acquaintance and the editor arrived at his home. They stayed until the early hours of the next morning and the agreement of March 4, 1955, was signed.

6. The agreement provided that the taxpayer would on or before March 11, 1955, make available to a writer appointed by Kemsley Newspapers Ltd. reminiscences of his life and experiences on the Turf for the purposes of writing a series of four articles of not less than 2,000 words each. The taxpayer undertook to place at the disposal of Kemsley Newspapers Ltd. all documents, photographs, newspaper cuttings or other matter in his custody or control relating to his reminiscences of people and events referred to therein and to facilitate their publication. The taxpayer for the consideration mentioned in the agreement as beneficial owner granted to Kemsley Newspapers Ltd. the first British serial rights in his reminiscences and authorized the publication of the articles under his name with the right to use a

[1] Income Tax Act, 1952, s. 123: ". . . Case VI—tax in respect of any "annual profits or gains not falling "under any of the foregoing Cases "and not charged by virtue" of Schedules A, B, C and E.

facsimile of his signature. Kemsley Newspapers Ltd. agreed to pay the taxpayer £1,500, as to £750 within seven days of the publication of the first article and the balance of £750 within seven days of the publication of the fourth article.

7. Somewhere about March 11, 1955, one Pollock, who was a writer employed by Kemsley Newspapers Ltd., installed himself in a public-house convenient to the taxpayer's home. He visited the taxpayer usually twice a day for a week. Before coming to see the taxpayer Pollock had done considerable research into the events of his life and his racing career. He discussed the information he had so obtained from other sources with the taxpayer, whose contribution to the discussion was confined to confirming most of the information supplied by Pollock with the correction of some minor errors of fact. The taxpayer did not put pen to paper, nor did he produce any documents, photographs, newspaper cuttings or other publishable material.

During the course of this single week of intermittent discussions Pollock drafted four articles for issue in the Sunday Chronicle. Each of these articles was read over by Pollock to the taxpayer, who suggested certain trifling amendments.

The first of the four articles was published in the Sunday Chronicle on March 20, 1955. Shortly thereafter the taxpayer received from Kemsley Newspapers Ltd. a cheque for £750 and it was this payment which was in dispute in this case.

Following the publication of the first article on March 20, the taxpayer was interviewed by the stewards of the National Hunt Committee at Aintree. He was not reprimanded by the stewards but they made it clear to him that they were not in favour of publication of newspaper articles by trainers or jockeys. The taxpayer was left with the impression that the stewards would see no objection to the publication of the articles prepared by Pollock if they appeared under his name and not under the taxpayer's name. Accordingly the taxpayer approached a representative of Kemsley Newspapers Ltd. who was also present at Aintree racecourse, and asked him to have the titles of the remaining three articles altered to show that the articles were written by Pollock.

No further action was taken by the taxpayer because shortly after the above-related events the Sunday Chronicle, in common with other newspapers, ceased publication for a while because of a strike of employees engaged in the newspaper industry. So far as the taxpayer knew, the second article written by Pollock was never published in the Sunday Chronicle newspaper. Certainly the third and fourth articles were not so published. The taxpayer did nothing about the second instalment of £750 mentioned in the agreement of March 4, 1955, and this sum was never paid to him.

9. It was contended on behalf of the taxpayer that the agreement of March 4, 1955, provided for the sale of the right to publish the taxpayer's reminiscences and that the sum of £750

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paid to him thereunder was not assessable upon him under Case VI of Schedule D.

10. It was contended on behalf of the Crown: (1) that the agreement of March 4, 1955, did not provide for the sale of any property by the taxpayer; (2) that it provided for the performance of services by the taxpayer; and (3) that the sum of £750 was properly assessed upon him under Case VI of Schedule D.

11. The commissioners decided to allow the appeal. They stated that it was common ground that the test which they ought to apply in this case was that approved by Lawrence J. in *Hobbs* v. *Hussey* (*Inspector of Taxes*),[2] viz: "the true "question in such cases is whether the transaction in question is "really sale of property or the performance of services . . ."

In applying that test to the construction of the agreement of March 4, 1955, they bore in mind that the taxpayer was well known to people interested in horse-racing; that the details of his life and achievements, though no doubt of great interest to such people, would have only an ephemeral appeal; and that their publication in a series of newspaper articles would exhaust their value as a subject of publication.

The agreement of March 4, 1955, provided for the taxpayer to make available to Kemsley Newspapers Ltd. his reminiscences and any documents, etc., relating thereto and granted to that company the right to publish before any other British newspaper a series of articles containing his reminiscences. The taxpayer could have made his reminiscences available by word of mouth or in some recorded form.

Bearing in mind those considerations, they thought that on a proper construction of the said agreement it provided predominantly for the sale of the major part, if not the whole, of the publication rights in his reminiscences. Any services to be rendered were, in their view, subsidiary and incidental to the sale of the taxpayer's property in these reminiscences.

They accordingly discharged the assessment appealed against.

The agreement so far as material provided:

"(1) The grantor [the taxpayer] shall on or before March 11, "1955, make available to a writer or writers to be appointed by "the company [Kemsley Newspapers Ltd.] reminiscences of "his life and experiences on the Turf for the purpose of writing "a series of four articles of not less than two thousand words "each.

"(2) The grantor warrants and represents that the said "reminiscences will not infringe the copyright belonging to any "party and that they will contain nothing slanderous.

"(3) The grantor undertakes to place at the disposal of the "company all documents photographs newspaper cuttings or "other matter in his custody or control relating to his said

[2] [1942] 1 K.B. 491, 496; [1942] 1 All E.R. 445; 24 T.C. 153.

"reminiscences or to the persons and events referred to therein "and gives permission so far as he is able for the publication of "the same and to obtain where necessary and where possible "the permission of any other person or persons to such "publication.

"(4) The grantor for the consideration hereinafter mentioned "as beneficial owner hereby grants to the company the first "British serial rights in the said reminiscences and authorizes the "company to publish the articles under his name and the right to "use a facsimile of his signature whether at the foot or elsewhere "in the said articles or in any advertisement issued by the "company in connexion therewith.

"(5) The grantor hereby undertakes that during the period "from the date hereof until the fourth of the said articles shall "have been published under the terms of this agreement he will "not allow himself to be interviewed (other than by officers or "employees of the company) on the subject of his said "reminiscences nor will he write permit to be written or provide "material for any person company or firm (other than the com-"pany) to write his said reminiscences.

"(6) For the consideration herein mentioned the company "agrees to pay to the grantor the sum of £1,500 as to £750 "within seven days of the publication of the first article and the "balance of £750 within seven days of the publication of the "fourth article.

"(7) The grantor undertakes to execute any further documents "or perform any further act or thing which shall more effectually "vest in the company the rights hereinbefore granted."

Alan Orr for the Crown.

G. B. Graham for the taxpayer.

Cases cited in argument, not referred to in the judgment: *Donoghue* v. *Allied Newspapers Ltd.*[3]; *Ryall* v. *Hoare*[4]; *Sherwin* v. *Barnes*[5]; *Mitchell* v. *Rosay*[6]; *Moriarty* v. *Evans Medical Supplies Ltd.*[7]; *Martin* v. *Lowry.*[8]

HARMAN J. The case, in my view, turns entirely on the construction of the written agreement of March 4, 1955, and though a number of cases have been cited to me about more or less similar instances, I do not think that on a question of construction a decision on one agreement can really be much guide to another, because the two will never be exactly the same.

This kind of case arises either as a result of something emanating from the famous, as, for instance, Lord Haig, the soldier, and Steve Donoghue, the jockey; or from the infamous,

[3] [1938] Ch. 106.

[4] [1923] 2 K.B. 447; 39 T.L.R. 475; 8 T.C. 521.

[5] (1931) 16 T.C. 278.

[6] (1954) 35 T.C. 496.

[7] [1958] 1 W.L.R. 66; [1958] 3 All E.R. 718; 37 T.C. 578.

[8] [1927] A.C. 312; 43 T.L.R. 116; 11 T.C. 297.

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William Cooper Hobbs (blackmail, forgery and arson). Either category can produce money, particularly, I think, from the Sunday newspapers, because the public likes to read at its ease before the fireside sensational reminiscences of either of these two categories of persons. They are not usually, in fact, strictly speaking, reminiscences of these persons at all; they are written by what are called "ghost" writers. The celebrated or notorious character communicates this or that to the "ghost" and may, as here, allow his signature to be used to give an air of reality to an otherwise bald and unconvincing narrative.

The question here is agreed to be capable of a simple statement: was the transaction on the one side the sale by the taxpayer of some property of his, or was he really agreeing to perform services for the newspaper for a reward? That services come under Case VI of Schedule D is well known and has been recently restated by Upjohn J. in *Bradbury* v. *Arnold*.[1] The facts of the case do not matter for my purpose; but the judge said this[2]: "There is no doubt that a contract for services may, "and clearly does, form a matter for assessment under Case VI "of Schedule D, and not the less so that the services to be "rendered are trivial, or that they are to be rendered once and "for all, so that the remuneration may be regarded as a casual "profit arising out of a single and isolated transaction."

The distinction between sale of property and the performance of services appears to have been stated by Lawrence J. in *Hobbs* v. *Hussey*,[3] Hobbs in that case being the notorious individual to whom I referred earlier.

The agreement, therefore, is what must be looked at. A copy of it is attached to the case, and I do not propose to read it here. The first clause binds the taxpayer to make available to a nominee of the company "reminiscences of his life and experiences "on the Turf for the purpose of writing a series of four articles." Thus, what he has to provide are reminiscences.

He also undertakes by clause (3) to provide photographs, press cuttings and such like, no doubt to illustrate the articles which the writer would produce.

By clause (4) he is expressed as beneficial owner to grant to the company (that is, Kemsley Newspapers Ltd.) "the first British "serial rights in the said reminiscences and authorizes the "company to publish the articles under his name." He also agreed not to communicate like matter to other people until the fourth of the articles was published.

Clause (6) provided: "For the consideration herein mentioned "the company agrees to pay to the grantor," as it turned out, £750.

So far as the history of the matter need be considered, it appears that in fact the "ghost" writer did a certain amount of research on his own account and produced the articles more or

[1] (1957) 37 T.C. 665.
[2] Ibid. 669.
[3] [1942] 1 K.B. 491; [1942] 1 All E.R. 445; 24 T.C. 153.

less ready made. The taxpayer was called upon to do very little of the things which he had undertaken to do; he merely had, to use a vulgarism, to "vet" the product of the "ghost" writer, who also provided the necessary background to illustrate it. The taxpayer did not do very much, but he did as much as he was called upon to do, and he was paid in accordance with the contract.

What was he paid for? He was paid for making available his reminiscences and for producing certain documents if called upon; and, I think, for nothing else. It is true that by clause (4) he is expressed to grant the British serial rights in the said reminiscences; but there were no reminiscences in existence when he so contracted or purported to grant the rights, and the reminiscences were never his copyright; they were the copyright either of the man who wrote them, that is to say, the "ghost," or the "ghost's" employers. There was nothing for the taxpayer to grant.

He did, it is true, authorize the use of his name and a facsimile of his signature. That was something in which he had a property.

The special commissioners, after stating quite correctly what the point was, came to the conclusion that the agreement provided "predominantly for the sale of the major part, if not the whole, "of the publication rights in his reminiscences," and that services to be rendered were merely subsidiary. That is an inference which they have drawn from the wording of the document; it is a conclusion of law with which I cannot agree. He did not sell any publication rights in his reminiscences; he had no reminiscences of which he could sell the rights. The reminiscences which he communicated to the journalist, if they had been used, which, actually, they were not, were not his; he had no secrets to impart, his life was open. He was not selling anything of which he had the property like the copyright. He was not selling anything secret. He was merely talking to the journalist and allowing the journalist's write-up to be put forward as his.

What then did he do in order to be paid £750? He performed some services, trivial enough because the work was done for him. But the amount of service, as Upjohn J. shows, is of no materiality. It is quite different from *Trustees of Earl Haig* v. *Inland Revenue Commissioners*[4]; in that case the trustees or the representatives of Earl Haig had his diaries in their possession, a subject of copyright. They sold a part of the rights of publication of those diaries, not the whole of them, for reasons into which I need not go. It is not unnatural that Lord Normand came to the conclusion that what they were selling was a piece of property, and that the price was not taxable.

In *Hobbs* v. *Hussey*,[5] on the other hand, the taxpayer did contract to write the articles, and did in fact write them, so that he did a great deal more than the taxpayer here.

[4] 1939 S.C. 676; 22 T.C. 725. [5] [1942] 1 K.B. 491.

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Harman J.

But it was none the less held that what he was paid for was the services he rendered and not the articles he sold.

This seems to me, with all respect to the special commissioners, a fairly plain case. I think, perhaps, they were misled by clause (4) of the agreement, by which the taxpayer is expressed to grant something like a copyright or a part of a copyright. When it is remembered that there was no such thing, nor would there be any such thing, for the taxpayer to grant, that clause does not really carry any weight; and even though the taxpayer did sell them an article in which he had property, namely, the right to use his name, that was a subsidiary matter in my view, and the major object and effect of the agreement was that he was paid a sum of money for services to be rendered. That is a taxable subject-matter and I must allow the appeal.

Appeal allowed.

Solicitors: *Solicitor, Inland Revenue; Delme, Radcliffe & Brunskill, Devizes.*

I. G. R. M.

[HOUSE OF LORDS.]

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Oct. 2, 6, 7, 8, 9, 13; *Nov.* 25.

*B. S. LYLE LTD. . . . . APPELLANTS;

AND

ROSHER AND OTHERS . . . . . RESPONDENTS.

Power of Appointment — Exercise — Construction — Trust expressed in favour of a person absolutely—Person holding on behalf of others—Purported assignment of that person's interest in favour of third party as security—Priorities.

Judicial Precedent—Scottish authority—Weight—Trust and trustee.

Under a settlement W. and his father had a joint power of appointment over certain funds. When he became a member of Lloyd's it was necessary for him to deposit funds which were procured from the settlement funds by means of a transaction taking the form of three deeds, all executed on February 13, 1933: (a) an exercise of the joint power by W. and his father, and (b) two deeds, to which W. and Lloyd's alone were parties, reciting that he had transferred or caused to be transferred to Lloyd's certain funds to be held on the trusts therein mentioned, and providing that the income of those funds was to be paid to W., his administrators or assigns as he or they should direct, that the fund might be used to pay certain claims if they should arise, and that the funds (or so much as should not be applied for that purpose) should be held in trust for W., his executors, administrators or assigns. There was nothing in the trust deeds to indicate that he was not beneficially entitled to these funds. In 1953 W.

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† *Present*: VISCOUNT KILMUIR L.C., LORD MORTON OF HENRYTON, LORD REID, LORD COHEN and LORD KEITH OF AVONHOLM.

purported to charge the funds deposited in favour of B. S. Lyle Ltd., who on inquiry, were informed by Lloyd's that they had no notice of any other charge on the funds. Written notice of the charge was given to Lloyd's. W. was adjudicated bankrupt in 1954. B. S. Lyle Ltd. claimed that their charge took priority over any interest in the fund of the trustees of the settlement:—

Held, that the power of appointment was exercised only to the extent necessary to enable the conditions incidental to W.'s admission to Lloyd's to be complied with. No equitable interest in the funds was ever conferred on him and he was never capable of assigning or charging them at all. Accordingly, the case never came within the rule in *Dearle* v. *Hall* (1823) 3 Russ. 1, which requires for its application a fundholder, a person who has, or has had, a beneficial interest, and two successive assignees.

Per Lord Reid: It would be an invitation to require a cestui que trust for his own protection to give notice of the trust in his favour.

Ward v. *Duncombe* [1893] A.C. 369 considered.

Redfearn v. *Somervail* (1813) 1 Dow 50; 5 Pat.App. 707 distinguished.

Decision of the Court of Appeal affirmed.

Appeal from the Court of Appeal (Jenkins and Sellers L.JJ., and Upjohn J.).

This was an appeal from an order of the Court of Appeal dated June 5, 1957, affirming an order of the Chancery Division (Wynn-Parry J.) dated November 1, 1956. The appellants, B. S. Lyle Ltd., were plaintiffs in the proceedings which were commenced by writ of summons dated August 25, 1954, in the Chancery Division. The first and second defendants, John Brenchley Rosher and Frederick James Mann, being the first and second respondents in this appeal, were the trustees of a resettlement dated March 2, 1927, made between Harry William George Willis and his son Algernon George Henry Willis (hereinafter called "the bankrupt"). The third defendants, being the third respondents, were the society incorporated by Lloyd's Act, 1871, under the name of Lloyd's. The fourth defendant, being the fourth respondent, was the trustee of the property of the bankrupt, who was adjudged bankrupt on March 4, 1954.

The facts are fully stated by Viscount Kilmuir L.C. in his opinion.

E. Milner Holland Q.C. and *Arthur Figgis* for the appellants.

Lionel Edwards Q.C. and *Sir Norman Touche* for the respondents.

The following authorities, besides those cited in their Lordships' opinions, were referred to in argument: *Montefiori* v. *Guedalla* [1]; *Gorringe* v. *Irwell India Rubber and Gutta Percha Works* [2]; *Timpson's Executors* v. *Yerbury* [3]; *Phillips* v. *Phillips* [4];

[1] [1903] 2 Ch. 26; 19 T.L.R. 390.
[2] (1886) 34 Ch.D. 128.
[3] [1936] 1 K.B. 645; [1936] 1 All E.R. 186.
[4] (1861) 4 De G.F. & J. 208.

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Cory v. *Eyre*[5]; *Taylor* v. *Russell*[6]; *Carritt* v. *Real and Personal Advance Co.*[7]; *Saffron Walden Second Benefit Building Society* v. *Rayner*[8]; *Wilkinson* v. *Wilkinson*[9] and *Camp* v. *King*.[10]

Their Lordships took time for consideration.

November 25. VISCOUNT KILMUIR L.C. My Lords, this is an appeal from an order of the Court of Appeal affirming a judgment of Wynn-Parry J.

The appellants were plaintiffs in proceedings in the Chancery Division; the first- and second-named respondents to this appeal are the trustees of a resettlement dated March 2, 1927, made between Harry William George Willis and Algernon George Henry Willis, whom I shall call "the father" and "the bankrupt" respectively. The third-named respondents (whom I shall call "Lloyd's") are the society incorporated by Lloyd's Act, 1871, under the name of Lloyd's. The fourth-named respondent is the trustee of the property of the bankrupt who was adjudged bankrupt on March 4, 1954.

The question which arose for decision in the action and arises for decision in this appeal is whether certain charges created in favour of the appellants by the bankrupt upon funds standing in the name of Lloyd's rank in priority to the interest therein of the settlement trustees.

In the year 1933 the bankrupt was desirous of becoming an underwriting member of Lloyd's. To qualify him for membership it was necessary that approved investments of sufficient value should be vested in Lloyd's upon trusts for securing the due discharge of the bankrupt's underwriting obligations, separate trust funds being required to be so constituted for non-marine and marine underwriting respectively. In order to provide these investments, the father and the bankrupt, as they had power to do under the settlement dated March 2, 1927, executed a deed of appointment and release to which the then settlement trustees were parties, dated February 13, 1933.

The appointment of 1933, after various recitals, including recital (C) which says that "in order to enable the conditions "incidental to [the bankrupt's] admission as an underwriting "member of Lloyd's to be complied with, the appointors are "desirous of exercising the joint power of appointment conferred "on them by the settlement" (that is, the resettlement of 1927) "to the extent and in the manner hereunder appearing," provided that certain investments should thereafter be held— "(I) Upon trust that the trustees of the settlement shall forth-"with transfer the said investments into the name of Lloyd's to "the intent that the said investments shall henceforth be held by

[5] (1862) 1 De G.J. & S. 149.
[6] [1892] A.C. 244; 8 T.L.R. 463.
[7] (1889) 42 Ch.D. 263; 5 T.L.R. 559.
[8] (1880) 14 Ch.D. 406.
[9] (1857) 4 Jur.N.S. 47.
[10] (1887) 14 V.L.R. 22.

"Lloyd's (*a*) as to [certain of the investments] and the property "from time to time representing the same (all of which are "hereinafter together called the non-marine deposit), upon the "trusts and for the purposes and subject to the powers provisions "and discretions upon for and subject to which, under a trust "deed (hereinafter called the non-marine trust deed) which is "intended to provide for the Lloyd's non-marine deposit of the "said Algernon George Henry Willis and has already been "prepared and is expressed to be made between the [bankrupt] "of the one part and Lloyd's of the other part and is intended to "bear even dates with these presents, the non-marine deposit "ought to be held from time to time." There followed (*b*) which dealt with the marine trust deed and constituted the marine deposit in exactly similar terms. It was further provided by the appointment of 1933 as follows: "(II) Provided that in so far as, under "the non-marine trust deed and the marine trust deed respec-"tively, the trust fund is directed or ought to be held upon trust "for the [bankrupt] or upon trust for him his executors adminis-"trators or assigns or upon trust to retransfer or repay the same "to him his executors administrators or assigns or as he or they "may direct or otherwise upon trust for him absolutely, and in "so far as, under the non-marine trust deed and the marine trust "deed respectively, the annual income of the trust fund is "directed to be paid to the [bankrupt] his executors and "administrators or assigns or as he or they shall direct, the trust "fund and the income thereof respectively shall be deemed, "subject as is next hereinafter provided, to be subject to the "trusts powers and provisions to which, under the settlement, "the trust fund and the income thereof respectively would have "been subject if these presents had not be executed. (III) Not-"withstanding anything in the last preceding proviso contained, "Lloyd's shall not be affected or deemed to be affected with "notice of any of the trusts powers and provisions lastly herein-"before referred to and shall be entitled to treat the trusts "expressed in favour of the [bankrupt] his executors admini-"strators and assigns in the non-marine trust deed and the "marine trust deed as being operative according to their tenor "and so that the receipt of the [bankrupt] his executors adminis-"trators or assigns shall be a sufficient discharge to Lloyd's in "respect of the trust fund or any part thereof or any income "arising therefrom"

The non-marine trust deed and the marine trust deed bearing even date with the appointment of 1933 (that is, February 13, 1933), were duly executed and the investments designated by the appointment of 1933 were duly transferred by the then settlement trustees to Lloyd's as trustees of the non-marine and marine trust deeds respectively, and the bankrupt duly became an underwriting member of Lloyd's.

Both the non-marine trust deed and the marine trust deed, after a number of trusts and provisions mainly for securing the

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payment of claims on policies underwritten by the bankrupt, contained ultimate trusts in favour of the bankrupt, his executors, administrators or assigns.

By a deed of appointment and release (which I shall call "the "appointment of 1934") made between the same parties as the appointment of 1933 and dated June 14, 1934, it was provided that certain further funds might be transferred by the settlement trustees to Lloyd's to be held by them upon the trusts of the non-marine trust deed. The material provisions of the appointment of 1934 were the same as those of the appointment of 1933. Pursuant to the appointment of 1934 the settlement trustees in 1938 and 1939 transferred into the name of Lloyd's certain further stocks.

In 1939 the bankrupt himself transferred into the name of Lloyd's £941 4 per cent. Consolidated Stock to be held upon the trusts of the non-marine trust deed.

In November, 1951, the bankrupt borrowed from the appellants, who were licensed moneylenders, the sum of £3,000 carrying interest at the rate of 75 per cent. per annum; in September, 1952, he was in default and the appellants commenced proceedings against him in respect of this loan and interest. By a charge (which I shall call "the first charge") dated February 9, 1953, the bankrupt, in consideration of the appellants agreeing to delay all further proceedings in that action, charged or purported to charge £8,581 3½ per cent. War Stock deposited with Lloyd's with the payment to the appellants of the principal, interest and costs claimed by the writ in the action. This sum of £8,581 3½ per cent. War Stock in fact represented, by reason of changes of investment made by Lloyd's, the whole of the investments transferred by the then settlement trustees to Lloyd's under the appointment of 1933 and the appointment of 1934.

On March 24, 1953, the bankrupt borrowed from the appellants a further sum of £2,500 carrying interest at 75 per cent. per annum, and by a charge of the same date (which I shall call "the second charge") he charged or purported to charge the £8,581 3½ per cent. War Stock and £941 4 per cent. Consols deposited with Lloyd's with the repayment to the appellants of the £2,500 and interest, subject as to the War Loan to the first charge.

Immediately before taking the first charge and immediately before taking the second charge the appellants, by their solicitors, inquired of Lloyd's whether Lloyd's had notice of any other charge on the stocks comprised in the first charge and the second charge respectively, and on each occasion were informed by Lloyd's that they had not. At the time when they took the first charge, and at the time when they took the second charge, the appellants had no knowledge of any other charge, assignment or interest of or in the stocks other than the interests of Lloyd's and of the bankrupt.

The appellants claimed in the action a declaration that the

first charge and the second charge rank in priority to any interest of the settlement trustees in the stocks in the hands of Lloyd's. The settlement trustees by their defence and counterclaim counterclaimed for a declaration that subject to the prior trusts in favour of Lloyd's they were entitled to these stocks (other than the £941 4 per cent. Consols to which they made no claim) in priority to any claim of the appellants.

The appellants contended that the case was one of competing equitable interests in which priority was to be decided by an application of the rule in *Dearle* v. *Hall*.[1] They claimed that the appointments of 1933 and 1934, upon their true construction, were in the first place an appointment to the debtor of the equitable beneficial interest in the investments transferred to Lloyd's subject to the trusts for securing the due performance of his underwriting obligations, and secondly, an assignment by the debtor of such interest to the trustees of the settlement of 1927. Even if there was not an instant of time when the bankrupt had the beneficial interest, it was urged (a) that the documents did confer upon the bankrupt the right as between himself and Lloyd's (subject to underwriting claims) to receive the investments, and that this was a chose in action as against Lloyd's which held upon trust for the trustees of the settlement; (b) that the bankrupt carried out successive dealings with that chose in action, that is to say, his being constituted trustee for the respondent trustees and his charging the chose, and (c) that these successive dealings created competing equities in the trustees and the appellants, the priority of which depended on the priority of notice given to Lloyd's.

As an independent point, the appellants contended that, quite apart from any question of notice, the trustees' interest ought to be postponed to that of the appellants on account of the misleading form of the documents and the nature of the transaction.

I cannot give to the documents the construction contended for by the appellants. The investments remained subject to the trusts of the settlement, save in so far as those trusts might be varied or abrogated by an exercise of the joint power of appointment conferred by the settlement on the bankrupt and his father. The appointments of 1933 and 1934 exercised this power only to the extent necessary to enable the conditions incidental to the bankrupt's admission as an underwriting member of Lloyd's to be complied with. Thus these appointments did not confer upon the bankrupt any equitable interest in the investments. The application to the investments of the trusts of the settlement being preserved (subject only to their postponement in order to secure the due performance of the bankrupt's underwriting obligations), the bankrupt never had any equitable interest in the investments and so never was capable of reassigning to the trustees of the settlement, as the first part of the argument suggests. He was,

[1] (1823) 3 Russ. 1.

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to my mind, never capable of assigning or charging the investments at all.

With regard to the second presentation of this part of the argument, I take the view that there was no dealing by the bankrupt with the chose in action, because the benefit of the chose in action from the time of its creation belonged to the respondent trustees, and never at any moment belonged to the bankrupt in equity. In the words of the Court of Appeal, he was a mere conduit pipe in the conveyancing scheme.

In my view, in the above circumstances one does not come within the postulates of the rule in *Dearle* v. *Hall*.[1] For the application of that doctrine there are at least four requirements, namely: a fundholder, someone who has, or has had, a beneficial interest, assignee No. 1 and assignee No. 2. I do not know of any case where the doctrine has been applied without there being someone who had at one time a beneficial interest. We were pressed with the argument that, in the classic *Dearle* v. *Hall*[1] case, the assignor has no beneficial interest at the time he makes the second assignment and is, indeed, constructive trustee for the first assignee. I do not think that the rule would be restricted beyond its intendment or present effect if it were held to apply only where, at the time of the assignment, the assignor had a beneficial interest *or* had no beneficial interest only because he had voluntarily divested himself of it. Put negatively, the rule does not apply where the assignor had no beneficial interest *and* had not deprived himself of one by voluntarily divesting himself of it. In view of Lord Macnaghten's words in *Ward* v. *Duncombe*[2] I am certainly not disposed to extend the doctrine. It was presented to us as a check—of necessity arbitrary—on the inevitable possible injustices of equitable assignments; all that one can do with an arbitrary rule is to endeavour to clarify its limits.

The limit which I have tried to indicate does not, in my view, conflict with any previous authority. The appellants relied on the Scottish case in this House of *Redfearn* v. *Somervail*,[3] in which one Steuart invested in his own name in the stock of the Edinburgh Glasshouse Co. money belonging to a partnership of which he was a member. Steuart later borrowed money from Redfearn and assigned the Glasshouse stock to him as security. Redfearn intimated (i.e., gave notice of) this assignation to the company, who had no intimation that the stock belonged to the partnership. On these facts the assignee won. Nevertheless, although Lord Eldon is reported as saying[4]: "This is a most "important case, especially as it concerns the interests of the "commercial community in both kingdoms," there are other aspects which must be borne in mind. The case was one under Scots law, in which there is no separate system of equity and no precise differentiation between legal and equitable interests. It

[1] 3 Russ. 1.
[2] [1893] A.C. 369, 384 et seq.
[3] (1813) 1 Dow 50; 5 Pat.App. 707.
[4] 1 Dow 50.

was not debated, even in your Lordships' House, whether the interest which Steuart assigned was a legal or an equitable interest, though Lord Redesdale[5] treated it as legal, as, apparently, did Sir Samuel Romilly who appeared for the appellant.[6] When the case came to be commented on by Lord Watson in *Heritable Reversionary Co. Ltd.* v. *Millar*,[7] he stated a principle about the acquisition of an equitable interest from a trustee which, under Scots law, is quite different from the equally authoritative statement of English law by Lord Cairns in *Shropshire Union Railways and Canal Co.* v. *Reg.*[8] Moreover, as far as I am aware, *Redfearn* v. *Somervail*[9] is not referred to in any English textbook. For all those reasons, this would be a most dangerous field to argue from Scots to English law, and *Redfearn* v. *Somervail*[9] is not, of course, authority for preferring the assignee who has given notice when the assignor did not possess either a legal or a beneficial interest.

I now come to the independent point that the trustees' interest ought to be postponed irrespective of the rule in *Dearle* v. *Hall*.[10] The trustees were, of course, parties to the deeds of appointment and release, but it must also be remembered that the manner of exercise of the power of appointment was a matter for the appointors. Furthermore, Mr. Milner Holland, to whose complete and interesting argument I should like to pay tribute, frankly put forward his case as not so strong as that which was successful in *In re King's Settlement*[11] or in *Abigail* v. *Lapin*.[12] I have tried to give full effect to his request that I should consider not only the form of the documents, but the transaction as a whole, but I cannot find anything approximating to a misrepresentation which should result in the postponement of the interest of the trustees.

On the view that I have taken, it is not necessary for me to consider whether the opinion of Eve J. in *Hill* v. *Peters*[13] that, for the purposes of the rule in *Dearle* v. *Hall*,[14] there is a distinction between a declaration of trust and an equitable assignment, is correct.

Nor am I required to pronounce on Mr. Edwards' submission that, even if the rule in *Dearle* v. *Hall*[14] applied, there was notice to Lloyd's which would have the effect of maintaining the priority of the respondent trustees.

I would dismiss the appeal with costs.

Lord Morton of Henryton. My Lords, the facts of this case have been fully stated by the Lord Chancellor and I shall not repeat them.

After much reflection upon the able arguments presented by

[5] 1 Dow 50, 68.
[6] Ibid. 64.
[7] [1892] A.C. 598, 610.
[8] (1875) L.R. 7 H.L. 496, 505.
[9] 1 Dow 50.
[10] 3 Russ. 1.
[11] [1931] 2 Ch. 294.
[12] [1934] A.C. 491.
[13] [1918] 2 Ch. 273.
[14] 3 Russ. 1.

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counsel on both sides, I find myself entirely in agreement with the Court of Appeal.

The appellant plaintiffs sought to establish in the action that the first and second charges executed in their favour by A. G. H. Willis (hereafter referred to as "the bankrupt") had priority over the equitable interest of the two respondent trustees in certain investments standing in the name of the respondent Lloyd's.

In my view, this claim must fail because the bankrupt was never able to create any charge upon these investments. He was not the legal owner of them, and the deeds of appointment and release of February 13, 1933, and June 11, 1934, did not confer upon him any beneficial interest therein. And "no ground has "been established for holding that the charges should neverthe-"less be held effective by estoppel or on any analogous principle; "nor was any such ground pleaded by way of answer to the "respondent trustees' contention that the charges were invalid." I borrow this language from the judgment of the Court of Appeal.

Counsel for the appellants contended that their clients had obtained priority over the respondent trustees by giving to Lloyd's notice of their two charges, under the well-known rule in *Dearle* v. *Hall*.[14] My Lords, in my opinion, the rule in *Dearle* v. *Hall*[14] has no application to this case. That rule applies where there is a debtor or fundholder, and an individual who, having a beneficial interest in the debt or fund, executes two or more successive equitable assignments of, or charges on, that interest in favour of different persons. In these circumstances questions of priority arise. But no question of priority can arise in the present case, where the bankrupt has merely executed two wholly ineffective charges, both in favour of the same party.

Mr. Milner Holland sought to satisfy your Lordships that there were defects in the equitable title of the respondent trustees to the funds in question. He failed to satisfy me that these defects exist, but I need not pursue that matter, for the appellants cannot succeed unless they show that they acquired a charge upon the funds; and this they have failed to do. No one of the numerous cases cited, dealing with the law of England, has any application to the present case, if the views which I have just stated are correct. Counsel for the appellants, however, rely upon a Scottish case, *Redfearn* v. *Somervail*,[15] which came to this House.

In that case, which was prior in date to *Dearle* v. *Hall*,[16] one David Steuart was registered in the books of an unincorporated society called the Edinburgh Glasshouse Co. as the owner of a share therein. In fact he held the share as trustee for a firm whereof he was a partner. He borrowed £1,400 from one Redfearn, and assigned the share to him as security for the debt. Redfearn gave notice of the assignment to the company, and

[14] 3 Russ. 1.
[15] 1 Dow 50.
[16] 3 Russ. 1.

this House held that he had priority over the claims of the partnership firm. It would seem clear that the law applicable was Scots law, but it was suggested, in the course of the argument in the present case, that *Redfearn* v. *Somervail* [17] was one of the early cases in this House in which English law was applied in a Scottish case, and there are passages in the speeches of Lord Redesdale and Lord Eldon which indicate that this is so. However this may be, my Lords, I find the case of *Redfearn* v. *Somervail* [17] of no assistance in the present case, for it would appear to be a case in which a trustee assigned, in breach of trust, a share whereof he was the registered owner. As Lord Redesdale said,[18] Steuart had a complete legal title. In the present case the bankrupt was not the registered owner of the shares which he proposed to charge in favour of the appellants. He could not transfer them and, as I have said, the relevant deeds did not confer any beneficial interest in them which he could charge in favour of the appellants. As the Court of Appeal correctly observed, the interests now claimed by the appellants were never in fact capable of being created by the bankrupt, "even in breach of trust." That fact, in my opinion, completely distinguishes the present case from *Redfearn* v. *Somervail*.[19]

For these reasons, the appellants' case fails in limine. Two questions much discussed at the hearing were (1) whether, for the purposes of the rule in *Dearle* v. *Hall*,[20] there is any difference between an equitable assignment and a declaration of trust, and (2) whether certain facts and events referred to in paragraph 3 of the defence of the respondent trustees constituted sufficient notice to Lloyd's to preserve the trustees' priority, even if the rule in *Dearle* v. *Hall* [20] applied in this case.

On the view which I take, neither of these questions arises, and I express no opinion upon them.

I should add that all the counsel appearing in this case invited your Lordships to disregard the fact that the bankrupt had a life interest in the funds subject to the trusts of the resettlement of March 2, 1927, from and after the death of his father, upon which he had created a charge. Accordingly, I have made no mention of that fact in expressing my opinion.

I would dismiss the appeal.

Lord Reid. My Lords, Mr. A. G. H. Willis, whom I shall call "the bankrupt," became a member of Lloyd's in 1933. In order to do so he had to procure the deposit with Lloyd's of certain funds. Those funds came from settled funds over which he and his father had a joint power of appointment, and the transaction took the form of three deeds—all executed on February 13, 1933—an exercise by the bankrupt and his father of

[17] 1 Dow 50.
[18] Ibid. 68.
[19] 1 Dow 50.
[20] 3 Russ. 1.

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this joint power and two trust deeds to which the bankrupt and Lloyd's alone were parties.

It was argued for the respondents that, although Lloyd's were not parties to the deed of appointment, in fact they had notice of it. But, in my opinion, no sufficient evidence was led to establish this and this case must be taken on the footing that Lloyd's had no notice of the deed of appointment or of its terms at any relevant time.

The trust deeds to which Lloyd's were parties narrated that the bankrupt had transferred or caused or procured to be transferred to Lloyd's certain funds to be held on the trusts therein mentioned and they provided that the income from those funds was to be paid to the bankrupt, his executors, administrators or assigns as he or they should direct, that the funds might be used to pay certain claims if they should arise, and that the funds or so much as should not be applied for such purposes should be held in trust for the bankrupt, his executors, administrators or assigns. There was nothing in these trust deeds to indicate that the bankrupt was not beneficially entitled to these funds.

In 1951 the bankrupt borrowed money from the appellants, and, in order to stop proceedings against him in respect of this loan, in 1953 he charged or purported to charge in favour of the appellants the funds deposited with Lloyd's. Later he granted a further charge. The appellants asked and were informed by Lloyd's that Lloyd's had no notice of any other charge on these funds. Written notices of these charges were given to Lloyd's. The bankrupt was adjudicated bankrupt in 1954. In the present action the appellants seek a declaration that these charges rank in priority to any interest of the respondent trustees in these funds.

The respondents deny the validity of these charges and found on the deed of appointment. By that deed the appointors appointed that the funds to be transferred to Lloyd's should thenceforth be held on trust that the trustees of the settlement should forthwith transfer these funds to Lloyd's to be held by them under the trust deeds to which I have referred, but subject to a proviso that, in so far as under these deeds the trust funds were directed to be held on trust for the bankrupt, his executors, administrators or assigns, they should be deemed to be subject to the trusts, powers and provisions to which they would have been subject if the deed of appointment had not been executed.

I do not quote the terms of the deed at length because I am satisfied that the bankrupt was given no beneficial interest in the funds held by Lloyd's. He was entitled to receive those funds from Lloyd's but he was bound to take them as trustee. I do not think that it matters whether he was bound to hand them over at once to the settlement trustees or whether he could have kept them in his own hands. In no case could he without breach of trust use them for his own purposes or attempt to create any charge on them in respect of his own debts.

The appellants' case can, I think, be simply stated. They say

that their charges were granted by a person who, on the face of the only document known to Lloyd's, was apparently beneficially entitled to the funds; that they, the appellants, had no means of discovering the respondents' rights, and that they took the charges in bona fide and for value; that they gave notice of these charges to Lloyd's before Lloyd's had any notice of the respondents' rights; and that they therefore acquired priority over the rights of the respondents although these rights were earlier in date than their own. For this they rely on the rule in *Dearle* v. *Hall.*[20] The respondents, on the other hand, deny that this rule is applicable to this case and they rely on the general rule that an equitable interest which is earlier in date has priority.

In the typical *Dearle* v. *Hall*[20] case a person, who is beneficially entitled to an equitable interest in a fund held by another person X, first assigns his interest to A, and then assigns, or purports to assign, the same interest to B. Then B succeeds in giving notice to X of his assignment before A has given notice to X of his assignment. B is then held to have acquired priority over A in spite of the assignment to A being earlier in date. The present case differs from such a typical case in two respects. First, the assignor, the bankrupt, never had any beneficial right in the funds which he purported to assign to the appellants; the title of the respondents to those funds flowed not from him but from the deed of appointment. And secondly, the right of the respondents, which is the earlier in date, arose not from an assignment but from the creation of a trust in their favour.

In considering what weight should be given to these distinctions I must keep in mind that it has been recognized, at least since *Ward* v. *Duncombe*[21] that the rule in *Dearle* v. *Hall*[22] ought not to be extended to a new case (see *per* Lord Macnaghten[23]). But that must, I think, mean a case where there is a significant distinction from the position in *Dearle* v. *Hall.*[24] And I have great difficulty in regarding it as a significant distinction that the bankrupt in this case never had a beneficial right whereas the assignor in the typical *Dearle* v. *Hall*[24] case had a beneficial interest until he assigned it to the first assignee. What ground is there for preferring the second assignee in a case where the assignor once had a beneficial right but not where the assignor never had such a right? If in the former case the assignor retained even a shadowy right, some kind of a residual right which he could still assign after the first assignment, the distinction would be clear: or, putting it otherwise, the distinction would be clear if the first assignee only got an inchoate right by the assignment to him and had to complete or perfect his right by giving notice to the fundholder. But as I read *Ward* v. *Duncombe*[25]—and I can find nothing to the contrary in any later authority cited to us—the right of the first assignee does not

[20] 3 Russ. 1.
[21] [1893] A.C. 369.
[22] 3 Russ. 1.
[23] [1893] A.C. 369, 394.
[24] 3 Russ. 1.
[25] [1893] A.C. 369.

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require to be completed or perfected by notice: the assignment to him completely divests the assignor. In both the typical *Dearle* v. *Hall*[26] case and the present case the assignor had nothing at all to give when he made the second assignment, and I have difficulty in finding any sufficient reason why the position of the second assignee should be improved by the historical accident that his assignor once had some right which he had no longer at the time when he made the second assignment.

I turn to consider whether the respondents are in a better position than the first assignees in the typical *Dearle* v. *Hall*[26] case, neither having given notice of their rights to the fund-holder before notice was given by the subsequent assignee. I agree with your Lordships that there was nothing in the form of the 1933 transaction or the conduct of the respondents which could disentitle them if on other grounds they are entitled to a preference. Therefore I must consider whether the rule in *Dearle* v. *Hall*[26] is inapplicable because the respondents' rights flow, not from an assignment to them, but from a trust.

We were referred to the decision of this House in a Scottish case *Redfearn* v. *Somervail*.[27] In that case money belonging to a partnership was invested in £2,000 stock of the Edinburgh Glasshouse Co., which was not a corporation. The stock was held in the name of Steuart, one of the partners. Steuart borrowed money from Redfearn and assigned the glasshouse company stock to him in security. This assignation was immediately intimated to the company, who had no notice that the stock in fact belonged to the partnership. Steuart became bankrupt and Somervail, one of his partners, claimed to have a better right to the stock than Redfearn. These facts have a resemblance to the facts of the present case.

The arguments in the Court of Session are well set out in Morison, from which I quote some passages. For Redfearn it was argued[28] "The onerous and bona fide acquirer of such a "personal right, by a regular transference from the person who "ex facie is proprietor, regularly completed by intimation to the "debtor, is secure against every latent claim of these parties . . . "Intimation is in such a case equivalent to possession of a "moveable subject, and must therefore cut off every claim at "the instance of mere personal creditors, which every person "competing with the assignee, whose assignation is intimated, "is held to be, whether he founds his claim upon a prior "assignation and declaration of trust, or on any other ground "whatever." For Somervail it was answered[29]: "When any "person holds a subject in his possession, which is not his "property, no act of his can transfer the property to another, to "the prejudice of the real owner . . . The right to this stock "never belonged to Mr. Steuart, but was a mere trust in him

[26] 3 Russ. 1.
[27] 1 Dow 50.
[28] M. "Personal and Real" App., Nos. 3, 6, 8.
[29] Ibid. 9–10.

"from the beginning for his creditors; and as a trust does not "require intimation to give it full effect, the right of the trusters "was all along complete." The court, reversing the decision of the Lord Ordinary, found that, the stock having stood in the person of Steuart in trust for the partnership, this excluded the assignment by Steuart to Redfearn. That decision was reversed by this House: I think that the grounds of judgment sufficiently appear from two short passages in the speech of Lord Eldon L.C.[30]: "If then the glass company was the debtor, the question "here was not between the assignee and the debtor, but between "the assignee and a person setting up a collateral claim in the "nature of that of a cestui que trust . . . If latent equities were "suffered to prevail against assignations the effect would be "that nothing could ever be assigned: for as long as their "Scotch neighbours retained any part of their characteristic "shrewdness they would never take an assignation if they were "aware that by means of latent equities such assignments might "give them nothing . . . He had found however no case nor "authority of any kind to support this position—that an intimated "assignation might be defeated by a latent equity, which as being "latent ex necessitate could not be intimated."

It will be seen that there was no discussion whether the right held by Steuart and assigned to Redfearn was a legal or an equitable right or interest. In Scotland there never was a separate court or a separate system of equity, and therefore there never has been a sharp distinction between legal and equitable rights or interests. For this reason, great caution must, in my view, be exercised in this field in using Scottish authorities in English cases or vice versa.

There may also be a somewhat different approach in the two countries to the matter of trusts. *Redfearn's* case[31] was explained by Lord Watson in *Heritable Reversionary Co.* v. *Millar* in this way[32]: "It must, however, be kept in view that the "validity of a right acquired in such circumstances by a bona "fide disponee for value does not rest upon the recognition of "any power in the trustee which he can lawfully exercise, "because breach of trust duty and wilful fraud can never be in "themselves lawful, but upon the well-known principle that a "true owner who chooses to conceal his right from the public, "and to clothe his trustee with all the indicia of ownership, is "thereby barred from challenging rights acquired by innocent "third parties for onerous considerations under contracts with "his fraudulent trustee." With that I may contrast what was said by Lord Cairns in *Shropshire Union Railways & Canal Co.* v. *Reg.*[33]: "Any person with whom Holyoake might deal by virtue "of his title upon the register, had, or ought to have had, these "considerations present to his mind. He ought to have known "that although Holyoake's name appeared upon the register as

[30] 1 Dow 50, 70–71, 72–73.
[31] 1 Dow 50.
[32] [1892] A.C. 598, 610.
[33] L.R. 7 H.L. 496, 505.

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"the owner of these shares, and although Holyoake could present "to him the certificates of this ownership, still it was perfectly "possible either that these shares were the beneficial property "of Holyoake himself or that they were the property of some "other person. If he dealt merely by equitable transfer or "equitable assignment with Holyoake, and if it turned out that "the beneficial ownership of Holyoake was coincident and co-"extensive with his legal title, well and good: his right would "be accordingly, so far as Holyoake was concerned, complete. "But if on the other hand it should turn out that Holyoake's "beneficial interest was either nil or was not co-extensive with "the whole of his apparent legal title, then I say any person "dealing with Holyoake by way of equitable bargain or contract "should have known that he could only obtain a title which was "imperfect, and would not bind the real beneficial owner."

If that is an accurate statement of the law—and no one suggests otherwise—it would appear to show that to apply the rule in *Dearle* v. *Hall*[34] to defeat the rights of a cestui que trust would introduce an exception to the general law. It might therefore be sufficient to say that the rights of a cestui que trust are clearly different from the rights of an assignee, that there is no authority for applying the rule in such a case, and that so to apply the rule would be extending it to a new case—a thing which all recent authorities recognize should not be done.

But Lord Macnaghten said in *Ward* v. *Duncombe*[35]: "It "seems to me that when your Lordships are asked to extend "the rule to a case not already covered by authority, it is proper "to inquire into the principles upon which the rule is said to be "founded." For that I cannot do better than quote what Buckley J. said in *In re Dallas*[36]: "When the judgments in that "case [*Ward* v. *Duncombe*[37]] are read, I think it will be found "that what was there established was, first, that the doctrine "of notice rests upon the principle that the equitable assignee "ought to take such steps as will prevent the assignor from "retaining the apparent ownership of the fund; and secondly (if "it be a different proposition, although I think it is only an "application of the former one) that he must take such steps as "will give him a right in rem against the fund as distinguished from "a right against the conscience of the assignor of the fund, and "that that ought to be done by his taking possession of the fund "to some extent—not necessarily to the full extent, but so far as "possible." And I also agree with what was said by Eve J. in *Hill* v. *Peters*[38]: "The principle on which the rule in *Dearle* "v. *Hall*[39] is founded, which regards the giving of notice by the "assignee as the nearest approach to the taking of possession, "has no application, in my opinion, to the beneficiary who has "no right to possession himself, and who can only assert his

[34] 3 Russ. 1.
[35] [1893] A.C. 363, 394.
[36] [1904] 2 Ch. 385, 396.
[37] [1893] A.C. 363.
[38] [1918] 2 Ch. 273, 279.
[39] 3 Russ. 1.

"claim to receive through his trustee." I think that it would be an innovation in the law of England to require a cestui que trust for his own protection to give notice of the trust in his favour to the person who holds the fund, and I therefore agree that this appeal should be dismissed.

Lord Cohen. My Lords, I have had an opportunity of reading the speeches which have been delivered by the Lord Chancellor and by the noble and learned Lord Morton of Henryton and find myself in such complete agreement with them and with the Court of Appeal that I can state quite shortly my reasons for concurrence.

I need not restate the facts. Suffice it to say that I agree with the noble and learned Lord Reid that upon the true construction of the deed of appointment the bankrupt never had any beneficial interest in the funds which he purported to assign to the appellants. In making this observation, I have not ignored his interest under the original deed of resettlement of March 2, 1927, an interest preserved by the provisos in clauses 1 (ii) and (2) (ii) of the deed of appointment, but the existence of that interest is irrelevant to the question your Lordships have to decide.

The fact that the bankrupt has no beneficial interest in the fund is, in my opinion, fatal to the appellants' claim under the rule in *Dearle* v. *Hall*.[39] The headnote in that case is in these terms: "A person having a beneficial interest in a sum of "money, invested in the names of trustees, assigns it for valuable "consideration to A., but no notice of the assignment is given to "the trustees; afterwards, the same person proposes to sell his "interest to B., and B., having made inquiry of the trustees as to "the nature of the vendor's title, and the amount of his interest, "and receiving no intimation of the existence of any prior incum-"brance, completes the purchase, and gives the trustees notice: "B. has a better equity than A. to the possession of the fund, "and the assignment to B., though posterior in date, is to be "preferred to the assignment to A." Now, I know of no case where the rule in *Dearle* v. *Hall*[39] has been applied where the creator of the incumbrances never had any beneficial interest in the fund. Nor were counsel able to direct our attention to any such case. Mr. Milner Holland submitted that this lack of beneficial interest does not prevent the application of the rule in *Dearle* v. *Hall*,[39] since where that rule applies the creator of the incumbrances has always given the second incumbrancer a charge on something which he has not himself got at the time of creating the charge. It seems to me, however, that it is of the essence of the rule in *Dearle* v. *Hall*[39] that the creator of the incumbrances, when he created the first equitable incumbrance, had a beneficial interest in the fund, and the reason for the postponement of the first incumbrancer seems to be that by failing to give notice to the fundholder the first incumbrancer failed to

[39] 3 Russ. 1.

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take a step which he could have taken to protect his interest in the fund and which, if taken, would have resulted in the intending second incumbrancer having notice of the first incumbrance. It would, I think, be an extension of this principle if we were now to hold that the creator of the incumbrances could give to a second incumbrancer a larger equitable right than he himself ever had. If the extension were plainly justified by the principles underlying that case, I must make the extension, but, if I may respectfully adopt the language of Lord Macnaghten in *Ward* v. *Duncombe*,[40] I do not think that those principles are so clear or so convincing as to compel me to hold that a man may create in favour of an incumbrancer a charge on a right he never had.

For the reasons given by Lord Morton of Henryton, I do not find anything in the decision in *Redfearn* v. *Somervail*[41] inconsistent with the view I have formed in this case.

This conclusion makes it unnecessary for me to consider at any length the other matters which were discussed at the hearing of the appeal, but since Wynn-Parry J., in the Chancery Division, and my noble and learned friend, Lord Reid, both relied on some observations of Eve J. in *Hill* v. *Peters*,[42] I will add some observations on that case. Eve J. said: "The principle on which the "rule in *Dearle* v. *Hall*[43] is founded, which regards the giving of "notice by the assignee as the nearest approach to the taking "of possession, has no application, in my opinion, to the bene-"ficiary who has no right to possession himself, and who can only "assert his claim to receive through his trustee." It may well be that this is a correct statement of the law, but, as Mr. Milner Holland pointed out in the course of the argument, it was not really necessary to the decision in *Hill* v. *Peters*.[44] In that case the fund was a mortgage debt of £4,000 secured on a reversionary interest in a share of personalty settled by a will. The fund-holders were the trustees of that will; notice of the mortgage was given to them by the solicitors in whose names the mortgage was taken. The solicitors declared themselves trustees of the mortgage in favour of two of their clients, and afterwards purported to assign the reversionary interest to the other mortgagees represented by the plaintiffs, who gave notice of this mortgage to the trustees of the will and claimed priority over the cestuis que trust on the basis of such notice. Mr. Milner Holland submitted, I think correctly, that the case could have been decided on the simple ground that the notice given to the executors of the will by the solicitors would enure to the benefit of their cestuis que trust, and being prior in date to the notice given by the plaintiffs, there was no room for the application of the rule in *Dearle* v. *Hall*.[45] For this reason, while not dissenting from the observations of Eve J., I prefer to base my opinion that the appeal should be dismissed solely on the ground I have already stated.

[40] [1893] A.C. 363, 394.
[41] 1 Dow 50.
[42] [1918] 2 Ch. 273, 279.
[43] 3 Russ. 1.
[44] [1918] 2 Ch. 273.
[45] 3 Russ. 1.

Lord Keith of Avonholm. My Lords, this case has raised in my mind doubts which are not entirely removed by the opinions of your Lordships more versed than I in the principles of English equity law. I should at the outset explain my view of the construction and effect of the deeds of appointment. In the exercise of a power of appointment under the settlement of 1927 Willis and his father appointed certain securities to be held upon trust that the trustees of the settlement should forthwith transfer them into the name of Lloyd's, to be held by Lloyd's subject to certain trusts under the marine and non-marine trust deeds, and subject to these trusts "in trust for Mr. Willis his executors adminis-"trators or assigns." If and when Willis received the securities from Lloyd's they were to be "deemed" to be subject to the trusts of the settlement. This last was a trust, created by Willis and his father, which was latent so far as Lloyd's was concerned, for I cannot hold that they had any notice of this trust, and it was also one which the appellants had no means of discovering. The position, then, was this. Willis had no right or title to the securities except to demand delivery of them by Lloyd's when the purposes of the marine and non-marine trust deeds had been satisfied. He could not be a trustee of the securities till he had reduced them into his possession. Before this happened he had charged the securities deposited with Lloyd's, in security of loans made to him by the appellants, and these charges were duly intimated to Lloyd's.

I accept it that Willis had neither the legal title nor the equitable right in the securities. He had no more than the title to demand the securities from Lloyd's in certain eventualities. This title he assigned to the appellants. I share the difficulty expressed by my noble and learned friend, Lord Reid, in seeing that, in this situation, the fact that Willis never had a beneficial interest in the securities creates a significant distinction from the position in a typical *Dearle* v. *Hall*[45] case. I understand that the others of your Lordships take the view that *Dearle* v. *Hall*[45] has never been applied to a case where the assignor never had a beneficial interest in the thing assigned, and that the rule of *Dearle* v. *Hall*[45] should not be extended to cover such a case. Though I might pause long before conceding the logic or reasonableness of such a limitation, I am not prepared on the authorities which have been cited to differ on a point which is so peculiarly a matter of English equity law.

I would wish only to add two observations. First, that in other circumstances, in which the question may arise whether a latent trust or right in equity can defeat an intimated assignment, the case of *Redfearn* v. *Somervail*,[46] will, in my opinion, require more consideration. Though a Scots decision, I have little doubt that Lord Eldon and Lord Redesdale were applying English law, and would have reached the same decision in like circumstances

[45] 3 Russ. 1.

[46] 1 Dow 50.

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in an English case. As Lord Justice-Clerk Moncreiff said in *North British Railway Co.* v. *Lindsay*[47]: "Until the case of *Redfearn*,[48] "decided in the House of Lords in 1813, the rule assignatus "utitur jure cedentis was very largely applied. In that case, in "which it was for the first time found that a special assignee was "not bound by a latent trust which qualified the right of his "cedent, it was conceded that the previous rule of the law of "Scotland was otherwise, and the judgment proceeded on views "of expediency which prevailed in the law of England." The case also supports the view noted by Lord Macnaghten in *Ward* v. *Duncombe*[49] that the rule of *Dearle* v. *Hall*[50] had, in Lord Eldon, an origin earlier than is generally supposed. Secondly, I would hesitate to agree with my noble and learned friend, Lord Reid, that the decision of this House in *Shropshire Union Railways and Canal Co.* v. *Reg.*[51] was conclusive in all cases of latent trusts. The circumstances of that case were somewhat special, and some of the observations in that case are not easy to reconcile with the remarks of Lord Watson in the later case of *Heritable Reversionary Co. Ltd.* v. *Millar*.[52]

I agree, though with some hesitation, that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *M. A. Jacobs & Sons; Rashleigh & Co.*

F. C.

[47] (1875) 3 R. 168, 176.
[48] 1 Dow 50.
[49] [1893] A.C. 369, 384.
[50] 3 Russ. 1.
[51] L.R. 7 H.L. 496.
[52] [1892] A.C. 548.

[COURT OF CRIMINAL APPEAL.]

C. C. A.
1958
Dec. 1.
Lord Parker C.J., Hilbery, Cassels, Barry and Paull JJ.

* REGINA *v.* EVANS.

Criminal Law—Sentence—Concurrent sentences—Detention order and probation order—Indictment containing two counts—Detention order made on first count and probation order on second—Whether orders can properly be made at same time—Criminal Justice Act, 1948 (11 *&* 12 *Geo.* 6, *c.* 58), *ss.* 3 (1), 18 (2).

The appellant, then aged 17, pleaded guilty at quarter sessions to two counts of an indictment charging him with storebreaking and larceny. He was sentenced (under section 18 of the Criminal Justice Act, 1948[1]) to three months in a detention centre on the

[1] Criminal Justice Act, 1948, s. 3 (1): "Where a court by or before "which a person is convicted of an "offence (not being an offence the "sentence for which is fixed by law) "is of opinion that having regard to "the circumstances, including the "nature of the offence and the "character of the offender, it is "expedient to do so, the court may, "instead of sentencing him, make a "probation order . . ."

S. 18 (1): "Where a court has "power . . . to impose imprisonment "on a person who is not less than "14 but under 21 years of age, the "court may . . . order him to be "detained in a detention centre . . .

first count and, on the second count, by an order made under section 3 (1), he was placed on probation for two years. While still on probation he committed two further offences, and as a result was committed to quarter sessions for breach of probation and sentenced to Borstal training:—

Held, that while there was nothing in the Act of 1948 which expressly prevented a probation order and a detention order being made at the same time, to do so was contrary to the spirit and intention of the Act, as it amounted to using the provisions of section 3 (1) for the purpose of after-care; that although there might be exceptional cases where the operation of a probation order was postponed, in normal cases the order must operate forthwith, and in a case such as the present, where there were two offences for one of which the appellant had been placed wholly outside the control of the probation officer, the two orders were entirely inconsistent; that a proper sentence on the second count would have been three months in a detention centre to run concurrently, and, accordingly, that sentence would be substituted for the probation order which would be quashed, as also would the sentence of Borstal training.

APPEAL against sentence.

On April 10, 1957, the appellant, Raymond Frederick Evans, pleaded "Guilty" at Surrey quarter sessions, where he was charged with another boy, to two counts of an indictment charging him with storebreaking and larceny and storebreaking with intent to commit a felony. He was sentenced on the first count to three months in a detention centre and, in respect of the second count, quarter sessions made a probation order putting him on probation for two years. In July, 1958, he appeared before Wimbledon magistrates' court charged with two further offences, namely, larceny from a gas meter and larceny as a servant. He pleaded "Guilty" to both and was fined £4 in respect of each offence. The magistrates committed him to Surrey quarter sessions for breach of the probation order made in April, 1957, and on July 28, 1958, quarter sessions sentenced him to Borstal training for breach of that order.

The appellant applied for leave to appeal against the sentence of Borstal training and on November 10 the Court of Criminal Appeal, being concerned as to whether a probation order could properly be made to run concurrently with a detention order, extended the time and gave leave to appeal against the original order in order to hear argument on the point. The appeal came before the court on November 24 but was adjourned for hearing before a full court of five judges.

P. A. Bruce for the appellant.

H. J. Leonard for the Crown.

"for a term of three months: . . .
"(2) A court shall not order a person
"to be detained in a detention centre
"—(*a*) if he has been previously
"sentenced to imprisonment or Bor-
"stal training; (*b*) if he is not less
"than 17 years of age, and has pre-
"viously been ordered to be so
"detained since attaining that age;
"and shall not order any other person
"to be so detained unless the court
"has considered every other method
"(except imprisonment) by which the
"court might deal with him and is of
"opinion that none of those methods
"is appropriate."

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Reg. v. *Gooding*[2] was referred to in the course of the argument.

LORD PARKER C.J., giving the judgment of the court, stated the facts, read sections 3 (1) and 18 (2) of the Criminal Justice Act, 1948, and continued: It is clear that if there had only been one offence it would have been impossible to couple an order for probation with a sentence of three months' detention in a detention centre. By section 3 (1) a probation order can only be made instead of a sentence and by section 80 it is provided that "sentence" includes an order for detention in a detention centre. But in the present case there were two counts which are equivalent to two separate indictments. If one looks at the express words of the Act, there does not appear to be anything which expressly prevents a probation order being made on the second count instead of a sentence being passed. It may be rather artificial for the court which has to consider "the circumstances," to treat these two offences as completely separate and to go by stages and, as regards the first count, to apply their minds to sections 3 and 18 and, having done that, to proceed to do exactly the same thing quite independently in regard to the second count. Be that as it may, it appears to this court that there are no express words which prevent these two orders being made at one and the same time. But although that may well be so, the court is clearly of opinion that the making of a probation order in such circumstances is contrary to the spirit and intention of the Act. To take the present case, the proper sentence, as it seems to us, three months in a detention centre on each count to run concurrently, and for the Court of Quarter Sessions to substitute probation in regard to the second count is really in the nature of providing for after-care. We are far from saying that some provision for after-care in such a case would not be very highly appropriate. A young man coming out of a detention centre after a period of discipline may well need looking after, and it may well be to his advantage to be under the supervision of a probation officer. But the question is whether section 3 can properly be made use of to provide for after-care. The matter becomes clearer if one considers the position in reverse. If in this case the court had made a probation order on the first count and then had gone on to consider the second count quite independently and had made an order for detention for three months in a detention centre the probation order on the first count would merely provide for after-care. It is also clear that if an order such as that made in the present case is properly made it could also be made in the case of imprisonment. In the case of two offences being dealt with at one and the same time, if the argument is right, there could be a short sentence of imprisonment and at the same time a probation order for three years. That clearly could be only for the

[2] (1955) 39 Cr.App.R. 187.

purposes of after-care, yet provision is made for this in section 22 of the Act.

Again, there is the further point that in the ordinary way a probation order must operate forthwith, whereas in the present case it could not become effective until the appellant was released from a detention centre. No doubt it does happen at times that a probation order and a sentence of imprisonment or indeed of detention in a detention centre might run concurrently. Thus, a sentence of imprisonment imposed during the currency of the probation order would not revoke that order. The order would merely fall into abeyance, and, if the offender was released before the expiry of the probation period, the order would revive and be fully effective. But it seems to us that that is quite a different case from the present when the coming into operation of the order itself is in effect postponed. A court dealing with these two offences at the same time cannot say whether at the end of a three months' period in a detention centre the offender will need probation. One of the matters which has to be considered is his character, and it must be his character at the time when the probation order becomes effective. In saying what it has, the court does not wish to throw any doubt on what is said to be the practice in regard to national service cases. It may well be then that if there is only a short time before the accused has served his full national service it would be proper to make a probation order which would not become fully effective until he was released from the services. But in a case such as the present where one is dealing with two offences and where for one offence he is placed wholly and entirely out of the control of the probation officer, it seems to the court that an order for detention in a detention centre and an order for probation are wholly inconsistent.

Accordingly the court must quash the probation order which was made on the second count and substitute therefor an order for detention in a detention centre for three months to run concurrently with the order made on the first count. In the result, the sentence of Borstal training which was imposed for the breach of the probation order must also be quashed and the appellant is discharged. It is quite clear that the appellant is a very lucky man in that if he had been committed not for breach of probation but for the offences for which he was fined in July last he would undoubtedly have gone to Borstal training, but as the Borstal training was imposed for breach of the probation order and that order has gone, the sentence of Borstal training must itself be quashed.

Appeal allowed.

Solicitors: *Registrar, Court of Criminal Appeal; Director of Public Prosecutions.*

E. M. W.

[CHANCERY DIVISION.]

1958
Dec. 4.

Danckwerts J.

* *In re* BERREY'S WILL TRUSTS. GREENING *v.* WATERS AND OTHERS.

[1958 B. 1989.]

Administration of Estates—Order of application of assets—Will—Intestacy as to share of residue—Debts, funeral, testamentary and administration expenses—Legacies—Whether payable out of residue or undisposed of share—Whether contrary intention in will—Administration of Estates Act, 1925 (15 *Geo.* 5, *c.* 23), *ss.* 33 (1) (2) (7), 34 (3); *Sch.* 1, *Part II, para.* 1.

A testatrix made her own will on a printed form which contained the usual directions found on printed forms referring to the revocation of previous wills and to executors, after which there was a direction that all her debts and funeral expenses should be paid as soon as conveniently might be after her decease. She then gave two legacies of £500 and provided: "After all my debts, and "funeral, and expenses are paid I give and bequeath all the residue "of my estate in equal shares to" four named persons, one of whom predeceased her and whose share lapsed accordingly.

On a summons to have determined the incidence of debts, funeral, testamentary and administration expenses and legacies:—

Held, (1) that the words used by the testatrix "after all my "debts, and funeral, and expenses are paid" showed an intention to vary the order of application of assets laid down in Part II of the First Schedule to the Administration of Estates Act, 1925,[1]

[1] Administration of Estates Act, 1925, s. 33: "(1) On the death of "a person intestate as to any real or "personal estate, such estate shall be "held by his personal representatives "—(*a*) as to the real estate upon "trust to sell the same; and (*b*) as "to the personal estate upon trust to "call in sell and convert into money "such part thereof as may not consist "of money, with power to postpone "such sale and conversion for such a "period as the personal representa-"tives, without being liable to "account, may think proper, and so "that any reversionary interest be "not sold until it falls into posses-"sion, unless the personal represen-"tatives see special reason for sale, "and so also that, unless required "for purposes of administration "owing to want of other assets, "personal chattels be not sold except "for special reason. (2) Out of the "net money to arise from the sale "and conversion of such real and "personal estate (after payment of "costs), and out of the ready money "of the deceased (so far as not dis-"posed of by his will, if any), the "personal representative shall pay all "such funeral, testamentary and "administration expenses, debts and "other liabilities as are properly pay-"able thereout having regard to the "rules of administration contained in "this Part of this Act, and out of the "residue of the said money the per-"sonal representative shall set aside "a fund sufficient to provide for any "pecuniary legacies bequeathed by "the will . . . (7) Where the "deceased leaves a will, this section "has effect subject to the provisions "contained in the will."

S. 34: "(3) Where the estate of "a deceased person is solvent his "real and personal estate shall, "subject to rules of court and the "provisions hereinafter contained as "to charges on property of the "deceased, and to the provisions, if "any, contained in his will, be "applicable towards the discharge of "the funeral, testamentary and "administration expenses, debts and "liabilities payable thereout in the "order mentioned in Part II of the "First Schedule to this Act."

Sch. 1, Part II. ORDER OF APPLICATION OF ASSETS WHERE THE ESTATE IS SOLVENT: "1. Property of "the deceased undisposed of by will, "subject to the retention thereout of "a fund sufficient to meet any pecuni-"ary legacies."

and the payment of her debts, funeral and testamentary expenses and expenses of the administration of her estate were accordingly thrown on residue as a whole before there was any division into shares.

(2) That section 33 of the Act which prescribed the payment of legacies out of property undisposed of by the will applied to a case of a partial intestacy, and the legacies were therefore payable out of the undisposed of share.

In re Worthington [1933] Ch. 771 applied.

In re Midgley [1955] Ch. 576; [1955] 3 W.L.R. 119; [1955] 2 All E.R. 625 and *In re Beaumont's Will Trusts* [1950] Ch. 462; 66 (Pt. 1) T.L.R. 712; [1950] 1 All E.R. 802 considered.

ADJOURNED SUMMONS.

Elsie Frances Berrey made her own will on a printed form on February 10, 1953. She died on February 12, 1957. She appointed her sister Mabel Rose Birkett as her executrix, the sister survived the testatrix but died on March 14, 1957, without having proved the will. Letters of administration with the will annexed were granted on May 22, 1957, to the plaintiff, her niece, Joyce Maude Greening, and another person who had since died.

The will form contained the usual directions found in printed forms, and after the words referring to the revocation of previous wills and to executors there was a direction that all the testatrix's debts and funeral expenses should be paid as soon as conveniently might be after her decease. There followed the printed words "I give and bequeath unto" [after which disregarding the grammatical intention of those words] the testatrix provided: "The following legacies free of duty namely: To my sister-in-law Grace "Emma Tatchell . . . the sum of £500, and To my friend "Gladys Izod . . . the sum of £500. After all my debts, and "funeral, and expenses are paid I give and bequeath all the "residue of my estate in equal shares to the following my sister "Mabel Rose Birkett . . . my sister Maude Ethel Smith . . . my "niece June Eloise Waters . . . and my grandniece Pamela "Elaine Waters . . . either in securities or money whichever they "may prefer . . ."

Her sister Mabel Rose Birkett having died in 1957, letters of administration to her (the sister's) estate were granted to the third defendant, James Somerville Birkett and another who had since died. The testatrix's sister Maude Ethel Smith died on December 13, 1956, in the lifetime of the testatrix and her share of residue accordingly lapsed. The plaintiff's niece June Eloise Waters was married and was now June Eloise Warner, the first defendant; the grandniece Pamela Elaine Waters was an infant and the second defendant.

The plaintiff who was one of the persons interested on intestacy took out the present summons for the determination of the following questions: (1) Whether on the true construction of the will of the testatrix and in the events (including the death in the lifetime of the testatrix of Maude Ethel Smith to whom a share

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of the residuary estate was bequeathed): (i) the funeral, testamentary and administration expenses and debts of the testatrix; (ii) the estate duty payable on the estate of the testatrix and interest paid thereon and (iii) the pecuniary legacies bequeathed by the testatrix's will ought respectively (as between the persons beneficially interested under the trusts of the will of the testatrix and under her partial intestacy) to be paid:—(a) out of the lapsed share of her residuary estate bequeathed by the will to her sister Maude Ethel Smith in exoneration of the other shares in the residuary estate; (b) out of the whole of the testatrix' residuary estate before the division thereof into four equal shares or (c) in some other and what manner.

P. S. A. Rossdale for the plaintiff, representing next-of-kin.
G. A. Grove for the defendants, residuary legatees.

The cases cited in argument are referred to in the judgment.

DANCKWERTS J. having stated the facts continued: The question that I have to decide is the incidence of debts, funeral expenses, testamentary and administration expenses, and also (though I am not considering that question for the moment) the legacies. Mr. Rossdale, on behalf of the next-of-kin, has referred me to a number of cases on this subject, which I think establish that the effect of the word "after" is to cast those expenses upon the whole of the residuary estate and not merely on the property undisposed of according to the second part of the First Schedule to the Administration of Estates Act, 1925. That is the effect of the word "after," having regard to *In re Petty*,[1] *In re Kempthorne*[2] and *In re Harland-Peck*.[3] But the question still remains what are actually cast upon the whole of the residuary estate by the words the testatrix has used. It is perfectly correct, as Mr. Grove argued, of course, and as pointed out by Simonds J. in *In re Sanger*,[4] that the general direction to be found in the printed words of the will, directing payment of debts and funeral expenses, does not alter the order of application in the case of a solvent estate laid down by section 34 (3) of the Administration of Estates Act, 1925, and Part II of the First Schedule; but the effective part is the disposition beginning with the word "after."

What does that second disposition mean? Mr. Grove has argued that it is merely repetition of the printed general direction which the testatrix was attempting to copy and repeat, which she thought she ought to do for the purpose of her residuary bequest. I do not reach that conclusion. It seems to me that I must pay attention to the actual words used by the testatrix in

[1] [1929] 1 Ch. 726.
[2] [1930] 1 Ch. 268; 46 T.L.R. 15.
[3] [1941] 1 Ch. 182; 57 T.L.R. 118; [1940] 4 All E.R. 347.
[4] [1939] Ch. 238; 55 T.L.R. 109; [1938] 4 All E.R. 417.

the will which she made herself. She has referred to three classes of things, "my debts," "my funeral" and "my "expenses," or "the expenses of my estate." Mr. Grove has also sought to cut down the ambit of the word "expenses," saying that she cannot possibly have meant to include the estate duty and that it would be giving a very technical meaning to the words which she has used out of her untutored mind.

In the result, I have to construe the words which I find, and since "expenses" (as I read the phrase) are something other than funeral expenses, I cannot see why I should limit them more than would be the natural course in any ordinary will. It seems to me that "expenses" must include not only testamentary expenses (which, of course, by reason of the rules which have been adopted in regard to wills, would include estate duty payable out of the general estate), but also would include the expenses of administration of the testatrix's estate.

Accordingly, it seems to me that the provisions of the First Schedule to the Administration of Estates Act, 1925, are varied to this extent, that those expenses to which I have referred come out of the whole of the residuary estate before there is any division into shares, and there is only an intestacy as regards one such share.

Argument was then heard on question (1) (iii).

DANCKWERTS J. I have now to consider the question of the incidence of the legacies amounting to £1,000 given by the will of the testatrix. This appears to me to be a question of considerable difficulty, and not less so because of some rather varying decisions of myself and other judges. It will be remembered that there was the general direction for the payment of debts and funeral expenses in the printed parts of this will, and then, after the bequests of the two legacies each of £500, the testatrix declared as follows: "After all my debts, and funeral, and "expenses are paid I give and bequeath all the residue of my "estate in equal shares" among four persons, one of whom pre-deceased the testatrix; so there was an intestacy as regards one quarter of the residuary estate. I have already held that the direction in the will beginning with the word "after" applied to debts and funeral expenses and also testamentary expenses and expenses of administration of the estate. Consequently, there is a specific direction in this will which threw upon the whole of the residuary estate and not on the undisposed of share those expenses which I have enumerated, which might be called liabilities.

Consequently, in that way the order of application of the property of the testatrix to the payment of liabilities initiated by section 34 (3) of the Administration of Estates Act, 1925, and contained in Part II of the First Schedule to that Act did not apply because of the variation contained in this will.

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It is argued on behalf of the next-of-kin (who, take the one-fourth quarter which is undisposed of by the will in the events which have happened) that the result of the decision I have already reached as regards liabilities is that there is nothing to which the words in section 34 (3) of the Act could apply, the Act only referring to debts and other liabilities and not referring in terms to legacies at all; and, consequently, as owing to the variation made by the will there is no reason to apply the second part of the First Schedule in respect of liabilities, there is no subject-matter to which the provisions of the first paragraph of the Schedule, Part II, could apply, the first paragraph being: "Property of the deceased undisposed of by will, subject to the "retention thereout of a fund sufficient to meet any pecuniary "legacies."

There are four cases to which it is necessary to refer upon those particular provisions. The first in time is a decision of Roxburgh J. in *In re Gillett's Will Trusts*.[5] There the testator bequeathed annuities to four persons, and he provided [6] "as to "any balance remaining of my residuary trust funds after the "provision and payment of all the aforesaid annuities my trustees "shall stand possessed thereof . . . in trust on the decease of "the survivor of the above first named four annuitants" in varying specified proportions for 17 named persons absolutely, but liable to be divested by certain substitutional gifts. He made no disposition of any surplus income there might be from the residuary trust funds pending the death of the survivor of the four annuitants; and after the death of two of them there was such a surplus. It was held that there was an intestacy as regards the surplus income undisposed of by the will. It was also held [6] "that there was no express direction in the will to dis-"place the general rule in Sched. 1, Part II, para. 1, of the "Administration of Estates Act, 1925, that the undisposed "income should be applied towards payment of legacies, since "the testator was not aware that he was leaving it undisposed of, "and it could not be inferred what disposition (if any) he might "have made thereof had he been so aware."

The judgment of Roxburgh J. on this point is [7]: "The point "which I now have to decide is whether for payment of the "legacies resort ought to be had in the first instance to the "undisposed of surplus income, if and in so far as it is sufficient "for the purpose. Mr. Rink submits that the legacies should "not fall on it. He concedes, I think, that they must unless I "can find a contrary intention in the will. He concedes, and "indeed it is obvious, that there is no express contrary intention "in the will. But he submits that I ought to imply a contrary "intention. His first submission is that the fact that the "testator has disposed of the whole or probably the whole income "of the residue for an undefined period shows that he did not

[5] [1950] Ch. 102; 65 T.L.R. 727; [1949] 2 All E.R. 893.

[6] [1950] Ch. 102, 103.

[7] [1950] Ch. 112.

"want the legacies to be paid out of income except possibly out "of any surplus income available in the first year from the "testator's death. That is his first submission. His alternative "submission is this: Where a testator has made express dis-"positions which make it legally impossible to retain a fund for "or towards meeting pecuniary legacies, he must be taken to be "varying the provisions for retention [which are to be found "in para. 1 of Part II of Sched. 1 to the Administration of "Estates Act, 1925]." Then it was decided, as described in the headnote, that the legacies were payable out of the undisposed of surplus income.

Mr. Rossdale, arguing for the next-of-kin in the present case, points out that the decision was reached really upon the footing of certain concessions made by Mr. Rink, and he says that those concessions ought not to have been made and at any rate he is not making them in the present case, and consequently *In re Gillett's Will Trusts* [8] is no authority on the present matter at all.

In the same volume of the Law Reports is my decision in *In re Beaumont's Will Trusts.*[9] There a testatrix by her will made in 1947 bequeathed free of duty specific articles and pecuniary legacies, and proceeded: "I give devise and bequeath "all my real estate and all my personal estate not hereby other-"wise disposed of (including all property over which I shall have "power to appoint) unto my trustees upon trust that my trustees "shall sell call in and convert into money the same or such part "thereof so far as shall be necessary [sic] and after payment "of all my funeral and testamentary expenses and debts shall "stand possessed of the residue thereof in trust to pay and "transfer the same equally between" four named persons. She died in 1948, and one of the four persons named in the will predeceased her. A summons was taken out by the trustees of the will to have determined (among other things) whether, on the true construction of the will and by virtue of section 34 (3) of the Act of 1925 and Part II of the First Schedule, the lapsed one-fourth share was applicable, in exoneration of the other shares in it, towards any, and if so, which, of the following liabilities: the funeral, testamentary and administration expenses, debts and liabilities, the pecuniary legacies bequeathed by the will, and so on. It was argued by Mr. Winterbotham that there was no provision in section 34 (3) which made the legacies payable out of the undisposed-of share; and that the only provision which might have that effect was section 33 (2), and he contended that that was displaced, because there was an express trust for sale in that case.

At this stage perhaps it will be desirable to look at the provisions of the Act. [His Lordship read section 34 (3) of the Administration of Estates Act, 1925.] I have already referred to Part II of the First Schedule. There is no reference to

[8] [1950] Ch. 102.

[9] [1950] Ch. 462; 66 (Pt. 1) T.L.R. 712; [1950] 1 All E.R. 802.

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legacies at all in section 34 (3); but, as I have already mentioned, in the order of application of assets for the payment of liabilities referred to in that subsection, the first property to be resorted to under paragraph 1 of Part II of the Schedule, is "Property of "the deceased undisposed of by will, subject to the retention "thereout of a fund sufficient to meet any pecuniary legacies." On the other hand one must compare section 33 (1). [His Lordship read section 33 (1) and (2) of the Administration of Estates Act, 1925.] One of the peculiarities of this legislation is that there is no direction in terms for payment of the legacies out of that fund. There is simply a direction that a fund is to be set aside, which is not followed up, as one would expect, with a direction that the fund set aside should be applied in payment of the legacies. That is one of the difficulties which have had to be considered in the course of these cases.

In *In re Beaumont* [10] I came to the conclusion, at any rate in the circumstances of that case, that the old law in regard to legacies which was current before 1926 applied, and that there was no case for the application of a different rule by virtue of section 34 (3) of the Administration of Estates Act, 1925. What I said was [11]: "As Mr. Winterbotham contended, section 34 (3) "of the Administration of Estates Act, 1925, has in effect made "no provision with regard to such things as legacies. On the "authorities, the funeral, testamentary and administration "expenses, debts and liabilities undoubtedly come out of the "whole residuary estate before division, because that is what the "will says," as of course it does in the present case, "but the "position of the legacies depends on the old law. By that law, "that is, before the Administration of Estates Act, 1925, legacies "would plainly come out of the residuary estate, and, although "in this particular will there is not in terms a gift of residue, "there is a gift of 'all my real estate and all my personal estate "'not hereby otherwise disposed of'; and it seems to me that "the old law applies unless something in the Administration of "Estates Act, 1925, demonstrably eliminates or modifies the old "law as to the extent of such burdens. On this point I am "assisted by *In re Thompson* [12] in which Clauson J. held that the "old law, laid down in *In re Boards*,[13] still remained operative "after the Administration of Estates Act, 1925, came into force, "so as to cast the primary burden of legacies on the personal "estate." I added [14]: "It seems to me, therefore, that in "the present case the pecuniary legacies and the specific legacies, "and the duty on those legacies which is in the form, or has the "effect, of an additional legacy, are all payable out of the whole "estate before coming to what is divided into four equal parts "and given to four named persons, so that the lapsed share is

[10] [1950] Ch. 462.
[11] Ibid. 466.
[12] [1936] Ch. 676; [1936] 2 All E.R. 141.
[13] [1895] 1 Ch. 499.
[14] [1950] Ch. 466.

"simply a lapsed share of the estate after those burdens have "been cleared." That decision of mine was discussed to some extent in legal publications, and certainly the matter is one which does admit of considerable doubt.

In *In re Martin*,[15] which I decided in 1955, I had to consider these provisions again, and I need only refer to certain remarks of mine in which I appear to have given some explanation of my decision in *In re Beaumont's Will Trusts*.[16] I said[17]: "I men-"tion in passing that I followed that case [that is, *In re Thompson*[18]] in *In re Beaumont's Will Trusts*,[19] which was "very different from the present case, because there was in that "case a trust for sale, and there was not, as in the present case, "an intestacy with regard to a particular asset of the testator's "estate, but merely an intestacy with regard to a share of the "fund given in the will, and therefore, as it seems to me, *In re* "*Beaumont's Will Trusts*[19] has no application to the case which "I have to decide now. There are no other cases which give "me any real assistance at all."

A rather similar question came before Harman J. in *In re Midgley*,[20] and it appears from his judgment that he was not entirely in agreement with the views which I had expressed in *In re Beaumont*.[21] According to the headnote, the facts of that case were[22]: "A testatrix, by a will made in 1951, after "bequeathing certain pecuniary legacies, bequeathed her residue "to her trustees on trust for sale and to hold the proceeds on "trust to pay debts and funeral and testamentary expenses, and "after such payment to hold the residue in equal shares abso-"lutely on trust for six named persons (some of whom were next-"of-kin while others were strangers), with a substituted gift of "the share of any beneficiary predeceasing the testatrix to that "person's issue if surviving the testatrix, followed by a proviso "that the share of any beneficiary predeceasing the testatrix "without issue surviving her should be held as an accretion to "the other shares. The testatrix later by codicil revoked the "bequest of one of the shares." Then, in accordance with the well-known authorities, it was held that the effect of the revocation was to cause an intestacy as regards that particular share. Harman J., according to the headnote, held[23]: "That "where, as in the present case, it was apparent that there was a "partial intestacy and no contrary intention appeared in the "will, pecuniary legacies were payable out of the undisposed-of "estate by virtue of Schedule 1, Part II, para. 1, of the Admini-"stration of Estates Act, 1925."

Harman J., in the second of his judgments, which relates to this particular point, said[24]: "The question now arises: out of

[15] [1955] Ch. 698; [1955] 2 W.L.R. 1029; [1955] 1 All E.R. 865.
[16] [1950] Ch. 462.
[17] [1955] Ch. 705.
[18] [1936] Ch. 676.
[19] [1950] Ch. 462.
[20] [1955] Ch. 576; [1955] 3 W.L.R. 119; [1955] 2 All E.R. 625.
[21] [1950] Ch. 462.
[22] [1955] Ch. 576.
[23] [1955] Ch. 577.
[24] Ibid. 583.

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"what sum are the pecuniary legacies to be paid? Having "regard to the form of the will, it is clear that the debts, funeral "and testamentary expenses are to be paid out of the whole "fund before the division of the shares, and that is conceded; "but the trust for sale created by clause 3 says nothing about "legacies which are not charged on any specific portion of the "estate," which, of course, is rather like the position of the present case, except that in the present case before me there is no trust for sale. He continued[24]: "I am to look, as it seems "to me, to section 34 (3) of the Administration of Estates Act, "1925, which deals with the method of administering the estate "of a deceased person who is solvent. The section only purports "to apply to the method of the discharge of the funeral, testa-"mentary and administration expenses, debts and liabilities; "nothing is said in the section about legacies. So far it appears "that the law about payment of legacies had not been altered, "but when I turn to Part II of Schedule 1, which is specified "by section 34 (3) as the place where the order of administration "is to be found, I find this: 'Order of application of assets where "'the estate is solvent,'" and he read para. 1, which I have already read. Then he continues[25]: "Therefore, one must first "retain out of the undisposed-of property a fund sufficient to "meet any pecuniary legacies, and must pay the debts, testa-"mentary expenses and so forth out of the rest of the property "undisposed of.

"What, then, is to be done with the fund which has been "retained thereout? The answer, it seems to me, is that it "must be used to meet the pecuniary legacies, because it has "been retained for that purpose. It is, if I may say so, a "tortuous way of legislating, but that is what I should have "thought the words inevitably mean; and so, indeed, Danckwerts "J. concluded in *In re Martin*.[26] It is true that there was un-"disposed-of real estate and no trust for sale, I think, which "applied to it. Any trust for sale would have failed because "of the failure of the gift. Danckwerts J. said[27]: 'It seems to "'me that here I am dealing simply with one asset, the undis-"'posed-of real estate, and out of that undisposed-of real estate "'a fund is to be raised to provide for the pecuniary legacies, and "'if the fund is not to be raised for the payment of the pecuniary "'legacies, it is difficult to see what reason there is for setting "'aside the fund. Therefore I am necessarily driven to the "'conclusion that the proper fund to meet the legacies in the "'present case is the undisposed-of property according to para-"'graph 1 of Part II of Schedule 1 to the Act.' That seems to "me, if I may say so, to be right. I am told, however, this does "not apply to a case where there is a trust for sale, and I was "referred to a former decision of the same judge, *In re*

[24] [1955] Ch. 577, 583.
[25] [1955] Ch. 583.
[26] Ibid. 698.
[27] Ibid. 706.

"*Beaumont's Will Trusts.*"[28] Then he read the end of the headnote of that case and continued[29]: "The argument that "prevailed in *Beaumont's* case[30] was apparently that where "there was a trust for sale imposed by the will, that excluded the "Act altogether, because it excluded section 33 of the Act. I "confess that I do not follow that argument. In coming to this "conclusion Danckwerts J. did not follow the decision of "Roxburgh J. in *In re Gillett's Will Trusts*,[31] which was "apparently not cited. In that case (it is true, on some con-"cessions from counsel) it was held that the first paragraph of "the Schedule made the legacies payable out of the undisposed-"of property. That rule may not apply when there is no "intestacy apparent at the death of the testator. I am not "suggesting that anything I say covers such a case; but where, "as here, it is apparent that the testator is to some extent "intestate at his death and where no contrary intention appears "in the will, then, as it seems to me, the effect of the first para-"graph of the second part of the Schedule does apply to make "the pecuniary legacies payable out of the undisposed-of money "or property, whatever they may be, and I so hold in this "present case."

There is one other decision to which I must refer, and that is a decision of the Court of Appeal in *In re Worthington.*[32] The headnote is: "Testatrix by her will after appointing a sole "executor thereof and bequeathing a number of pecuniary "legacies gave devised and bequeathed all the residue of her "estate both real and personal to E.S. and L.M.H. in equal "shares absolutely. E.S. died in the lifetime of the testatrix, "and her moiety lapsed and passed as on an intestacy." It is to be observed that in that case there was no trust for sale in the will, as in the present case before me. It was held[32] "that "the order of the application prescribed by the Administration "of Estates Act, 1925, section 33 (2), and Schedule 1, Part II, "being under section 33 (7), section 34 (3), and Schedule 1, "Part II, expressly subject to variation by the provisions of the "will, and there being in this case no such provisions, the "statutory order must be followed, and that both the debts, "funeral and testamentary expenses and the legacies were pay-"able primarily out of the lapsed share of the residue."

Mr. Rossdale attempted to distinguish this case at any rate by pointing out that in *In re Worthington*,[33] though there was no trust for sale, there was no charge of the liabilities on any particular parts of the estate, and so plainly the statutory order of application did apply, which is perfectly true. But the importance of the case from my point of view is that section 33 (2) is referred to by Lord Hanworth M.R.,[34] whom I understand as saying that the provisions of that subsection will apply—and, of course, it

[28] [1950] Ch. 462.
[29] [1955] Ch. 584.
[30] [1950] Ch. 462.
[31] [1950] Ch. 102.
[32] [1933] 1 Ch. 771.
[33] [1933] 1 Ch. 771.
[34] Ibid. 774.

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means that subsection (1) must also apply—in the case of an estate in which there is only an intestacy as regards a share of the whole estate. Strong argument was put forward by Mr. Rossdale that the provisions of section 33 of the Administration of Estates Act, 1925, which were relied upon by Mr. Grove, could not apply to a case where the only intestacy was not as regards particular assets of the whole estate but as regards a share in the residuary estate, as in the case now before me.

It seems to me that *In re Worthington*[35] disposes of that conclusion or argument; and, of course, what is said by the Court of Appeal is binding upon me, and I must apply it if it is properly to be applied in the present case. It is perfectly true that *In re Worthington*[35] was cited to me in *In re Beaumont's Will Trusts*,[36] but I do not think that I paid much attention to it in that case, for the reason that I was persuaded, it seems, by the argument of Mr. Winterbotham that section 33 was excluded by reason of the presence of an express trust for sale in the will under consideration by me in that case. As I have already mentioned, there is no express trust for sale in the present case, and therefore the same considerations which are referred to in *In re Beaumont's Will Trusts*,[36] and in the explanation of that case in particular which I gave in *In re Martin*,[37] are not applicable in the present case. There is no trust for sale contained in the will and, therefore, it seems to me that, following the decision of the Court of Appeal in *In re Worthington*,[38] I must infer that with regard to the undisposed-of one-fourth share, in the same way as regards the undisposed-of one-half share in *In re Worthington*,[38] that the trusts which create a trust for sale with a disposition of the resulting fund according to section 33 of the Administration of Estates Act, 1925, must be applied in the present case. It seems to me, therefore, that I do get an express reference to the creation of a fund for the payment of legacies under the terms of the first paragraph of Part II of the First Schedule to the Act.

On that conclusion, in spite of the peculiar way in which the legislation has been settled or directed, it seems to me that if a fund is formed for the payment of legacies, the intention of the Act must be that the legacies should be paid out of that fund, or perhaps one should say that that fund should be applied in the payment of the legacies. It seems to me that the result is, that whatever was decided in *In re Beaumont's Will Trusts*[39] and in *In re Midgley*[40] by Harman J., and whether or not those cases are reconcilable, in the case I have before me now I must apply the decision of the Court of Appeal in *In re Worthington*,[41] and come to the conclusion that the legacies are payable out of the undisposed-of share in the present case.

I will answer question 1, paragraphs (i) and (ii), in the terms

[35] [1933] 1 Ch. 771.
[36] [1950] Ch. 462.
[37] [1955] Ch. 698.
[38] [1933] 1 Ch. 771.
[39] [1950] Ch. 462.
[40] [1955] Ch. 576.
[41] [1933] 1 Ch. 771.

of alternative (b), namely, that the funeral and testamentary and administration expenses and estate duty come out of the residuary estate before the division into shares, and question 1, paragraph (iii), in the terms of paragraph (a) of the summons, namely, that the legacies are payable out of the undisposed share of residue.

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Declarations accordingly.

Solicitors: *Chalton Hubbard & Co. for Marsh & Ferriman, Worthing; Official Solicitor.*

I. G. R. M.

[COURT OF APPEAL.]

* KELLY *v.* LOMBARD BANKING CO. LTD.

C. A.

1958 *Nov.* 28.

Lord Denning, Hodson and Ormerod L.JJ.

[Plaint No. 004983.]

Hire-Purchase — Hire-purchase agreement — Option to purchase — Motor-car—Initial payment "in consideration of option "to purchase"—Contract validly terminated by owners before option exercised—Whether initial payment recoverable as money paid for a consideration which had wholly failed—Nature of right of option to purchase in hire-purchase agreement.

By a clause in a hire-purchase agreement for a motor-car, the hirer agreed with a finance comany "to pay on the signing of the "agreement the initial payment of £186 2s. . . . in consideration "of the option to purchase contained in clause 3 (*b*) hereof." The clause continued: "Credit for such payment shall be given to the "hirer only in the event of such option to purchase being exercised "by him." By clause 3 (*b*) the owners agreed that if the hirer performed all the terms of the agreement on his part "he shall have "the option to purchase the vehicle for the sum of 20s."

The hirer paid the initial sum of £186 2s. and monthly rentals thereafter until he had paid a total of £419 6s. 2d. on the full hire-purchase price of £534 1s. 9d. At that point, execution was levied on him at the instance of a judgment creditor; and the finance company thereupon exercised their right under another clause in the agreement to terminate the agreement, and repossessed themselves of the car, refusing an offer by the hirer to pay the whole balance outstanding within a month.

The hirer thereupon brought an action for the recovery of the initial payment of £186 2s., contending that as he had never obtained the option for which, under the terms of the agrement, he had paid that sum, it was recoverable as a payment, consideration for which had wholly failed:—

Held, dismissing the hirer's appeal, that this agreement could not be distinguished from the many other hire-purchase agreements with which the court was familiar; and under it the £186 2s. was paid in consideration for the option to purchase in clause 3 (*b*). That option was an existing right from the moment of signing the contract and paying the money, notwithstanding that it could not be exercised until certain conditions had been fulfilled. Accordingly, the sum was not recoverable by the hirer.

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APPEAL from Judge Dale, sitting at Westminster County Court.

A hirer, Herbert Kelly, entered into a hire-purchase agreement in writing on December 8, 1954, with a finance company, Lombard Banking Co. Ltd., by which the company agreed to let to him a Jaguar saloon car on hire-purchase terms. The cash price was expressed to be £465, and the total hire-purchase price £534 1s. 9d. There was to be an initial payment of £186 2s. and 21 monthly hire rentals of £16 11s. 3d. thereafter.

By clause 2 (*a*) of the agreement the hirer agreed "to pay "on the signing of this agreement the initial payment of £186 2s. ". . . in consideration of the option to purchase contained in "clause 3 (*b*) hereof." The clause continued: "Credit for such "payment shall be given to the hirer only in the event of such "option to purchase being exercised by him." By clause 3 the owners agreed "(*b*) that if the hirer shall punctually pay the "monthly hire rentals and all other sums due under this agree-"ment and shall strictly observe and perform all the terms "conditions and obligations on his part contained in this agree-"ment, he shall have the option to purchase the vehicle for the "sum of 20s."

Clause 5 provided that the agreement and the hiring "shall "forthwith and for all purposes be determined absolutely and "come to an end . . . (vi) if any step should be taken by any "judgment creditor of the hirer to levy execution upon the goods "of or in the possession of the hirer."

The hirer paid the initial sum of £186 2s. and thereafter by way of rental he paid—though not altogether regularly—to the company up to and including February 7, 1956, further monthly sums amounting to £233 4s. 2d.—a total amount under the agreement of £419 6s. 2d. Shortly after, execution was levied on the goods of and in the possession of the hirer by the sheriff at the instance of a judgment creditor for a debt of £147. When the sheriff was told by the hirer that the car belonged to the company, he got in touch with them, and they by a letter of March 8, 1956, informed the hirer that they would repossess the car; and they did so, refusing an offer by the hirer to pay the total balance outstanding under the agreement within a month.

The hirer thereupon claimed in the county court for the recovery of the sum of £186 2s., contending that as he had never got the option for which he had paid that sum under the terms of the contract, the consideration for that payment had wholly failed.

By their amended defence the company denied that the consideration for the payment had failed, and relied on the full and precise terms of the agreement. They claimed that under the terms of clause 5 (vi) the hirer's rights had been determined absolutely, and that they had become entitled to repossess the vehicle, and had done so, on or about March 8, 1956.

The hearing in the county court proceeded on agreed facts and no evidence was taken. The county court judge held that on the

true construction of the agreement and on the facts there had been sufficient consideration in law for the payment of the sum of £186 2s., since it was by reason of that payment that the hirer was permitted to hire the car, the subject-matter of the agreement, and that that constituted valid consideration for the payment made. He accordingly gave judgment for the company with costs.

The hirer appealed.

John Davies for the hirer.
Stephen Terrell for the finance company.

The following cases were cited in the course of the argument: *Cooden Engineering Co. Ltd.* v. *Stanford* [1]; *Warman* v. *Southern Counties Car Finance Corporation Ltd.* [2]; *Belsize Motor Supply Co.* v. *Cox* [3]; *Blakey* v. *Trustees of Pendlebury Property* [4]; *Whiteley Ltd.* v. *Hilt* [5]; *Howe* v. *Smith* [6]; *Helby* v. *Matthews* [7]; *G. Scammell & Nephew Ltd.* v. *Ouston* [8]; *North Eastern Railway Co.* v. *Lord Hastings.* [9]

LORD DENNING. This is an interesting point which has come before the court for the first time, namely, whether the hirer under a hire-purchase agreement with a finance company can get back his initial payment. The facts are agreed. No evidence was taken in the court below. [His Lordship stated the facts set out more fully above, and continued:] I do not know of a case before where a man whose car has been retaken lawfully has said: "I want my initial payment back." Still, if it is a good claim, the novelty of it is no answer to it.

Mr. Davies, on his behalf, has put forward a very ingenious argument. He invites us to look at this hire-purchase agreement and see what it says about this initial payment. "The hirer "agrees (*a*) to pay on the signing of this agreement the initial "payment of £186 2s. set out in the schedule hereto in con-"sideration of the option to purchase contained in clause 3 (*b*) "hereof." Then, if you look at clause 3 (*b*), it says: "The "owners agree (*b*) that if the hirer shall punctually pay the "monthly hire rentals and all other sums due under this agree-"ment and shall strictly observe and perform all the terms "conditions and obligations on his part contained in this agree-"ment, he shall have the option to purchase the vehicle for the "sum of 20s." Mr. Davies says that this £186 2s. was paid for the option to purchase, but that the hirer never got an option to purchase and, therefore, the consideration fails. It is like a

[1] [1953] 1 Q.B. 86; [1952] 2 T.L.R. 822; [1952] 2 All E.R. 915.
[2] [1949] 2 K.B. 576; [1949] 1 All E.R. 711.
[3] [1914] 1 K.B. 244.
[4] [1931] 2 Ch. 255; 47 T.L.R. 503.
[5] [1918] 2 K.B. 808; 34 T.L.R. 592.
[6] (1884) 27 Ch.D. 88.
[7] [1895] A.C. 471; 11 T.L.R. 446.
[8] [1941] A.C. 251; 57 T.L.R. 280; [1941] 1 All E.R. 14.
[9] [1900] A.C. 260.

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payment in advance for property, where the property is never conveyed, in which case the payer can get the money back subject to a cross-claim for damages if it is his fault that the contract has not been effected. Likewise, says Mr. Davies, this is a payment in advance for an option to purchase which has never come into being. He says that on the wording of the clause the option did not come into being until the end of the hiring when all the payments had been made. It never came into being in this case because the finance company terminated the hiring. In the circumstances it is argued that there has been no consideration for this payment, and it ought to be returned.

I cannot agree with that interpretation of the contract. It seems to me that the option to purchase is an existing right which exists as from the date of this agreement. It is true that it is subject to conditions: it is subject to the hirer fulfilling his obligations in order to be entitled under it. But, nevertheless, the option to purchase is an existing right as from the moment of signing the contract and the payment of the money. So he has got what he has paid for. He has to fulfil the conditions in order to exercise the option. But he has paid for an option which he has got.

This interpretation of the clause seems to be borne out very much by the very next sentence in clause 2 (*a*): "Credit for such "payment shall be given to the hirer only in the event of such "option to purchase being exercised by him." That seems to me to indicate that he does not get his money back either by way of credit or in cash, unless he exercises the option to purchase.

I need not refer to all the various other clauses because that is the only clause which Mr. Davies relies on so as to distinguish this agreement from the many other hire-purchase agreements with which one is familiar, in which no one could suggest that the hirer is entitled to recover his initial payment.

I see the hardship on the hirer. I often think it is hard under these hire-purchase agreements when the hirer has parted with his money and the finance company take both the car and the money: but there is the law. Notwithstanding the ingenious argument of Mr. Davies, I do not think he is right. I agree with the judgment of the county court judge, and I think that this appeal must fail.

HODSON L.J. I am of the same opinion. I think that the construction of this agreement is quite plain. There was no failure of consideration. The £186 2s. was paid in consideration of the option to purchase contained in clause 3 (*b*), which states that if the hirer shall punctually pay the monthly hire rentals, and so forth, he shall have the option to purchase the vehicle for the sum of 20s. The option was bought for £186 2s. notwithstanding that it could not be exercised until certain conditions

had been fulfilled. I agree that the appeal fails and must be dismissed.

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ORMEROD L.J. I agree.

Appeal dismissed.
Money in court by way of security for costs ordered to be paid out to the respondents.

Solicitors: *Stanley & Co.; Victor Mishcon & Co.*

M. M. H.

[COURT OF APPEAL.]

* BEWLAY (TOBACCONISTS) LTD. *v.* BRITISH BATA SHOE CO. LTD.

C. A.
1958
Nov. 20, 21.
Lord Evershed M.R., Sellers L.J. and Roxburgh J.

[Plaint No. N. 1690.]

Landlord and Tenant—Business premises (security of tenure)—Landlord's intention to reconstruct—"Substantial part of premises"—Meaning—Totality of proposed work to be considered—Landlord and Tenant Act, 1954 (2 *&* 3 *Eliz.* 2, *c.* 56), *s.* 30 (1) (*f*).

Court of Appeal—County court—Appeal from—Question of degree and fact.

Fact or Law—Landlord and tenant—Business premises—"Substantial "part" question of fact—Landlord and Tenant Act, 1954, *s.* 30 (1) (*f*).

The landlords of a retail shop, who owned and occupied the adjoining shop, gave notice to the tenants determining the tenancy. On the tenants applying to the county court under the Landlord and Tenant Act, 1954, for the grant of a new lease, the landlords opposed on the ground that on the termination of the tenancy they intended to demolish and reconstruct the premises or a substantial part thereof, and could not reasonably do so without obtaining possession. The scheme was to amalgamate the two self-contained shops into one shop. It was proved to the satisfaction of the judge that the landlords intended, inter alia, to reconstruct an entirely new shop front, involving the abolition of the existing means of access to the street, and to remove three-quarters of the dividing wall between the two shops, which necessitated alterations to some of the pillars supporting the ceiling. The judge considered that the proposed work involved both the demolition and reconstruction of a substantial part of the premises, and, accordingly, he refused the tenants' application. On appeal:—

Held, dismissing the appeal, that there was evidence to support the judge's findings of fact, and that he had applied the correct test. He was entitled to look at the totality of the work which was proposed to be done in order to decide whether as a matter of fact

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and common sense those proposals came within the scope of paragraph (*f*) of section 30 (1) of the Act of 1954.[1]

APPEAL from Judge Bassett, sitting at Ilford County Court.

In 1936 premises used for a retail shop, known as 14, North Street, Romford, Essex, were let for a term of 21 years expiring on September 29, 1957. In 1937 the lease was assigned to Bewlay (Tobacconists) Ltd., hereinafter called the "tenants," and in 1955 the reversion was purchased by the British Bata Shoe Co. Ltd., hereinafter called the "landlords." The landlords owned and occupied 12, North Street, the adjoining premises, as a retail shop. On March 27, 1957, the landlords served a notice to terminate the tenancy on September 29, stating that they would oppose an application by the tenants for the grant of a new tenancy on the ground that, on the termination of the current tenancy, they intended to carry out substantial reconstruction in both 12 and 14, North Street which could not reasonably be done without obtaining possession of 14, North Street. On June 5, 1957, the tenants applied for the grant of a new tenancy, and on July 22 the landlords served a notice opposing the grant.

In the proceedings in the county court the landlords proved that they intended to carry out work which the judge described as follows: "The contemplated work involves alterations to the "lavatory accommodation which involves a small amount of "demolition and reconstruction but which in itself could in no "sense be termed substantial. The wall between No. 14 and "No. 16 is to be altered by filling in the recessed portion to make "the surface wholly even, but again I should hesitate to call this "by itself substantial and attach no real importance to it. The "front is to be reconstructed by means of an entirely new shop "front and the present means of access to the premises from the "street abolished. Although a shop front is often put in by a "tenant to suit his own requirements it is certainly part of the "structure of the building . . . and the alteration shown in "the specification and plans involves an alteration in the struc-"ture of the front of the whole premises and is a matter of "reconstruction. On the fourth side of the premises lies the "dividing wall between Nos. 12 and 14. The intention of "the landlords is to remove approximately three-quarters of this "wall involving consequential alterations to some of the pillars "supporting the ceiling. At some time or other the occupants "of the premises on the first floor had desired a clear space above "and this wall is not load-bearing. It was strongly urged . . . on

[1] Landlord and Tenant Act, 1954, s. 30: "(1) The grounds on which a "landlord may oppose an application "[for a new tenancy under the Act] ". . . are such of the following "grounds as may be stated in the "landlord's notice . . . that is to "say:— . . . (*f*) that on the termina-"tion of the current tenancy the "landlord intends to demolish or "reconstruct the premises comprised "in the holding or a substantial part "of those premises or to carry out "substantial work of construction on "the holding or part thereof and that "he could not reasonably do so with-"out obtaining possession of the "holding; . . ."

"behalf of the [tenants] that as the wall was not load-bearing its "removal either in whole or in part could not be classed as "substantial."

The judge referred to the plans, which showed that at present No. 14, North Street was a self-contained shop, with a shop-window abutting on the pavement, but having an entrance set back at an angle from the pavement.

The judge concluded as follows: "Regarding then the matter "solely from the point of view of the structure of the premises, "I take the view, bearing in mind particularly the alterations to "the shop front and the dividing wall between Nos. 14 and 12, "that the intended work involves both the demolition and the "reconstruction of a substantial part of the premises." Accordingly, he dismissed the tenants' application.

The tenants appealed.

J. P. Widgery Q.C. and *Alan Fletcher* for the tenants.
Adrian Head for the landlords.

In addition to the cases referred to in the judgments, the following were cited in argument: *Betty's Cafés Ltd.* v. *Phillips Furnishing Stores Ltd.*[2]; *Cadle (Percy E.) & Co. Ltd.* v. *Jacmarch Properties Ltd.*[3]; *Joel* v. *Swaddle*[4]; *Biles* v. *Caesar.*[5]

LORD EVERSHED M.R. This is an appeal by the tenants in proceedings under the Landlord and Tenant Act, 1954, whereby the tenants were applying for the grant of a new tenancy of certain premises, No. 14, North Street, Romford, Essex. The point to be determined in the appeal is the single point whether the work which the landlords have admittedly proved that they intend to do on the termination of the tenancy is of a kind covered by the language of paragraph (*f*) of subsection (1) of section 30 of the Landlord and Tenant Act, 1954, namely, "that on the termination "of the current tenancy the landlord intends to demolish or "reconstruct the premises comprised in the holding or a sub-"stantial part of those premises or to carry out substantial work "of construction on the holding or part thereof and that he could "not reasonably do so without obtaining possession of the "holding."

The judge held that the work did fall within the terms of the paragraph; and we are asked to say that that decision was wrong, and so to say on the ground that, in answering the question, the judge misinterpreted the words of the paragraph. That much indeed has necessarily to be said: for the question whether the work proposed is or involves demolition, or reconstruction of a substantial part of the premises, or substantial work of construction on part of the premises, is, prima facie, a question of degree

[2] [1958] 2 W.L.R. 513; [1958] 1 All E.R. 607.
[3] [1957] 1 Q.B. 323; [1957] 2 W.L.R. 80; [1957] 1 All E.R. 148.
[4] [1957] 1 W.L.R. 1094; [1957] 3 All E.R. 325.
[5] [1957] 1 W.L.R. 156; [1957] 1 All E.R. 151.

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and fact, and, therefore, in the present case at any rate, one which, in the absence of misdirection or of evidence to support the conclusion, this court will not review. So much is clear, as a matter of general principle, in an appeal coming from a county court—except, of course, in those cases (of which the present is not one) where appeal may now be made on questions of fact. But it has also been laid down for us by the decided cases in this court, including particularly *Atkinson* v. *Bettison*.[1] [His Lordship referred to the findings of fact by the county court judge as set out above and continued:]

The proposed alterations involve considerable (and I use that word deliberately) changes in the physical character of the front of the holding. If they are carried out as proposed, there will then be no access or entrance whatever from the highway, and there will be a wholly different front to the shop, the new front being substituted so as to cover the whole area of the ground facing the street occupied by the tenants' holding. In other words, this is not a case, by any means, of mere substitution on the same site of a shop front in the sense of a display window for another shop front of a similar purpose and content. Certain it is that the proposed alterations to the shop front could not possibly (so far as I can see) be done while the present tenants remained in occupation under their tenancy.

The judge expressed his final conclusion, in the paragraph set out above upon which Mr. Widgery has mainly directed his criticisms. That conclusion is attacked by Mr. Widgery as necessarily involving a failure on the judge's part properly to analyse the requirements of the paragraph. As expanded, his argument was to this effect: if work is to be done which involves some demolition and also some construction or reconstruction; but if the demolition, taken in isolation, is not demolition of a substantial part of the premises; and similarly, if the work of construction or reconstruction does not involve construction or reconstruction on or of a substantial part of the premises; then the landlord cannot successfully invoke the paragraph by saying that the parts which are the subject of the demolition, on the one hand, and the construction or reconstruction on the other, when added together, amount to a substantial part of the premises. This (says Mr. Widgery) is what in truth the judge has done; and that is the vice of his judgment. And it is inherent in that argument, first, that if the wall between Nos. 14 and 12 cannot be said to be "demolition," then the substitution for it of the light screens proposed certainly cannot be said to be "reconstruction"; and, secondly, that the work in front of the shop which I have earlier described amounts to no more than a mere change of shop front, which of itself (and Mr. Widgery invokes some language of Denning L.J. in *Fisher* v. *Taylor's Furnishing*

[1] [1955] 1 W.L.R. 1127; [1955] 3 All E.R. 340.

Stores Ltd.[2]) cannot be said to be work of substantial construction or of reconstruction of a substantial part of the premises.

I do not accept either of these propositions: that is, I do not accept it that, first, the removal of the wall is not "demolition," and, further, that the replacement of the wall by screens cannot fairly be called, in some real sense, "reconstruction," within the language of the paragraph; and, secondly, that the change of the front of the shop can be (in effect) disregarded. As to the latter, I note further that the cost of this work to the front of the premises, together with the cost of remaking (to use a neutral word) the shop front of No. 12, according to the estimate, amounts to nearly £3,000, out of a total proposed to be expended of £5,600.

If I am right, then the basis of Mr. Widgery's criticism of the judgment goes. I think that the judge was entitled to look at the totality of what is proposed to be done and, as a matter of fact and common sense, to ask himself the question whether these proposals involve the demolition or reconstruction of a substantial part of the premises, or the carrying out of substantial work of construction on them. The case may perhaps be near the line; though I am not for myself saying that it is. But if it is near the line, then I think that there was here evidence to justify the conclusion of fact which the judge expressed in the paragraph already quoted. I would add that I do not, for my part, accept the view that paragraph (*f*) is exclusively applicable to the kind of demolition, construction or reconstruction which is appropriate to turning to modern uses an old or out-of-date building. The paragraph does not say so; and we must construe the paragraph according to its terms.

Mr. Widgery will not, I hope, think that I am unappreciative of his clear argument if I do not elaborate my judgment. I prefer to avoid exegeses of the statutory language unless they are absolutely necessary; for the result would otherwise tend thereafter to substitute for the problem of construction of Parliamentary language the problem of the construction of the judgments of the court. I prefer, therefore, to express no view upon what the answer would be in a case where the work proposed involved demolition of some part of the premises, with nothing whatever in the way of reconstruction of that part, and where the part so demolished could not be regarded as substantial—whether it would be legitimate then to add that part to some other part of the premises which was the subject of constructional work, and which in turn was not itself substantial. What I do say is that one is entitled in this case to look at the totality of the work to be done and ask oneself if that work, within the language of the paragraph, involves a demolition or reconstruction of a substantial part of the premises, or the carrying out of substantial work of construction upon those premises or some part thereof.

[2] [1956] 2 Q.B. 78; [1956] 2 W.L.R. 985; [1956] 2 All E.R. 78.

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Applying what I think to be legitimate tests, and in the light of what I have already said in answer to Mr. Widgery's main argument, I think that there was clearly evidence to support a conclusion favourable to the landlords. That being so, I think that there are no grounds upon which we could interfere; and this appeal must be dismissed accordingly.

SELLERS L.J. I agree. The county court judge found that the intended work could not reasonably be done by the landlords without obtaining possession of the premises, No. 14. The only question that remains on this appeal is, then, whether it was properly established that the landlords intended to demolish or reconstruct a substantial part of those premises. In my view, there was ample evidence on which the county court judge could arrive at that conclusion and there was no misdirection. I do not repeat the reasons which my Lord, the Master of the Rolls, has given in that respect.

I would only add one word about a shop front. It seems to me that the construction of a shop front might be expensive and elaborate and substantial in relation to the whole of the premises, but that normally the work of putting in such a front would not fall within (*f*) because it has to be established that it could not reasonably be done without obtaining possession of the holding. It is within observation that very elaborate and large shop fronts are frequently put in whilst the business is still continuing, justifying a notice "Business as usual." I would dismiss this appeal.

ROXBURGH J. I agree.

Appeal dismissed.

Solicitors: *Bartlett & Gluckstein; Hatten, Asplin, Jewers & Glenny, Grays, Essex.*

E. D.

[COURT OF APPEAL.]

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Nov. 24, 27.
Jenkins and Romer L.JJ. and Roxburgh J.

* HUNT *v.* ALLIED BAKERIES LTD. (NO. 2).

[1955 H. 3148.]

Execution—Examiner—Jurisdiction—Failure to attend before examiner—Whether indorsement on order fixing appointment requires signature of examiner—Whether appointment made by examiner ultra vires—Whether examiner officer of court—R.S.C., Ord. 42, *r.* 32.

The plaintiff in the action, by an order dated December 3, 1957, which was headed with the names of the parties as plaintiff and defendants respectively, was ordered to attend before an examiner "at such time and place as the said examiner may appoint" to be

orally examined as to his means of satisfying the directions contained in various orders for the payment of costs. Several appointments were made before the examiner which the plaintiff failed to attend, and after his failure to attend an appointment fixed for July 17, 1958, and indorsed on the order, the defendants moved for and obtained an order for the committal of the plaintiff to prison for contempt of court for failing to attend the appointment. The plaintiff appealed on the grounds that the order of December 3, 1957, and the indorsement thereon was defective in various respects: —

Held, dismissing the appeal, (1) that the fact that the indorsement fixing the appointment of July 17, 1958, was not signed by the examiner himself but was merely authenticated by the Central Office seal of the Supreme Court of Judicature did not invalidate it.

(2) That the order was not invalid because it retained the title of the action as its heading instead of using the heading to be found in Form 38 in Appendix K to the Rules of the Supreme Court.

(3) That an examiner was an officer of the court for the purposes of R.S.C., Ord. 42, r. 32.

(4) That the order was not ultra vires merely because the appointment to attend for examination was to be made by the examiner and not by the court or judge as prescribed by R.S.C., Ord. 42, r. 32. This was a purely ministerial act and there was nothing obnoxious in delegating the making of an appointment to the examiner.

In re Evans [1893] 1 Ch. 252 and *Townend* v. *Townend* (1905) 22 T.L.R. 50 applied.

Decision of Wynn-Parry J. affirmed.

APPEAL from Wynn-Parry J.

The plaintiff, Kenneth Douglas Hunt, appealed from an order of Wynn-Parry J. dated November 4, 1958, made on the motion of the defendants, Allied Bakeries Ltd., for the committal of the plaintiff to Brixton Prison for contempt of court for failing to attend an appointment before an examiner of the court on July 17, 1958, after being duly served with notice of the appointment. The appointment was made pursuant to an order of Master Wheatcroft on December 3, 1957, ordering him to attend so as to be orally examined as to his means of satisfying the directions for the payment of costs respectively contained in orders dated March 2, 1956, March 12, 1956, April 25, 1956, July 27, 1956, July 5, 1957, and July 22, 1957.

The plaintiff appeared in person.

W. E. Denny for the defendants.

The following cases, in addition to those referred to in the judgments, were cited in argument: *Adlington* v. *Conyngham* [1]; *Stumm* v. *Dixon* [2]; *Iberian Trust Ltd.* v. *Founders Trust and Investment Co. Ltd.* [3]; *Mackenzie* v. *Mackenzie* [4]; *Callow* v. *Young* [5]; *D.* v. *A. & Co.* [6]

[1] [1898] 2 Q.B. 492.
[2] (1889) 22 Q.B.D. 529, 531.
[3] [1932] 2 K.B. 87, 95, 96–98; 48 T.L.R. 292.
[4] (1852) 21 L.J.Ch. 386.
[5] (1887) 56 L.T. 147.
[6] [1900] 1 Ch. 484.

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HUNT v. ALLIED BAKERIES LTD. (No. 2).

JENKINS L.J. This is an appeal by Kenneth Douglas Hunt, the plaintiff in the action, from an order of Wynn-Parry J. dated November 4, 1958, for the committal of the plaintiff to prison for disobedience of an order of December 3, 1957, that disobedience taking the form of failing to attend an appointment before an examiner fixed for a particular day, namely, July 17, 1958. As the basis of the proceeding was the order of December 3, 1957, I had better read the operative part of it. It is in these terms: "It is ordered that the plaintiff do attend before an examiner of "the court to be orally examined as to his means of satisfying "the directions for the payment of costs respectively contained "in the orders dated respectively March 2, 1956, March 12, 1956, "April 25, 1956, July 27, 1956, July 5, 1957, and July 22, 1957."

The course of events after the order had been made was somewhat remarkable. The plaintiff pursued a course of what may be described as masterly inaction. Numerous successive appointments were made and he did not attend any of them, his guiding principle being, as I understand it, that he need not comply with any order unless he is satisfied that the order is valid. There were appointments for February 6 and February 27, 1958, which the plaintiff did not attend, and later there was an appointment for June 5, notice of which apparently is not alleged to have been served on the plaintiff. Then there was an appointment for July 5, in respect of which the defendants claim to have served the plaintiff, and, finally, there was the appointment for July 17, 1958, the plaintiff's failure to attend which formed the ground for the committal order under appeal. In respect of the plaintiff's failure to attend the appointments of February 6 and February 27, or one of them, an order was made by Vaisey J. on May 9, 1958, giving liberty to issue writ of attachment against the plaintiff for his failure to attend, but the judge directed that the writ should lie in the office for a period—I gather because there was a possibility of appeal. The plaintiff did in fact appeal, and he succeeded in procuring a reversal of Vaisey J.'s order, inasmuch as the documents in the case were in one way or another defective.

The plaintiff has impressed upon us, and we have been perfectly well aware for many years, that in proceedings for contempt the proper documents must be properly served, and that owing to the penal character of the jurisdiction, defects, which would be overlooked for the purposes of ordinary litigation, may afford sufficient ground for refusing attachment or committal where the question is one of contempt, which, if brought home, may involve deprivation of liberty.

The plaintiff has addressed us at very great length, but I am not blaming him for that, because the matter is no doubt, in his view, of great importance. He began by telling us that he did not challenge the service of the various documents, so that, so far as I suppose what one might call the machinery of service was concerned, he had no complaint to make, but he says although there was service, this was not what he called "due service" so

as to satisfy the rules. He told us over and over again that if any technical point was wrong, he was entitled to take advantage of it. As the plaintiff does not dispute the matter of service, it is unnecessary for me to refer to the affidavits dealing with that aspect of the case.

His first complaint, as I understand it, is that the indorsement fixing the appointment of July 17, 1958, did not comply with the order of December 3, 1957, because it was not an appointment by the examiner "at such time and place as the said examiner may "appoint" within the meaning of the order of December 3, 1957. In fact, the indorsement was in this form: "Restored to the list "for Thursday, July 17, 1958, at 11.30 o'clock in the forenoon "in Room 106." That indorsement on the order was not signed by the examiner, but it was authenticated by the Central Office seal of the Supreme Court of Judicature, which was impressed so as to overlap the last two lines of the indorsement. I cannot agree that there is any valid ground for complaint on the strength of the precise form of words used in that indorsement. "Restored "to the list" could not mean anything else but that the case was going to be heard, and that it was intended to appoint as the day on which it was going to be heard, Thursday, July 17, and the indorsement goes on to say perfectly plainly the time "11.30 "o'clock in the forenoon in Room 106." The plaintiff argued, though I think somewhat faintly, that the description "Room "106" was insufficient because it did not go on to state that the room was in the Royal Courts of Justice. I cannot accept that. Even in contempt proceedings there must be a modicum of common sense, and I regard that indorsement as sufficient for the purposes of the order of December 3, 1957.

The second matter was that there were two letters written by the defendants' solicitors to the plaintiff informing him of the appointment for July 17, 1958. Those were only referred to by the plaintiff for the purpose of contending that they were wholly irrelevant, and that it was only permissible to look at the documents actually served. I am not satisfied that that submission is entirely correct. I agree, so far as service of the proceedings is concerned, these letters are irrelevant, but they certainly show that the plaintiff cannot have been under any misapprehension at any time about this appointment, and, indeed, I did not understand him really in the end to suggest that he was.

Thirdly, Mr. Hunt complained of a two months' delay on the part of the defendants in moving their motion for attachment or committal. In the circumstances of the case I cannot regard that degree of delay as material.

The plaintiff's fourth point arises under R.S.C., Ord. 41, r. 5, and this well known rule provides: "Every judgment or "order made in any cause or matter requiring any person to do "an act thereby ordered shall state the time, or the time after "service of the judgment, or order, within which the act is to be "done . . ." The plaintiff says that rule was not complied with;

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there was no indorsement of the day, place and time. That, as I understand it, was really another way of relying on his first point as to the form of the indorsement.

The plaintiff's fifth point was that the order of December 3, 1957, was in the wrong form and, therefore, has at all times been bad and, what is more, bad on its face so that it cannot be made the subject of proceedings in contempt. In order to appreciate that point, one has first of all to look at R.S.C., Ord. 42, r. 32, which provides: "*Examination of judgment debtor as to debts* "*owing to him.* 32. When a judgment or order is for the recovery "or payment of money, the party entitled to enforce it may apply "to the court or a judge for an order that the debtor liable under "such judgment or order, or, in the case of a corporation, that "any officer thereof, be orally examined, as to whether any and "what debts are owing to the debtor, and whether the debtor "has any and what other property or means of satisfying the "judgment or order, before a judge or officer of the court as the "court or judge shall appoint; and the court or judge may make "an order for the attendance and the examination of such debtor, "or of any other person, and for the production of any books or "documents." One should look next at the form of order in such a case contained in Appendix K to the Rules of the Supreme Court. It is in fact Form No. 38 and is headed: "In the High "Court of Justice, (blank) Division. Master (blank)," and in the top right-hand corner there are the figures "19 (blank)" and there are to be put in the letter and number of the action concerned. Then it says: "Between (blank) Judgment Creditor and "(blank) Judgment Debtor," and then it goes on: "Upon "hearing (blank) and upon reading the affidavit of (blank) filed "herein, it is ordered that the above-named judgment debtor ". . . attend," and so on, as in the order of December 3, 1957, "before [one of the masters of the Supreme Court of Judicature "or] one of the examiners of the court, at such time and place as "he may appoint . . ." The body of that order appears to me to be substantially the same as the operative part of the order of December 3, 1957, which I have read, with the exception that whereas Form No. 38 assumes that the document is going to be entitled between a judgment creditor and a judgment debtor, in the present case the title of the action appears to have been retained, so that the order is headed: "Kenneth Douglas Hunt, "plaintiff, and Allied Bakeries Ltd., defendants." The plaintiff invited us to hold that that was a fatal defect in the order. I cannot accept that view. There is, I think, good ground for supposing that the practice of retaining the heading of the action is sometimes followed. I notice that the form given in Daniell's Chancery Forms, 7th ed., p. 354, appears to be in that form, the application being described as "an application on the part of "the plaintiff that the above-named defendant shall be ordered," and so on. That point appears to me to be entirely without substance.

The point which has occasioned me more difficulty arises in this way. Turning to R.S.C., Ord. 42, r. 32, one finds "... whether the debtor has any and what other property or "means of satisfying the judgment or order, before a judge or "officer of the court as the court or judge shall appoint; and the "court or judge may make an order for the attendance and the "examination of such debtor," and so on. It is to be observed that the examination is to be held, according to that, "before a "judge or officer of the court." In the present case the examination was to be held before one of the examiners of the court. An examiner of the court, the plaintiff says, is not an officer of the court, and, accordingly, the order of December 3, 1957, is an order not warranted by the rules, and, therefore, for this reason also it is invalid on its face. The plaintiff's argument that examiners are not officers of the court depends on a note at page 1034 of the Annual Practice (1959 edition): "Before a judge or "officer of the court." Under that heading this note appears: "In 1929, it became and has since been the practice to refer the "examination of a judgment debtor to an examiner of the court. "What sanction there was for this procedure it is difficult to say, "because it is an open question whether an 'examiner' is an "officer of the court. He is (ex hypothesi) a barrister, whose "position and powers are defined in R.S.C., Ord. 37, r. 5, 39–52, "and all the examiners are practising barristers. Yet no officer "of the court can practise as a barrister." Then there is a reference to the Judicature Act, 1925, section 120. I am not satisfied that for the purposes of this rule examiners of the court are not officers of the court. Moreover, as appears from the note, the practice adverted to was introduced as long ago as 1929, and I am not prepared on any submission which has been made to us in the course of this case to hold that this long-standing practice is ultra vires. One should also, I think, refer to R.S.C., Ord. 61, r. 33: "The masters may from time to time prescribe the use in or "for the purpose of the Central Office, and subject to the approval "of the Lord Chancellor in and for the purposes of the District "Registries, of such modified and additional forms as may be "deemed expedient. Such modified and additional forms shall "when approved by the Lord Chancellor be forthwith transmitted "to each district registrar and shall be the forms to be used in "and for the purposes of the district registry." According to Appendix K in the Annual Practice, Form No. 38—that is to say, the form of order—was introduced under R.S.C., Ord. 61, r. 33.

There is one other point on this aspect of the matter. In *In re Evans*,[1] which contains Mr. Registrar Lavie's celebrated note on attachment and committal, the order in question appears to have been substantially in the form of the order of December 3, 1957, in the present case. The relevant passage in the statement of facts reads: "On March 4, an order was made in chambers

[1] [1893] 1 Ch. 252, 259.

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"that Noton should attend before the examiner in rotation at "such place and time as he should appoint, and be examined on "the part of the plaintiff for the purpose of the inquiry directed "by the order of February 1, 1892." I need not, I think, read further, but that passage shows recognition of this type of order as long ago as 1892, and reference is made to it also in *Townend* v. *Townend*.[2]

Over and above his point that the examiners are not officers of the court, the plaintiff raised the point that a form of order providing that the appointment should be before one of the examiners of the court at such time and place as the examiner may appoint was ultra vires in that it involved a delegation by the court or a judge of the judicial powers conferred upon them. I return to R.S.C., Ord. 42, r. 32. The form of words is: "before "a judge or officer of the court as the court or judge shall appoint; "and the court or judge may make an order for the attendance "and the examination of such debtor." It is said that the words in the present order "that the plaintiff do attend before one of "the examiners of the court at such time and place as the "examiner may appoint" delegates to the examiner the duty properly reposed in the judge or officer of the court of fixing the time at which an examination is to be held. That, it seems to me, is a pure ministerial act, and I doubt very much whether there would be anything obnoxious in any such delegation. This practice, according to the Annual Practice, has been followed since 1929, and one may add to that that on this point also one appears to find recognition of this type of order in *In re Evans*.[3]

Then the plaintiff said that the indorsement was not part of the order. He cited *Townend* v. *Townend*,[4] which I have already mentioned, but I think it appears from that case, and also from *In re Evans*,[5] that this type of order is free from objection provided the indorsement specifying the time and place, and so on, is adequately recorded and authenticated on the order. The actual form of order in *Townend* v. *Townend*[6] was an order that "the "respondent do attend before one of the registrars for the purpose "of being examined as to the security he can give to carry out "the provisions of the order." He was to attend before one of the registrars, but it appears to have been accepted in that case that while an informal appointment with the time of hearing before the registrar would not do, an order on the lines of that in *In re Evans*[7] would be free from objection. In the present case one has the order contemplating on the face of it that the examiner is to fix the time and place of the appointment. Accordingly, I think the time and place of the appointment is sufficiently indorsed on the order for the purpose of proceedings in contempt if there is put on the order the day, time and place

[2] (1905) 22 T.L.R. 50; 93 L.T. 680.
[3] [1893] 1 Ch. 252.
[4] 22 T.L.R. 50.
[5] [1893] 1 Ch. 252.
[6] 22 T.L.R. 50.
[7] [1893] 1 Ch. 252.

of the appointment and the indorsement is authenticated by the seal of the Central Office, as was done here.

The plaintiff complained that the examiner did not sign the indorsement. There is in fact nothing in the order, as far as I can see, which requires him to sign it. *Townend* v. *Townend* [8] shows that the indorsement fixing the time must be properly authenticated, but provided that is done I see no reason why it should not be sufficient.

Then the plaintiff said the fixing of dates over and over again under this order was objectionable, and he suggested that the power of doing so expired, I think according to his argument in its original form, after one appointment had been made. I do not think he adhered to that, but he did point out that there is an indorsement of February 27, 1958, which adjourned the matter for a date to be fixed within three months, and he said no date ever, in fact, was fixed within three months, and that once the three months had expired without an appointment being fixed, the order must be considered as exhausted. I can see no sufficient ground for so holding. It appears to me that this form of order is a very convenient form, and it would involve a great deal more trouble and expense if a fresh order had to be obtained for every proposed appointment.

I have now referred to a number of the plaintiff's points, and I hope I have done justice to them. There may be one or two which I have omitted to mention specifically, for he did, as I have said, raise a very large number of points indeed, but giving the whole matter the best consideration I can, I see no sufficient reason for differing from the judge, and in my judgment this appeal fails and should be dismissed.

I have only to add, in view of various observations which fell from the plaintiff, that, in my view, he really has himself to thank in this case. He could long since have been cleared of this trouble if he had chosen to assent to an appointment being fixed and had attended such appointment; at all events, if he had made a genuine offer to do that he would probably by this time have been cleared of his contempt. As it is, all I can say is, as I have said before, that in my view this appeal fails and should be dismissed.

ROMER L.J. I agree. There is only one point I had perhaps better mention. At one time the plaintiff was inclined to say that if any order should be made against him at all, it should take the form of attachment and not committal. I do not think he pursued that because having regard to the terms of R.S.C. Ord. 42, r. 7, it is quite clear that an order for committal was justified in this case as the rule says: "A judgment requiring "any person to do any act other than the payment of money, "or to abstain from doing anything, may be enforced by writ

[8] 22 T.L.R. 50.

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"of attachment, or by committal." On every other point I agree wholly with what my Lord has said and have nothing to add myself.

ROXBURGH J. I agree.

JENKINS L.J. I should like to express my agreement with what has fallen from Romer L.J. as to the propriety of proceedings by way of committal as distinct from attachment in the present case.

Appeal dismissed.

Solicitors: *A. Kramer & Co.*

J. A. G.

[QUEEN'S BENCH DIVISION.]

1958
Oct. 22.
Lord Parker C.J., Streatfeild and Diplock JJ.

* REGINA *v.* OLDHAM JUSTICES. *Ex parte* MORRISSEY.

Justices—Plea—Plea of guilty—Notice to court—Notice to be read out —Magistrates' Courts Act, 1957 (5 *&* 6 *Eliz.* 2, *c.* 29), *s.* 1 (2) (ii).

The applicant, who was accused of a parking offence, sent a notification to the court under the provisions of section 1 (2) of the Magistrates' Courts Act, 1957,[1] that he desired to plead Guilty, and added a submission with a view to mitigation. Although the statement was handed to the magistrates, it was not read out before the court. The applicant, having been convicted, applied for an order of certiorari to quash the conviction:—

Held, that before the magistrates could exercise jurisdiction under the Act, they must observe strictly the conditions laid down therein; that the statement should have been read out in open court pursuant to section 1 (2) (ii) of the Act of 1957, and as this had not been done, an order of certiorari would issue.

APPLICATION for order of certiorari.

The applicant applied for certiorari on the ground that a statement submitted to the magistrates under section 1 (2) of the Magistrates' Courts Act, 1957, was not read out before the court as required by sub-paragraph (ii) of that subsection.

A. J. Irvine Q.C. and *Cecil Binney* for the applicant.

The respondents did not appear and were not represented.

[1] Magistrates' Courts Act, 1957, s. 1 (2): "Where the clerk of the "court receives a notification in "writing purporting to be given by "the accused . . . that the accused "desires to plead Guilty without "appearing before the court . . . (*a*) "the court may proceed to hear "and dispose of the case in the "absence of the accused . . . Pro-"vided that . . . (ii) before accepting "the plea of Guilty and convicting "the accused in his absence under "this subsection, the court shall "cause the notification . . . including "any submission received with the "notification which the accused "wishes to be brought to the atten-"tion of the court with a view to "mitigation of sentence, to be read "out before the court."

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REGINA v. OLDHAM JUSTICES. *Ex parte* MORRISSEY.

LORD PARKER C.J. In this case Mr. Irvine moves on behalf of Charles Durman Morrissey for an order of certiorari to quash a conviction and sentence on the applicant by the magistrates' court for the county borough of Oldham, for a parking offence.

The grounds on which this application is made are that the magistrates had no jurisdiction to convict or sentence having regard to the fact that the conditions of section 1 (2) (ii) of the Magistrates' Courts Act, 1957, were not fulfilled. Section 1 (2) of that Act provides machinery whereby in the case of certain minor offences the accused need not attend the court, but can send in, in effect, a plea of Guilty. The magistrates have power on considering the notice put in by him to decide whether they can treat it as a plea of Guilty and convict, or whether the matter is of a serious nature requiring them to adjourn the case for the accused to appear. There is one important condition precedent to the exercise of their jurisdiction under this section, and that is provided by the second proviso. [His Lordship read proviso (ii) and continued:] In this case the applicant put in a written statement in mitigation. It is conceded by the magistrates' clerk—and no doubt we all know that these matters have to be dealt with expeditiously, and there were a great number of cases to be heard on that day—that the letter was not read out in court, though he states that it was handed to the magistrates, and to the best of his belief the magistrates had full knowledge of it. It seems to me quite clear that before the magistrates can exercise jurisdiction in a case of this sort, they must strictly observe the conditions of the statute: mere knowledge of the contents of the accused's submission, the mere reading of it to themselves is not sufficient, it must be read out in open court. That being so, the magistrates in this case had no jurisdiction to convict or sentence, and this order must go.

STREATFEILD J. I agree.

DIPLOCK J. I also agree.

Application granted.

Solicitors: *Amery-Parkes & Co.*

J. D. P.

NOTE.

* REGINA *v.* DAVIS, *Ex parte* BROUGH.

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May 8.

Lord Goddard C.J., Cassels and Diplock JJ.

Justices—Plea—Plea of guilty—Notice to court—Notice to be read out—Magistrates' Courts Act, 1957 (5 *&* 6 *Eliz.* 2, *c.* 29), *s.* 1 (2) (ii).

APPLICATION for certiorari.

The applicant was summoned for causing an obstruction with a motor-car and sent a notice in the statutory form under section 1 (2) of the Magistrates' Courts Act, 1957, to the Clerkenwell Magistrates'

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Court, pleading Guilty and setting out mitigating circumstances. At the hearing he was present in a public part of the court room, but was not called upon to appear. He was convicted and fined £1. He applied for an order of certiorari on the ground that the facts he submitted in mitigation were not read out in court as required by proviso (ii) to section 1 (2) of the Magistrates' Courts Act, 1957.

A. J. Irvine Q.C. and *John Clark* for the applicant.
The respondent did not appear and was not represented.

LORD GODDARD C.J. said that the applicant was in court throughout the hearing of the summons and was perfectly entitled, as soon as the case was called on, to get up and say: "I am present and wish to be "heard." The Act expressly said that he could do so; but he did not. If the applicant thought that the mitigating circumstances were not brought before the court he could have said so. His Lordship had not the least doubt that the mitigating circumstances were read out, in substance at any rate.

His Lordship then said: I do not want anything that I say to give the idea that this court thinks that the proceedings laid down by the statute ought not to be strictly followed. I think that they ought. But I am certainly not prepared in this case to find as a fact that the submission was not read out in open court. It is for him to prove it, and he certainly has not proved it.

CASSELS and DIPLOCK JJ. agreed.

Application refused.

Solicitors: *Amery-Parkes & Co.*

[PROBATE, ETC., DIVISION.]

1958 *Oct.* 31; *Nov.* 3.

Lord Merriman P. and Hewson J.

* JOHN *v.* JOHN.

PRACTICE NOTE.

Husband and Wife—Maintenance—Justices—Variation—Application to vary or discharge an existing order—New court—Transmission of information—Magistrates' Courts Act, 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 55)—*Magistrates' Courts Rules,* 1952 (*S.I.* 1952, *No.* 2190 (*L.* 18)), *r.* 34.

APPEAL by husband against the dismissal by the justices for the Long Aston petty sessional division of Somerset sitting at Flax Bourton on August 27, 1958, of his complaint to discharge or vary an order of November 20, 1957, made by the justices for the petty sessional division of Aberavon sitting at Port Talbot, Glamorganshire, on November 20, 1957, on the ground of desertion. By that order the wife had been granted maintenance at £2 10s. a week and an order for maintenance of a child at £1 10s. a week, the custody of the child being given to the wife. The husband sought to have the order varied or discharged upon the

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REPORTER'S NOTE: The effect of the new procedure was also considered by the Divisional Court in *Meaney* v. *Meaney* [1957] 1 W.L.R. 796; [1957] 2 All E.R. 415.

ground that there was "fresh evidence" to establish that the child was illegitimate. The justices had ruled that there was no case to answer.

The case is reported solely upon the question of practice involved.

Patrick Webster and *J. Newey* for the husband.
J. D. F. Moylan for the wife.

LORD MERRIMAN P. in the course of his judgment referred to the fact that the husband's complaint had been heard in a court in a petty sessional division other than that which had made the original order and said: I want to say a word about a feature of this case which is not without importance. As is well known, until recently applications to vary or discharge an order had to be made to the petty sessional division which had made the original order, but now, since the Magistrates' Courts Act, 1952, and in particular since the passing of rule 34 of the Magistrates' Courts Rules, 1952, it is possible, as in this case, to make the application to another petty sessional division. [His Lordship referred to rule 34 (2) and (7)[1] as set out in Stone's Justices Manual, 90th ed., at pp. 2664–2665 and said that the effect of the operative rule, rule 34 (2), was that a complaint for revocation, discharge, revival, alteration or variation of an order enforceable as an affiliation order might be made to a justice acting for the same petty sessional area as the court which made the order, which court was referred to as the "original court," or to a justice acting for the petty sessional area where the complainant was for the time being. His Lordship continued:]

But I wish particularly to call attention to a note in Stone at p. 2664 setting out a Home Office circular[2] relating to this particular jurisdiction. I do not propose to read the whole of it, because a lot of it refers, as one might expect, to variations of amount, which are within the new jurisdiction, but the circular having said "that it is desirable, in order that the other court," that is, the new court, "may be in a position to deal with the "matter that any necessary further information should be trans-"mitted at the same time as the complaint is sent; . . . Where "the application is for variation of some other provision of the "order"—(that is, other than the mere amount)—"the court "would also be helped by knowing the circumstances in which

[1] Magistrates' Courts Rules, 1952, r. 34 (7): "Where a complaint to "which this rule applies is made to a "justice of the peace acting for a "petty sessions area other than that "for which the original court acted, "the justice shall cause the clerk of "the magistrates' court acting for "that other petty sessions area to "send the complaint and the said "particulars by post to the clerk of "the original court; and the clerk of "the original court shall bring the "complaint before the court; and "thereupon paragraphs (4) to (6) of "this rule shall have effect as if the "complaint had been made and the "particulars furnished to a justice "of the peace acting for the same "petty sessions area as the original "court."

[2] Home Office Circular 278/1947.

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"this provision was included in the order. It will be for the "clerk of the transmitting court to decide what information "should be sent with the complaint in any individual case, but "the Secretary of State would suggest that the guiding principle "should be that such information should be sent as it would in "his opinion be desirable that the original court should have, "if it were dealing with the complaint."

There is not one single piece of information of any kind available in this case about what happened at Aberavon with this exception, that the husband stated in evidence before the Long Aston justices that he had denied the paternity at Aberavon. Manifestly that is an important circumstance, because if he had admitted it on that occasion, or done something which estopped him from raising it afterwards, that would be a matter, no doubt, of considerable importance in applying the rule about fresh evidence. Still, as the matter stands before us, we have the record of the husband's evidence that he had denied the paternity at Aberavon. I have only called attention to this matter so that when there is, as I think there inevitably must be, a rehearing by the Long Aston court, I trust that an attempt will be made by somebody to rectify this omission, so that whatever record is available of what happened at Aberavon on the first occasion may be made available to the Long Aston justices.

[His Lordship then considered the evidence and said that there must be a rehearing before a new panel of justices for the Long Aston petty sessional division.]

Hewson J. delivered a concurring judgment.

Appeal allowed: rehearing ordered.

Solicitors: *Le Brasseur and Oakley for Wehrle and Sheehan, Port Talbot; Haslewoods for Watson, Cox and Counsell, Bristol.*

J. B. G.

[COURT OF APPEAL.]

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1958 *Nov.* 10, 11, 12, 13, 14, 17.

Jenkins, Romer and Willmer L.JJ.

* *In re* H. R. HARMER LTD.

[No. 00663 of 1957.]

Company—Oppression—Voting control—Private company—Founder of business retaining voting control when business transferred to limited company—Sons of founder life directors of company—Major beneficial interest in equity of company held by sons—Majority of sons' shares gift from founder—Autocratic use of voting power by founder—Whether conduct oppressive—Whether sons debarred from relief—Companies Act, 1948 (11 & 12 *Geo.* 6, *c.* 38), *s.* 210.

In 1947 H. formed a private limited company to acquire the business of philatelic auctioneers and valuers which he had

founded and which was subsequently carried on by himself and two of his sons. H. was chairman and a life director of the company, and the sons were also life directors. H. was also governing director, but the company's articles of association contained no provision conferring any powers on the governing director or restricting the powers of the other directors, and a director appointed to the office of managing director, or manager, was not liable to have his tenure of office as managing director, or manager, determined by a resolution of the company in general meeting. The quorum of directors was two. The disposition of the shareholding of the company and the rights attached to the various classes of shares was such that, although the sons and their wives had the major beneficial interest in the equity of the company, H. and his wife had the majority of votes and were in a position to procure the passing of extraordinary and special resolutions as well as ordinary resolutions, it being assumed that Mrs. H. would always vote in accordance with her husband's wishes.

In 1957 the sons presented a petition for relief under section 210 of the Companies Act, 1948.[1] The petitioners alleged, inter alia, that notwithstanding the incorporation of the company and its acquisition from H. of the business, H. had continued to regard the business of the company as though it was still his own absolute property, and to ignore the interests of the shareholders, the wishes of his co-directors, and resolutions of the board of directors. H. asserted that he was entitled to adopt this attitude towards the company and its members and directors by virtue of his shareholding and that of his wife, in the knowledge that his wife was likely always to exercise her voting rights as he directed. He also asserted (contrary to the fact) that he was so entitled by virtue of his being named as governing director in the articles of association.

It was common ground that at the date of the petition it was just and equitable that the company should be wound up.

Roxburgh J. accepted the sons' evidence and submissions and granted relief under the section, which provided, inter alia, that H. should not interfere in the affairs of the company otherwise than in accordance with valid decisions of the board.

On appeal:—

Held, dismissing the appeal, (1) that H.'s conduct in relation to members of the company (including the petitioners) was "burdensome, harsh and wrongful," and, accordingly, was oppressive within the meaning of section 210.

Observations of Viscount Simonds in *Scottish Co-operative Wholesale Society Ltd.* v. *Meyer* [1958] 3 W.L.R. 404, 410; [1958] 3 All E.R. 66 applied.

[1] Companies Act, 1948, s. 210: "(1) Any member of a company who "complains that the affairs of the "company are being conducted in a "manner oppressive to some part of "the members (including himself) . . . "may make application to the court "by petition for an order under this "section. (2) If on any such petition "the court is of opinion—(*a*) that the "company's affairs are being con-"ducted as aforesaid; and (*b*) that to "wind up the company would unfairly "prejudice that part of the members, "but otherwise the facts would justify "the making of a winding-up order "on the ground that it was just and "equitable that the company should "be wound up; the court may, "with a view to bringing to an end "the matters complained of, make "such order as it thinks fit, whether "for regulating the conduct of the "company's affairs in future, or for "the purchase of the shares of any "members of the company by other "members of the company or by the "company and, in the case of a pur-"chase by the company, for the "reduction accordingly of the com-"pany's capital, or otherwise."

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Observations of the Lord President, Lord Cooper, and Lord Keith as to the scope of section 210, in *Elder* v. *Elder & Watson Ltd.*, 1952 S.C. 49, 55, 56, 57, 58, 59, 60 approved.

(2) That the fact that the petitioners obtained the bulk of their shares as a gift from H. did not disentitle them from relief. H. had created the company and he could not now disregard the legal entity which was brought into being and the shares which were created therein. Further, the fact that the petitioners knew when the company was formed that H. would retain control by virtue of his predominant holding of shares which carried votes was irrelevant. They were entitled to assume that H. would exercise his control in a lawful and regular manner.

(3) That once it was shown that the acts complained of were oppressive to the petitioners as members of the company, it was irrelevant that the petitioners were also directors, for oppressed members who were also directors were not, by virtue of holding such office, disqualified from obtaining relief.

Per curiam. For the purpose of obtaining relief under section 210 it is not essential to prove that the alleged oppressor is oppressing in order to obtain pecuniary benefit. If there is oppression it remains so even though the oppression is due simply to the controlling shareholders' overwhelming desire for power and control, and not with a view to his own advantage in the pecuniary sense. The result rather than the motive is the material thing.

Decision of Roxburgh J. affirmed.

APPEAL from Roxburgh J.

This was an appeal by Henry Revell Harmer, the chairman of H. R. Harmer Ltd., from an order made by Roxburgh J. on May 12, 1958, under section 210 of the Companies Act, 1948, on a petition presented by Cyril Henry Carrington Harmer (" Cyril ") and Bernard Bertram Dorkin Harmer (" Bernard "), two directors of the company who were sons of the chairman. The respondents to the petition were the company and the chairman and his wife, but neither the company nor Mrs. Harmer appeared or was represented at the hearing of the petition before Roxburgh J.

The chairman (hereinafter referred to as " the father ") was born in 1869. He founded the business, subsequently acquired by the company, of philatelic auctioneers and valuers in 1918 according to the evidence of the petitioners, and in 1894, according to his own evidence, and carried it on with the assistance of Cyril and Bernard, Cyril having been employed in the business continuously since 1921 and Bernard since 1931. By 1935 Cyril had become responsible for the day-to-day management of the London office of the business and thereafter the father's participation in the day-to-day conduct of the business gradually declined. In 1940 the father opened a branch of the business in New York. In June, 1940, a United States company called H. R. Harmer Inc. was incorporated to take over the American business (hereinafter referred to as " the American company "), and all the shares were then owned by the father. In 1946 Bernard went to New York to take up the office of vice-president of the American company, of which the father was president and Cyril was a

director, although Bernard was in charge of its day-to-day business.

The respondent company was incorporated on July 1, 1947, with a view to acquiring, and shortly after its incorporation did acquire, the business of philatelic auctioneers and valuers formerly carried on by the father, including the issued share capital of the American company which belonged to him.

By the articles of association, the first directors were the father, Cyril, Bernard and another son (who resigned in 1950), and they were to be life directors not subject to retirement at annual general meetings of the company. The father was to be chairman of the board of directors for life and he was also to be governing director, but the articles contained no provision conferring any powers on the governing director or restricting the powers of the other directors. Regulation 68 of Table A in the First Schedule to the Companies Act, 1929 (which applied to the company), was modified by omitting therefrom all the words therein after the words "from any cause to be a director," so that a director appointed to the office of managing director, or manager, was not liable to have his tenure of office as managing director or manager determined by a resolution of the company in general meeting. The quorum of directors, unless otherwise fixed (which had not happened), was two. The shareholding in the company at the date of the petition was as follows:

	"A" ordinary	*"B" ordinary*	*Preference*
the father	1,028	491	11,029
Cyril	4,611	4	5,291
Bernard	4,361	4	3,230
the father's wife		295	
Cyril's wife		103	150
Bernard's wife		103	150
	10,000	1,000	19,850

The remaining 14,152 of the issued preference shares were held by other members of the family, by directors and former directors of the company, and by the American company. The preference shares and the "A" ordinary shares conferred no voting rights and only the holders of "B" ordinary shares were entitled to vote at general meetings of the company. Accordingly, the equity of the company was held as to a little over 10 per cent. by the father and as to the remainder by Cyril and Bernard approximately equally, but the voting control of the company was held approximately as to 49 per cent. by the father, as to 21 per cent. by Cyril and Bernard and their wives and as to 29 per cent. by the father's wife. Accordingly, the father was, down to the date of Roxburgh J.'s order, in a position to control the company by the use of his own and his wife's votes, their combined preponderance of voting power being sufficient to procure the passing of extraordinary and special as well as ordinary

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resolutions. Roxburgh J. found that Mrs. Harmer agreed with her husband, when her holding of "B" shares was transferred to her, to vote in accordance with his directions, and it was to be assumed that she would in fact always do so.

The following is a summary of the matters of which the petitioners complained and which were referred to in the judgments as examples of the father's conduct in relation to the affairs of the company. (a) In 1947 the father went to Australia to investigate the possibilities of opening a branch of the business there. In or about January, 1948, the father, purporting to act on behalf of the company, but without the authority of the board of directors, set up a branch of the business in Australia. In answer to a protest by one of the directors he replied: "unless my "judgment is accepted shall exercise my agreed control of the "company to compel my views." The Australian business had not proved to be profitable. (b) In 1954 the father purported to dismiss summarily one Edwards, an old servant of the business, who was appointed a director on the formation of the company. It appears that Edwards had written a letter to Bernard about a collection of postage stamps, and this letter apparently gave offence to the father in various ways including the fact that there was no reference to the father in the letter. In reply to a letter from his father which stated "I have sacked Ed. . . ." Cyril answered that he proposed to call a board meeting to discuss the position, to which the father replied: "I forbid it and shall exercise "my position as controlling shareholder to prevent you doing so." In fact Edwards remained in the service of the company but the father prevented his re-election as a director when his term of office expired in November, 1954. (c) The father by means of his preponderance of voting power procured the appointment of directors whom he thought would vote as he directed. The story of these appointments, none of which lasted long, supported the conclusion that the father was guided in making his appointments by the question whether his nominees could be expected with certainty always to vote in accordance with his wishes. (d) In 1954 the father had given instructions to the then secretary of the company that no board meetings were to be called without his agreement. (e) At a board meeting held on July 22, 1947, it was resolved that the company should pay the expenses of directors incurred on journeys undertaken on the company's business but not the expenses of their wives. In 1954 the father accompanied by his wife visited Australia and on his return procured a cheque to be drawn on the company's banking account by the secretary to reimburse him not only for his own expenses but also for a proportion of Mrs. Harmer's expenses. When the secretary protested the father replied that he was the company and the secretary was to do as she was told. (f) At board meetings held on May 13 and July 4, 1955, the father refused to renew the service agreement of one Buck, a director of the American company, notwithstanding that such refusal might result in that company

losing an extremely profitable contract which it was on the point of securing. (g) In or about July, 1955, the father suspected that some of the senior members of the staff were untrustworthy and might be stealing the company's property. Instead of raising the matter with the board, he engaged a detective to keep watch on the staff, and when the matter came to the sons' knowledge, refused to give them any information. The staff knew that they were being watched and resented it. (h) At a board meeting held on September 12, 1956, it was resolved to pay £450 as remuneration to one Dalwick, a director. Subsequently the father wrote a letter to certain members of the staff forbidding the payment of this sum and making charges, against Cyril and the secretary, in regard to the accuracy of the records of meetings. (i) In September, 1956, the father told a prospective employee that Cyril was "wrong in the head" and that, if he took up employment with the company, he would not find Cyril there. (j) At a board meeting held on January 19, 1957, it was resolved that the secretary should proceed with negotiations for the renewal of the lease of the company's premises in Bond Street. Subsequently the father without the authority of the directors instructed the secretary not to proceed with these negotiations. At a subsequent board meeting held on May 29, 1957, it was resolved that the company's surveyor be authorised to conclude the negotiations at a specified figure. On June 3, 1957, the father wrote to the surveyor to the effect that he was not to proceed with the negotiations and on June 5, 1957, the father wrote to the surveyor to the effect that he (the surveyor) had received no valid authority to proceed with the negotiations. On account of the delay thus caused, the company lost the opportunity of making an advantageous bargain for the renewal of the lease. (k) On May 20, 1957, Bernard learned that the father was contemplating procuring the sale of the share capital or undertaking of the American company and had first taken steps to that end in October, 1956, by giving written instructions to an agent and his lawyer in New York to negotiate such a sale, and had done so without the knowledge or authority of his co-directors in either company. The proposed sale became known to philatelic circles in New York and was detrimental to the interests of the company. Cyril and Bernard prevailed upon the father not to proceed further with the negotiations which he had in hand, but he refused to undertake not in future to carry on unilateral negotiations for the disposal of any part of the undertaking of the American company without the sanction of the board.

The petitioners prayed for the following relief: (1) that the regulations of the company might be altered so as to confer upon the holders of ordinary shares the right to one vote per share. (2) Alternatively, that the father should be ordered to sell to the petitioners all his "A" and "B" ordinary shares, or alternatively, all his "B" ordinary shares at named figures, or at such other price as the court should think proper. (3) That the father

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should be relieved from his office as a director of the company, and that the company's articles of association should be altered accordingly, on the company's undertaking to pay to the father and his wife such pension (if any) as the court might think proper. (4) Or that such other order might be made in the premises as might be just.

Roxburgh J. granted relief under section 210 but (with the agreement of the petitioners) not in the terms of the prayer of the petition. His Lordship ordered, inter alia, that the company should contract for the services of the father as philatelic consultant at a named salary, that the father should not interfere in the affairs of the company otherwise than in accordance with the valid decisions of the board of directors, and that he should be appointed president of the company for life, but that this office should not impose any duties or rights or powers.

The father appealed.

Harold Brown Q.C. and *J. L. E. MacManus* for the chairman of the company, the father.

E. Milner Holland Q.C. and *Denys Buckley* for the petitioners, the sons.

All the cases cited in argument are referred to in the judgments.

JENKINS L.J. This truly lamentable litigation concerns a company called H. R. Harmer Ltd., and comes before us on appeal from an order of Roxburgh J. dated May 12, 1958, whereby he granted relief under section 210 of the Companies Act, 1948, at the instance of two sons of H. R. Harmer, the founder of the business. The two sons are life directors. The father, Harmer senior, is also a life director and, as will later be seen, in point of voting power controls the company. The company carries on in succession to Harmer senior [hereinafter referred to as "the "father"] a large and, one might say, world renowned business of philatelic auctioneering and dealing in and valuing stamps. The father, who is upwards of 88 years of age, has been concerned in this class of business all his life, and according to him he commenced the business, which he later transferred to the company, as long ago as 1894. One finds the date 1918 given in some parts of the evidence as the actual date when he set up the present business, but it is clear that he was in fact doing business of this kind at a much earlier date. I think he said his first dealing in stamps took place as long ago as 1886. The father, from whatever the exact date may have been, carried on this business on his own account and he was sole proprietor of it down to the year 1947, when the company was formed to take over the business. There were three sons, of whom one, Leslie, was concerned in the business only from 1947 until 1951. The other two are Cyril and Bernard; Cyril left school in 1921 and went

into the business; Bernard left school in 1931 and likewise entered the business; Leslie entered the Colonial service and left that service for the purpose of joining the company when it was formed. According to Cyril, by 1935 the day-to-day management of the business in London was left to him. On the outbreak of war in 1939 Cyril joined the Army and he had the misfortune to be taken prisoner and was a prisoner of war for the rest of the period of hostilities. In 1940 the father and his wife went to the United States of America and there the father opened a branch in New York. In June, 1940, a United States company called H. R. Harmer Inc. was incorporated to take over this business and the father owned all the shares in that American corporation. He stayed in the United States until 1945, and during his absence in the United States the London business was carried on by one Edwards, an old employee of the business, with the help of the son Bernard. In 1945 the father and his wife returned to England and shortly afterwards sent Bernard to take charge of the business in the United States, and Bernard has been in charge of that business ever since. His co-director, or one of his co-directors, in that business is named Buck, to whom further reference will be made hereafter. Cyril, on his release as a prisoner of war, returned to the business in London. In 1946 there were discussions between the father and his sons about the formation of a limited company. It is not clear from whom the initial suggestion came and I do not think it matters. The upshot of these discussions was that the company, H. R. Harmer Ltd., was formed on July 1, 1947. It was formed to acquire and did acquire the English business and all the shares in the United States business. The nominal capital of the company was £50,000 divided into 39,000 preference shares of £1, 10,000 " A " ordinary shares of £1, and 1,000 " B " ordinary shares of £1. The whole of the ordinary shares, " A " and " B," and most of the preference shares have been issued. The preference shares conferred on the holders a right to a dividend of 4 per cent. and priority as to capital in a winding up, but they did not confer any right to any surplus assets in the winding up. The " A " ordinary shares had the right to the residue of the divisible profits, and the " B " ordinary shares conferred no right to participate in the profits but carried the whole of the voting power. On a winding up the " A " and " B " shares were to rank equally for return of capital and participation in surplus assets.

On July 11, 1947, a sale agreement was entered into between the father and the company. Under that agreement the father sold to the company the whole of the assets of the business, including the shares in the United States company, for the sum of £33,325. That consideration was to be satisfied by the issue to him or nominees of his of 22,325 preference shares, all the 10,000 " A " shares and all the 1,000 " B " shares. The father nominated the sons as allottees in equal shares of 6,750 of the " A " shares and 240 of the " B " shares. There was further an

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agreement that on his death the remaining 3,250 " A " shares and 760 " B " shares allotted to the father were to be offered to the three sons. Under the articles of association the father was to be chairman of the board of directors and as such was entitled to a casting vote in the event of equality of votes. Further, by the articles the father was appointed governing director for life but no special rights were attached to that office. He also had a service agreement appointing him managing director for 10 years from August 31, 1946, at a salary of £3,000 a year. That agreement expired in 1956 and was not renewed, but I understand no special powers were delegated to him in his capacity as managing director. Cyril was appointed a director for life and London executive manager at a salary of £2,500. His post of London executive manager was likewise for 10 years from August, 1946, and that was renewed in 1956 for a further seven years at a salary of £3,500. Bernard was likewise appointed a director for life, and he, too, had a service agreement under which he was an executive manager at a salary of £2,250 per annum likewise for 10 years from August, 1946. Leslie gave up his career in the Colonial service and was appointed a life director and executive manager for a similar period of 10 years from August, 1946, at a salary of £2,000. Under the arrangements made the three sons were to purchase certain preference shares at par. Cyril was to take 5,000 of these shares, Bernard 4,000 and Leslie 2,000. I have already referred to the option given to the sons to purchase their father's shares on his death. After the formation of the company various changes took place in the shareholdings which are not altogether easy to follow. It appears that in 1949 advice was taken as to the position in regard to estate duty, and I think also income tax, and it was pointed out that the father's position of absolute control might create difficulty, and as a result the father transferred to the three sons 3,250 " A " shares in equal shares, that is, 1,083 " A " shares each to Cyril and Bernard, and 1,084, including the one odd share, to Leslie. He also transferred 270 of his " B " shares to his wife. That situation was modified when Leslie left the company in 1951. On the occasion of his leaving an agreement was entered into under which he gave up his employment and his shareholding and the benefit of the option. He was suitably compensated for these matters. His " A " shares were transferred in equal shares to the father, Cyril and Bernard and his " B " shares were transferred to the father, Cyril, Bernard and the father's wife. At some stage Cyril and Bernard each transferred 103 of their respective holdings of " B " shares to their wives, and the result of these somewhat complicated readjustments was to make the present capital situation as set out in paragraph 7 of the petition by which Cyril's and Bernard's application to the court was initiated. Paragraph 7 is in these terms: " The present shareholding of the company is as follows," and then there are three columns: " A " ordinary, " B " ordinary

and preference. As to the "A" ordinary, the father holds 1,028 —those are the shares he took when Leslie left—Cyril 4,611, Bernard 4,361. As to the "B" ordinary shares, the father holds 491, Cyril four, Bernard four, the father's wife 295, Cyril's wife 103 and Bernard's wife 103. Then as to the preference shares, 11,029 are held by the father, 5,291 by Cyril, 3,230 by Bernard and 150 each by Cyril's wife and Bernard's wife. That accounts for the whole of the "A" ordinary and "B" ordinary, and 19,850 of the preference, shares.

Then paragraph 7 of the petition goes on: "The remaining "14,152 of the issued preference shares are held by other "members of the [father's] family and by directors and former "directors of the company and its subsidiary company herein-"after mentioned." In those circumstances the position as regards the control of the company, ignoring the slight differences while Leslie was with the company, was this. The father and his wife held respectively 491 and 295 "B" shares, making a combined holding of 786 of such shares. The two sons held four "B" shares each and their respective wives held 103 "B" shares each. The "B" shares, as I have said, are the only shares in the capital of the company carrying any right to vote. On the other hand, the two sons held approximately nine-tenths to the father's one-tenth of the "A" shares which carry substantially the whole of what is now conveniently though erroneously termed the equity of the company. The holdings of preference shares can, I think, for present purposes be ignored.

So far as the directorate was concerned, the father and the two sons were all life directors, the father being chairman with a casting vote. The father, as I have said, is also styled governing director, but no special powers or duties are assigned to that office. It follows that the father was, down to the date of Roxburgh J.'s order, in a position to control the company by the use of his own and his wife's votes, their combined preponderance of voting power being sufficient to procure the passing of extraordinary and special as well as ordinary resolutions. The judge has found, and there is evidence to show, that Mrs. Harmer agreed with her husband, when her holding of "B" shares was transferred to her, to vote in accordance with his directions, and it is to be assumed that she would in fact always do so. The sons, Cyril and Bernard, claim that the father has repeatedly abused his controlling power in the conduct of the company's affairs to a point which has left them no option but to apply to the court for relief under section 210, and this they have accordingly done by presenting to the court on October 1, 1957, the petition on which the order under appeal was made, the respondents to such petition being the father and the company.

The gist of the sons' complaint is stated in paragraph 16 of the petition in these comprehensive terms: "Notwithstanding "the incorporation of the company and its acquisition from him "of the said business the [father] has continued to regard the

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"business of the company as though it was still his own absolute "property and to ignore the interests of the shareholders of the "company and in particular of your petitioners, the wishes of "his co-directors and the resolutions of the board of directors "of the company. He asserts that he is entitled to adopt this "attitude towards the company and its members and directors "by virtue of his shareholding and that of [his wife], in the "knowledge that [his wife] is likely always to exercise the voting "rights attaching to her 'B' ordinary shares as the [father] "directs. He also asserts (contrary to the fact) that he is so "entitled by virtue of his being named as governing director in "the company's articles of association." I should at this point also refer to the first few lines of paragraph 17: "The [father] "has always acted as though the sole right of appointing and "dismissing the senior staff of the company is vested in himself "and he extends this attitude to embrace the directors of the "company claiming that his views alone are to be considered as "to who shall be appointed or elected a director and whether or "not a director should be removed from office or be not re-elected. "He also considers that no director should express a contrary "view to that expressed by himself."

The question in the case is whether these general complaints, exemplified and supported as they are by reference to a number of particular matters to which I will return, suffice, on the footing that they are established by the evidence, to make out a case for relief under section 210. It should be stated at the outset that Roxburgh J. accepted in substance the whole of the evidence adduced in support of the petition, about which there is really very little dispute, and having seen and heard the father giving evidence before him, he said: "The father is undoubtedly a man "of international reputation of a high order, and let nobody think "that I do not regard him even now as an asset to this company. "Unfortunately, in common with all of us, he gets older and "older. The purpose of this action is not so much to rake up "the past as to redeem the future; and therefore I cannot deny "my anxiety from the mere physical circumstance that every "day the father is getting older and older, because as events, "which I shall have to record in detail, will painfully show, "his conduct is perhaps characteristic of very old men, shows "no sign of improvement, and might in the normal course be "expected to deteriorate. He is in fact more than 88 years of "age now. He suffers from one of the familiar disabilities of "old age, namely, deafness. He is very deaf. He is so deaf "that he can only hear what is said to him if he stands at a "suitable distance from, and I think actually facing, the person "speaking to him. I mention that at an early stage. As a "witness he was most unsatisfactory, mainly I think because of "his deafness, but partly on account of his age and slower com-"prehension of what was put to him, when, with difficulty, he "understood what was being said. There will be many matters in

"the course of this judgment in which I shall not have accepted "his evidence. I feel in duty bound to mention that in case "some ingenious argument is ventilated elsewhere that something appears on some shorthand note which the judge did not "say he did not believe. I am going to say at every stage why "I have found the facts exactly as I find them even if it appears "to some extent from what the father said either in his affidavit "or in his cross-examination. I must say that as in duty bound; "but I wish to make it quite plain that this is not in my view "the type of case in which someone has come here to deceive "the court. I use no offensive words about the father's evidence. "I attribute his shortcomings to things to which we are all "subject, age and infirmity. None the less, when I am considering autocratic interference in the day-to-day affairs of a "business, the havoc which can be wrought by age and infirmity "is self-evident. I hope that I have done justice to the father, "who is undoubtedly a very great man in the world of stamps, "and it is just because he is such a great man that some of his "wholly indefensible actions in connexion with the company's "business must have done damage to the reputation of the "company not only in this country but all the world over."

I should also refer to this passage in the judgment of Roxburgh J.: "From the very moment of the incorporation of the "company the [father] has acted, and acted consistently, not "merely down to but even since the presentation of the petition, "upon the footing that he can whenever he likes override any "decision of the board, or regulate any matter of the company's "business exactly as he wishes without any formality, even by "the method of giving instructions direct to the staff behind the "backs of his co-directors. If at the outset he believed that "he had power to do this—a point upon which I do not find it "necessary to make any finding—he certainly became aware at "an early stage that he had not, and his reaction was not to "change his conduct or attitude in the light of the newly acquired "knowledge (if new it was) but to endeavour to pack the board "with voters on whom he could rely, an attempt which in fact "failed miserably as the sequel will show. The result is that "for a long time he has been deliberately interfering with the "company's business and overriding the board in a manner which "he knew to be beyond his powers. This has had and is still "having a detrimental effect on the company's business, and "accordingly upon all its 'A' ordinary shareholders, of which "shares he holds, as I have said, about one-tenth, and the "petitioners hold the rest."

Next I must note the very important circumstance that it was agreed before Roxburgh J. that the facts proved or admitted would suffice to make out a case for a winding-up order under the "just and equitable" rule. I should also call attention to these passages from the father's evidence. The first is from his first affidavit, paragraph 21: "I deny that the affairs of the

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"company are being conducted in a manner oppressive to a part "of the members of the company and the allegation contained in "paragraph 27 of Cyril's affidavit that my actions have done "nothing but harm to the company is not only untrue but one "which I very much resent. The company has been largely "dependent since its incorporation on my long experience in and "knowledge of philately which is and has been, in my humble "opinion, of very great value to the company. I have never "taken any step or done any thing which has been harmful to "the company in any way, neither have I ever done anything "which has resulted in the affairs of the company being con-"ducted in a manner oppressive to any part of the members. "I now realise that I am no longer in a position to dictate the "policy of the company or to control completely the running of "its business and I am prepared for the future to exercise only "the ordinary powers of a director and to act in accordance with "resolutions of the board. The reason why I have in the past "acted as I have is that I have been under a misapprehension as "to my powers which was brought about by reason of the matters "referred to in paragraphs 5 and 13 of this affidavit."

Then there is his oral evidence during his cross-examination by Mr. Milner Holland: "His Lordship was speaking at the same "time as you with the result that I heard neither. Will you "answer the question once more. Did you believe that you were "entitled to disregard the decisions of the board of directors? "(A) My answer is that as long as I held the control shares I "considered I had and it was agreed with my sons that I should "have it." Then a little later: Mr. Milner Holland: "He said: "'As long as I hold the control shares, the answer is Yes.'" Roxburgh J.: "I will write it down and hand it to him: 'As "'long as I hold the control shares'—then what did he say?" Mr. Milner Holland: "The answer is Yes." Then a little later Mr. Milner Holland said to the father: "Do sign it. Sign it by "all means." Roxburgh J.: "I did not ask him to. I should "not feel entitled to ask him to do that." Then the father signed the passage in the judge's notebook. Then the judge said: "I "will read it out so that it can go on the shorthand note. The "written answer which he has given me is as follows: 'I still "'believe that I am entitled to disregard resolutions of the board "'so long as I hold the requisite proportion of the control "'shares.'"

Then, in the last paragraph of his second affidavit, the father said: "With reference to paragraph 6 of Mr. Hunter's affidavit "I was never advised by Mr. Hunter to the effect that without "the addition of specific powers the mere conferring on me of the "office of governing director had no effect, and did not give me "power to control the board, and until so advised during the "course of these proceedings I had always thought that my posi-"tion as such did confer on me such a power."

These passages appear to me to contain admissions by the

father which are of great importance in this case. The judge seems to have considered, as appears from the passage in the judgment to which I have referred, that the father was aware of the true position at an earlier date than he was prepared to admit.

I should next say a word or two as to the scope and effect of section 210 of the Act. It is in these terms, so far as material for the present purpose: [His Lordship read section 210 (1) and (2) and continued:] I think that is all I need read for the present purpose. It is to be observed, first, that the person permitted to apply to the court under section 210 is "any *member* of the "company," and he must show "that the affairs of the company "are being conducted in a manner oppressive to some part of "the members (including himself)." This indicates that the oppression complained of must be complained of by a member of the company and must be oppression of some part of the members (including himself) in their or his capacity as a member or members of the company as such. Secondly, it is to be noted that the section does not purport to apply to every case in which the facts would justify the making of a winding-up order under the "just and equitable" rule, but only to those cases of that character which have in them the requisite element of oppression. Thirdly, the phrase "the affairs of the company are being con-"ducted" suggests prima facie a continuing process and is wide enough to cover oppression by anyone who is taking part in the conduct of the affairs of the company whether de facto or de jure. Fourthly, the section gives no guidance as to the meaning of the word "oppressive," although it does, as already mentioned, indicate that the victim or victims of the oppressive conduct must be a member or members of the company as such. Prima facie, therefore, the word "oppressive" must be given its ordinary sense and the question must be whether in that sense the conduct complained of is oppressive to a member or members as such. Inasmuch as in the present case it is not in dispute that the facts would justify a winding-up order under the "just "and equitable" rule and it is recognized that such an order would unfairly prejudice the complaining members, this would appear to be in effect the only question in issue.

There is no English case before this one in which an order has been made under the section, but there have been two such cases in Scotland, one of which has been the subject of an appeal to the House of Lords. The first of the Scottish cases is *Elder* v. *Elder & Watson, Ltd.*[1] Inevitably the result of applications under section 210 in different cases must depend on the particular facts of each case, the circumstances in which oppression may arise being so infinitely various that it is impossible to define them with precision. In *Elder* v. *Elder & Watson, Ltd.*[1] according to the headnote the nature of the case was this—I read the

[1] 1952 S.C. 49.

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second paragraph of the headnote: "In a petition presented "under section 210 it was averred that two of the petitioners, "shareholders in a private limited company which was in effect "a small family concern, had suffered oppression at the hands of "other shareholders who had used their combined voting powers "to remove these petitioners from their offices as directors and "from their employment as secretary and factory manager respec-"tively. It was further averred that this action had been taken "against them at the instigation of a director who had had serious "differences with one of them and who had sought successfully "in this way to obtain control of the company for himself and "his nominees. There was no averment that the business had "been mismanaged to the detriment of the shareholders. Before "presenting the petition, the petitioners had sought unsuccessfully "to dispose of their shares in the company at a price to be fixed "by arbitration.

"Held (1) that section 210 was intended to meet the case of "oppression of members of a company in their character as such; "(2) that the matters complained of by the petitioners affected "them solely in the character of director or employee of the "company, and there were thus no relevant averments of oppres-"sion for the purposes of the section; and (3) that there were no "facts averred which would justify a winding-up order on 'just "'and equitable' grounds; and the petition dismissed as "irrelevant."

The Lord President, Lord Cooper said [2]: "The applicant for "relief is thus envisaged as one of an oppressed minority of "shareholders. On such a petition the court can only act under "the section on being satisfied of three matters: (i) that the "company's affairs are being conducted in a manner oppressive "to some part of the members (including the petitioner); (ii) that "to wind up the company would unfairly prejudice that part of "the members; and (iii) that otherwise the facts would justify "the making of a winding-up order under the 'just and equitable' "clause.

"In the present case it is conceded that it would be quite "unjustifiable to liquidate the company and that condition (ii) "is satisfied. It remains to consider conditions (i) and (iii). "which can best be examined together. The introduction into "section 210 of condition (iii) refers us back to the pre-1947 "practice under the 'just and equitable' clause, and is a salutary "reminder of the fact that the new remedy is not lightly to be "accorded. Under the former practice winding up has been "ordered in many types of case which involved no true element "of oppression to shareholders, for example, where the sub-"stratum of the company had vanished, and such cases will "doubtless continue to arise. On the other hand the justice and "equity which led to the grant of a winding-up order have often

[2] 1952 S.C. 49, 55.

"been found in conduct reasonably capable of being described "as 'oppressive' to some part of the company's members, the "oppression being usually exerted by a person with predominating "voting power which was employed for his own advantage to "the detriment of a helpless minority. The decisions indicate "that conduct which is technically legal and correct may never-"theless be such as to justify the application of the 'just and "'equitable' jurisdiction, and, conversely, that conduct involving "illegality and contravention of the Act may not suffice to "warrant the remedy of winding up, especially where alternative "remedies are available. Where the 'just and equitable' juris-"diction has been applied in cases of this type, the circumstances "have always, I think, been such as to warrant the inference "that there has been, at least, an unfair abuse of powers and an "impairment of confidence in the probity with which the com-"pany's affairs are being conducted, as distinguished from mere "resentment on the part of a minority at being outvoted on some "issue of domestic policy. The phrase 'oppressive to some part "'of the members' acquires a certain colour from its collocation "in section 165 with such stronger expressions as 'intent to "'defraud,' 'fraud,' 'misfeasance,' or 'other misconduct,' and "the essence of the matter seems to be that the conduct com-"plained of should at the lowest involve a visible departure from "the standards of fair dealing, and a violation of the conditions "of fair play on which every shareholder who entrusts his money "to a company is entitled to rely. This, broadly speaking, was "the class of case which the draftsman of section 210 evidently "had in mind, and the question is whether the petitioners have "brought themselves within the scope of the section." A little later Lord Cooper said[3]: "I also accept it that in the familiar "'deadlock' type of case the partnership and the small company "may be virtually indistinguishable, and identical principles may "fall to be applied to both alike. But this is not to say "that we can import the detailed provisions of the Partnership "Act into the Companies Act, still less that we can ignore the "specific requirement of section 210 that before applying that "section we must be able to affirm 'oppression' of some part of "the members of the company. While therefore I give full "weight to the circumstance that we have here to deal with a "small domestic concern, I do not feel free to deal with the "case otherwise than under the terms of section 210 alone." Then Lord Cooper said[4]: "It does not assist the petitioners to "assert that the shareholders took sides in the dispute, for they "had no option but to take sides, and the real complaint is that "more of them sided with Walter Elder than with the petitioners. "Moreover I search the petition in vain for any relevant aver-"ment that the petitioners have suffered in their character as "members of the company. Qua members, their position does

[3] 1952 S.C. 49, 56.

[4] Ibid. 57.

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"not seem to me to differ significantly from that of any other "shareholder. The true grievance is that two of them, George "Elder and James Glass, have lost the positions which they "formerly held as directors and officers of the company. I do "not consider that section 210 was intended to meet any such "case, the 'oppression' required by the section being oppression "of members in their character as such. I do not think that a "'just and equitable' winding up has ever yet been ordered "merely because of changes effected in the board of directors or "the dismissal of officers, and very strong grounds would be "needed to justify such a step."

Lord Keith said[5]: "The difficulty is perhaps to define the "limits within which section 210 shall apply. It does not apply "to all cases in which it would be just and equitable to wind up "a company, because some of these are cases in which it could "not be said that there is oppression of any part of the members "in the conduct of the affairs of the company. Apart from the "Board of Trade, to whom I shall refer later, it is only a mem-"ber who can invoke the section, and, in my opinion, this means "a member in his capacity as a member, and further, in my "opinion, his only relevant ground of complaint is oppression of "his rights as a member." A little later in his judgment Lord Keith said[6]: "But, apart from this, the question of absence of "mutual confidence per se between partners, or between two sets "of shareholders, however relevant to a winding-up, seems to "me to have no direct relevance to the remedy granted by section "210. It is oppression of some part of the shareholders by the "manner in which the affairs of the company are being con-"ducted that must be averred and proved. Mere loss of confi-"dence or pure deadlock does not, I think, come within section "210." Then Lord Keith said[7]: "It is not lack of confidence "between shareholders per se that brings section 210 into play, "but lack of confidence springing from oppression of a minority by "a majority in the management of the company's affairs and "oppression involves, I think, at least an element of lack of pro-"bity or fair dealing to a member in the matter of his proprietary "right as a shareholder. Cases like that of *Loch* v. *John Black-"wood Ltd.*[8] and *Thomson* v. *Drysdale*[9] might, I think, readily "have come under section 210. I doubt whether a case like *In re "Yenidje Tobacco Co.*[10] could be brought under the section." I think what is said in that case as to the scope of section 210 is, if I may respectfully say so, well founded, and the caution administered in regard to it should be borne constantly in mind when any application under section 210 falls to be considered.

The other Scottish case is *Meyer* v. *Scottish Co-operative Wholesale Society Ltd.*[11] which came on first on the question of

[5] 1952 S.C. 49, 58.
[6] Ibid. 59.
[7] Ibid. 60.
[8] [1924] A.C. 783; 40 T.L.R. 732.
[9] 1925 S.C. 311.
[10] [1916] 2 Ch. 426; 32 T.L.R. 709.
[11] 1954 S.C. 381.

the relevance of the averments before the matters complained of had been proved in evidence, and was further heard before the First Division after the facts had been proved.[12] The report is an exceedingly long one owing to the complication of the transactions involved, but it was a case even more remotely related to the present case on its facts than was *Elder* v. *Elder & Watson.*[13] *Meyer* v. *Scottish Co-operative Wholesale Society Ltd.*[14] appears to have been a case in which a parent company was in control of a subsidiary company which also had a minority of independent members. A time came when trading conditions were such that it would be to the advantage of the parent company to do away with the subsidiary company, and the question, which the court answered in the affirmative, was whether the conduct of the parent company in seeking to achieve that result amounted to oppression or oppressive conduct of the affairs of the company within section 210. I do not propose to take up time by citing at length from this case; I will content myself by taking this from the judgment of the Lord President, Lord Cooper[15]: "I am "not prepared to state on the basis of mere averments that the "company's affairs were not being conducted in a manner oppres- "sive to the petitioners within the meaning of the section. In "my view, the section warrants the court in looking at the "business realities of a situation and does not confine them to "a narrow legalistic view."

Then when *Meyer* v. *Scottish Co-operative Wholesale Society, Ltd.*[16] came before the House of Lords, where the decision was affirmed, some observations were made by Viscount Simonds and Lord Morton of Henryton to which I would refer. Viscount Simonds said: "My Lords, upon the facts, as I have outlined "them and as they appear in greater detail in the judgments of "their Lordships of the First Division, it appears to me incon- "trovertible that the society have behaved to the minority share- "holders of the company in a manner which can justly be "described as 'oppressive.' They had the majority power and "they exercised their authority in a manner 'burdensome, harsh "'and wrongful'—I take the dictionary meaning of the word. "But, it is said, let it be assumed that the society acted in an "oppressive manner: yet they did not conduct the affairs of the "company in an oppressive manner." That last sentence referred to the question whether in that case the conduct of the parent company amounted to conducting the affairs of the sub- sidiary company, as distinct from those of the parent company, in an oppressive manner. No such complication enters into the present case. I attach importance to Viscount Simonds' adop- tion of the meaning of "oppression" as "burdensome, harsh "and wrongful." Lord Morton felt difficulty on the point I have

[12] 1957 S.C. 110.
[13] 1952 S.C. 49.
[14] 1954 S.C. 381.
[15] Ibid. 391.
[16] Sub nom. *Scottish Co-operative Wholesale Society Ltd.* v. *Meyer* [1958] 3 W.L.R. 404, 410; [1958] 3 All E.R. 66.

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mentioned as one which does not arise in the present case, but he was able to agree with the decision of the House, as appears from this passage in his speech [17]: "Suffice it to say that in the "end I have reached the conclusion that there is evidence to "justify the view that the affairs of the company were 'con-"'ducted in a manner oppressive' to the respondents. I am not "disposed to give a narrow meaning to these words, having "regard to the manifest object of section 210. I am naturally "assisted in my conclusion by the fact that the decision of the "four learned judges of that Division (including Lord Carmont, "who had the advantage of seeing and hearing the witnesses) "was unanimous, and by the fact that your Lordships are all of "the same opinion."

Finally, as regards the cases I would refer to two of those concerned with the application of the "just and equitable" principle as not without assistance in the present case. The first is *Thomson* v. *Drysdale*.[18] Lord Clyde said [19]: "Now, in any "case in which the shareholders who hold a preponderating "interest in a company make it manifest that they intend to set "at naught the security provided by company procedure, and to "treat the company and its affairs as if they were their own "property, it is impossible that the minority should retain any "confidence in the impartiality or probity of the company's "administration, and—according to the circumstances of each "particular case—it becomes a question whether the minority "are not entitled, as a matter of 'justice and equity' within the "meaning of subsection (vi) of section 129 of the Companies "(Consolidation) Act, 1908, to have the company wound up. It "is always true that the majority are entitled to use their voting "power in what they believe to be the interests of the company; "and the petitioner's fellow-shareholder had no doubt been "allowed to acquire an overwhelmingly preponderant power so "far as votes were concerned. But whether he could have used "that power, not only to annul the arrangements made in the "directors' minutes—I assume he could—but also to acquire for "himself the petitioner's touring business (for which the company "had never paid a single penny) is a very different matter. In "any case, he never attempted to use his voting power in the only "legitimate way." Lord Skerrington said [20]: "It must, however, "be kept in view that this state of matters did not result from "any underhand manoeuvring on the part of the respondent (who "holds the 1,501 shares) nor yet from any accidental circum-"stances. It resulted from the deliberate actings and contracts "of the two shareholders, each of whom originally held a single "share. Accordingly, in considering whether it is just and equit-"able that the company should be now wound up, the court must "be careful not to allow itself to be made an instrument for

[17] [1958] 3 W.L.R. 404, 415.
[18] 1925 S.C. 311.
[19] Ibid. 315.
[20] Ibid. 316.

"relieving the petitioner from the natural and lawful conse-
"quences of his own actings and contracts. On the other hand,
"in circumstances like the present, it behoves the shareholder
"who has the 1,501 votes to avoid any conduct which would
"reasonably lead to the inference that he fails to appreciate the
"fact that it is his duty to use his voting power in the interests
"of the company as a whole, and that he must not ignore the
"interests of the other shareholder or treat the company and its
"assets as if they were his own private property. Further, he
"must avoid acting in such a way as might reasonably be held
"to make it impossible for the other shareholder to co-operate
"with him in the management of the company."

The other case bearing on the just and equitable rule to which I would refer is the Privy Council case of *Loch* v. *John Blackwood Ltd.*[21] In that case Lord Shaw of Dunfermline gave the opinion of the Judicial Committee, and I would refer to this passage[22]: "The present Lord President of the Court of Session (Lord Clyde)
"in *Baird* v. *Lees*[23] discusses the section and the ejusdem
"generis doctrine in exactly the same spirit. His words are as
"follows: 'I have no intention of attempting a definition of the
"'circumstances which amount to a "just and equitable" cause.
"'But I think I may say this. A shareholder puts his money
"'into a company on certain conditions. The first of them is
"'that the business in which he invests shall be limited to
"'certain definite objects. The second is that it shall be carried
"'on by certain persons elected in a specified way. And the
"'third is that the business shall be conducted in accordance
"'with certain principles of commercial administration defined
"'in the statute, which provide some guarantee of commercial
"'probity and efficiency. If shareholders find that these
"'conditions or some of them are deliberately and consistently
"'violated and set aside by the action of a member and official
"'of the company who wields an overwhelming voting power,
"'and if the result of that is that, for the extrication of their
"'rights as shareholders, they are deprived of the ordinary
"'facilities which compliance with the Companies Acts would
"'provide them with, then there does arise, in my opinion, a
"'situation in which it may be just and equitable for the court
"'to wind up the company.'"

Having now dealt so far as I am able with the law to be applied, I turn to the particular matters of complaint alleged by the two sons in their petition. It should be remembered that they are to some extent in the nature of illustrations of the general course of conduct complained of in paragraph 16 of the petition. [His Lordship then referred to the father's conduct in relation to the Australian business and the purported dismissal of Edwards and continued:] There were in the course of the history of this unfortunate matter a remarkable number of appointments of

[21] [1924] A.C. 783.
[22] Ibid. 793.
[23] 1924 S.C. 83, 92.

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directors and retirements of directors brought about in one way or another by the father. This is an aspect of the case one must approach with caution. It cannot be denied that the holder of the majority in voting power of the shares in a company may, broadly speaking, appoint any person he thinks fit as director, and the appointment cannot be challenged merely on the ground that he might have found some more suitable person than the person he selected, or that the person he selected was his friend; but I take it that the majority shareholder's power of appointing directors must within broad limits be exercised for the benefit of the company as a whole and not to secure some ulterior advantage. With that caution, I would observe that as part of the history of this matter, and considered in conjunction with the father's whole course of conduct in relation to the company, the changes in the directorate from November, 1954, onwards are, to my mind, not without their materiality.

[His Lordship then referred to the evidence in relation to changes in the directorate of the company, and continued:] That is the story of the directorate, and it does seem to me to support the conclusion that the father was guided in making his appointments by the question whether they could be expected with certainty always to vote in accordance with his wishes. But, as I have said, the facts of this case are by no means usual, and I would not have it go forth that every time a majority shareholder appoints directors of his own choosing, he has done something wrong, or something which can be challenged by a dissatisfied minority, but if he goes on, having seen to it that the requisite majority is obtained, to state his motives for having Mr. A rather than Mr. B, and says: "Mr. A will always vote "in the way I tell him to," then it seems to me it is impinging on dangerous ground. I pass from this matter of the directorate simply with the observation that it does appear to me to afford some support for the petitioners' case when looked at in conjunction with the whole course of the father's conduct.

[His Lordship then referred to the other facts and examples of the father's conduct on which the petitioners relied, and continued:] The question remains whether, on these facts, the petitioners were rightly granted the relief which Roxburgh J. thought fit to grant under section 210. Upon this issue Mr. Harold Brown, for the father, made in effect these submissions—I am not attempting to quote his words; I merely give the general effect of his argument, as I understood it. First, he said that the sons should not be heard to complain since they acquired their shares through the generosity of their father, who having built up the business, proceeded to turn it into a company and to hand over a major part of the beneficial interest in the form of shares to his sons virtually by way of gift. As to this, the sons did at all events pay for their preference shares, and if they had not paid anything, two of them at all events had long been working in the business, while the third gave up his career in the Colonial

Office in order to take up employment in the business. Moreover, the question of consideration appears to me to be irrelevant, a mere matter of prejudice. Suppose the transaction was a mere matter of gift, the gift, if valid (and there is no suggestion it was not) must surely have conferred the same rights as if the transaction had been for full consideration.

Mr. Harold Brown's second point was that the sons knew full well when the company was formed that the father was to retain control by means of his predominant holding of "B" shares so long as he lived. I agree, but I cannot concur with Mr. Brown in adducing from this that the sons must be taken to have assumed that the father would exercise his control irregularly by doing what he thought fit without reference to the board or in defiance of the board's decisions.

Then the third submission of Mr. Harold Brown was that what was done by the father was not oppressive of the rights of the sons as members, but merely oppressive of their rights as directors. I cannot accept this. It appears to me that the sons as members and not merely as directors were oppressed by the singular conduct of the father. The oppression must no doubt be oppression of members as such, but it does not follow that the fact that the oppressed members are also directors is a disqualifying circumstance when the question of relief under section 210 arises. I think there may well be oppression from the point of view of member-directors where a majority shareholder (that is to say, a shareholder with a preponderance of voting power) proceeds, on the strength of his control, to act contrary to the decisions of, or without the authority of, the duly constituted board of directors of the company.

Fourthly, Mr. Harold Brown said that the acts complained of might have been restrained by injunction in so far as they were acts done without the authority of the board. As to this, I do not think a wrongdoer in this field can well complain that the person wronged might have chosen another remedy.

Then fifthly, Mr. Harold Brown said that the acts complained of were not in their result oppressive, because it cannot be demonstrated that the company suffered any loss from any of them. I cannot agree. The acts complained of were, I should say for the most part, calculated to damage the company in one way or the other.

Sixthly, Mr. Harold Brown said that the acts complained of might have been lawfully done by calling a general meeting and passing the requisite resolutions, ordinary or special. As to this, I think the sons were at least entitled to require that the proper procedure should be applied.

Then seventhly, Mr. Harold Brown said that this is not a case of discrimination between different shareholders or classes of shareholders. I agree, but see no reason for holding that section 210 is necessarily confined to cases of discrimination, though it

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is to be expected that cases calling for its application would most usually take that form.

Finally, he submitted that the father got no pecuniary benefit out of what he did. That is not literally true, but even if it was, I do not think it is essential to a case of oppression that the alleged oppressor is oppressing in order to obtain pecuniary benefit. If there is oppression, it remains oppression even though the oppression is due simply to the controlling shareholder's overwhelming desire for power and control, and not with a view to his own advantage in the pecuniary sense. It seems to me the result rather than the motive is the material thing.

Then on the other side, Mr. Milner Holland's submissions were to this effect: (1) The question is whether the course of conduct complained of was "burdensome, harsh or wrongful" to shareholders, that is to say, a part of the shareholders, including the petitioners.

(2) If a person, relying on majority control in point of voting power, dispenses with the proper procedure for producing the result he desires to achieve, and simply insists on this or that being done or omitted, his conduct is oppressive because it deprives the minority of shareholders of their right as members of the company to have its affairs conducted in accordance with its articles of association.

(3) It is not shown that if the father had acted strictly in accordance with the articles of association, he could have achieved his object. The proper procedure cannot be put on one side as mere machinery. It is the duty of the board to consider any proposal. If a majority shareholder desires to override the board, there must be a proper meeting, whether of the board or the company, and at least an opportunity of discussion. Moreover, if a majority shareholder sets about asserting his power in accordance with the articles and succeeds in point of numbers, he may be faced with questions as to fraud on the minority and so forth, which are burked by the expedient of simply doing what he chooses without ceremony on the ground that if it came to a vote he could outvote anyone.

In his judgment, Roxburgh J., after saying that he adopted the reasoning of the Lord President, Lord Cooper, in *Meyer* v. *Scottish Co-operative Wholesale Society Ltd.*,[24] said: "That "being so, for my part the section seems to admit of no "ambiguity. The word 'oppression' is a word in common use "and understanding in the English language. But I would just "observe in passing that it does not say 'who complains of acts "'of oppression'; it says 'that the affairs of the company are "'being conducted in a manner oppressive.' In other words, "I think it invites attention not to events considered in isolation, "but to events considered as part of a consecutive story; and it "is because I take that view that I have not dealt (and do not

[24] 1954 S.C. 381, 392.

"propose to deal) with each of the items which I have enumerated "one by one. But I must pause to dismiss, so far as I am "concerned, the submission made by Mr. Russell [leading "counsel for the father before Roxburgh J.] to the effect, as I "understood it, that the nature of the oppression that the section "requires could be in some way affected by the use of the word "'minorities.' To start with, I can see no need to introduce "any modification into the words of the statute, which seem to "me to be sufficiently plain. Secondly, I do not think that "the word 'minorities' was intended to be introduced at that "point. I think the point about the word 'minorities' is that it "is only where the voting control is elsewhere that a case for "the application of the section arises. To take this case, if the "voting control had resided where the beneficial interest in the "ordinary shares resides, there would have been no need to "invoke the section. The [father] would have been eradicated "root and branch by this time. It is only because of the bene-"ficial voting interest and his having voting control that it is "necessary to invoke the section at all. I cannot think of any "case where it would be possible to invoke the section if the "voting control was in the hands of the persons who are alleged "to have been oppressed; and that, I think, is the only and "natural explanation of the word 'minorities' being there." Then he says: "It remains, in my view, a question for the court "to decide on the whole story, as revealed in the evidence, "whether the affairs of the company are being—it has to be a "state of affairs continuing at the date of the petition—conducted "in a manner oppressive to some part of the members. I do not "know that it has any particular bearing on the case, but this "case is curious in that it is not a minority beneficial interest "that is being oppressed, and that would be the normal case; "it is a majority beneficial interest which is being oppressed "because the voting control is placed in the hands of a minority "beneficial interest. In my judgment, I reach the opinion—"because that is what I have to do—that at the date of the "presentation of this petition the affairs of the company were "being conducted in a manner oppressive to the petitioners."

Having given the best consideration I can to this not altogether easy case, I have come to the same conclusion, preferring the reasoning of Mr. Milner Holland to that of Mr. Harold Brown, and accepting the reasoning and conclusion of the judge. I am fortified in this view by the consideration that it has obviously become increasingly difficult, nay really impossible, for the business of this company to be carried on successfully as matters stood before Roxburgh J.'s order, and that it is plainly in the best interests of all parties that an order in these terms, or substantially in these terms, should be made. No criticism of any importance of the form of Roxburgh J.'s order has been made good before us.

For these reasons I would dismiss this appeal.

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ROMER L.J. I agree. At an early stage of Mr. Harold Brown's opening in this case he suggested that even if the father had been shown to have been conducting the affairs of the company in an oppressive way, which Mr. Harold Brown strenuously denied, nevertheless it was not open to the sons to base a petition under section 210 on that footing, because he said the sons had been given the bulk of their shares by the father and owed everything to his bounty, and they could not complain, even though other people in similar circumstances might. But I think that leaves entirely out of account the fact that the father did in fact create the company. He created proprietary interests in this business, and he cannot now disregard the legal entity which was brought into being and the shares which were created therein. I do not know how long, on that argument, the sons would have to wait until they were permitted to complain.

The second point was that the sons agreed that their father should govern the company, and, therefore, they must put up with it. I cannot myself believe that the agreement to his appointment as governing director was wholly unconditional on the way he was to govern, and surely they were entitled to assume that their father would exercise his power moderately and reasonably and give some effect, at least, to their own life directorships to which he had agreed.

Viewing the evidence as a whole, no one could doubt but that the father acted oppressively in the sense in which that word is ordinarily used. He rode roughshod over his sons and everybody else, and dictated the general conduct of the company's affairs and its policy with an intolerant disregard of the wishes of his co-directors, and, indeed, in some instances, in disregard of the best interests of the company itself. The question, however, is whether it has been shown within section 210 of the Act that the affairs of the company were being conducted by the father in a manner oppressive to the shareholders, including the petitioners, who are in a voting minority. Mr. Harold Brown said that Cyril and not the father was conducting the affairs of the company in London. I cannot accept that suggestion. It is quite true that Cyril was, as he said in evidence, conducting the day-to-day routine work in the London office, but it is quite obvious that the affairs in general of the company were conducted by the father and no one else, and I should imagine the father himself would be the last person in the world to deny that.

In considering whether the way in which he did conduct the company's affairs was oppressive, I agree with the judge that although naturally attention must be paid to the various incidents of which the petitioners complain taken by themselves, the court is concerned really to consider the history of the matter as a whole, and to see whether a course of conduct by the father has been established which constitutes an oppression of the other shareholders. The word "oppression" was defined by Viscount Simonds, as my Lord has pointed out, in *Scottish Co-operative*

Wholesale Society Ltd. v. *Meyer*,[25] where he accepted the dictionary meaning "burdensome, harsh and wrongful," and I respectfully would adopt that definition of the word to be found in section 210. With regard to that section, Lord Morton[26] in his speech said that he was not disposed to give a narrow meaning to the word "oppression" having regard to the manifest object of section 210. It is true that the mere use of voting power at board meetings or at a general meeting to secure the passing of resolutions, which the other members of the board or shareholders oppose, would not in general constitute oppression for the purpose of the section or for any other purpose. For a petition to succeed it must be shown that there has been oppression in a real sense of members qua shareholders, and not merely a subordination of their wishes to the power of a voting majority.

As to this, however, I accept Mr. Milner Holland's submission that shareholders are entitled to have the affairs of a company conducted in the way laid down by the company's constitution. Members are entitled to expect that their board shall perform its functions as a board, and that the proceedings of the directors shall be carried out in a normal and orthodox manner. They are entitled to the benefit of the collective experience of the directors and to expect that the directors and each of them can freely express their views at board meetings, and that regard shall be had to what they say and to resolutions properly passed. If the board is browbeaten and either ignored or overruled by one of its number, in this case the father, in reliance on his superior voting power, the proprietary interests of the minority shareholders cannot fail to be affected, and a case of oppression within section 210 is, in my judgment, made out. That such has been the policy of the father since the inception of the company has been established by the evidence, in my view, beyond a shadow of doubt. The petitioners' grievance on this matter is stated generally in paragraph 16 of the petition which my Lord has read, and I do not read again. An illuminating statement with regard to it is found in the father's first affidavit, where he said: "I "believe that the basis on which the company was formed "entitled me to run the business and it was a breach of faith for "my sons to deny it."

Of all the instances or illustrations of the father's attitude as chairman, with which my Lord has dealt, I will only refer very shortly to two. [His Lordship then referred to (a) the father's instructions to the secretary of the company that no board meetings were to be called without his agreement; (b) the question of the lease of the company's premises. His Lordship then referred to a transcript of one of the board meetings, to show the atmosphere which prevailed there (the father and the sons each having a solicitor present), and continued:] We were told that Mr. Charles Russell, who appeared for the father in the court below,

[25] [1958] 3 W.L.R. 404, 410. [26] Ibid. 415.

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conceded that affairs had got to such a pass that a contributory's petition to wind up the company on the ground that it was just and equitable to wind it up would have succeeded. I think this concession was very rightly made, and none the less so because the shareholders might in connexion with some, at least, of the father's activities have obtained relief by resorting to a different jurisdiction. It is true enough that the mere fact that it is just and equitable to wind up a company on a contributory's petition does not in itself necessarily bring a case within section 210, but when the ground for winding up is oppression, it may well amount also to a ground for bringing section 210 into play, as Lord Keith pointed out in *Elder* v. *Elder & Watson Ltd.*[27] I am at all events abundantly satisfied that it does in the present case.

I would wish in conclusion to adopt a passage from the judgment of Roxburgh J. in this case where he said: "If [the father] "assumed powers that he did not possess (and he certainly did "that) and exercised them against the wishes of the shareholders "who had major beneficial interests, but a minority of votes "(and he certainly did that) that, in my opinion, is prima facie "oppression. It is sufficient prima facie oppression to shift the "burden of proof; and, therefore, as it seems to me, the burden "of avoiding that conclusion rests upon the usurper. So far from "discharging that burden, the argument has left me with the "firm conclusion that, looking over the whole story, the chairman "has been so dominated by one or other of two collateral "motives—either just lack of temper, or the motive of asserting "and attempting to sustain an absolute overriding power of "control in the face of opposition—that he has on many occasions "acted in complete disregard of the interests of the company as a "whole."

I agree with that passage from the judge's judgment, and I agree that the appeal should be dismissed.

WILLMER L.J. I agree that this appeal fails, and if it were not for the importance of the case I should have been content merely to express that view and say no more, but as the matters in issue here have been very fully debated and are of such serious consequence, particularly for Harmer senior, I think it is right that I should endeavour to state, in as few words as I can, the reasons which have led me to my conclusion.

The only question which in the event has to be decided in the case is whether or not the affairs of H. R. Harmer Ltd. were being conducted in a manner oppressive to some part of the members, including the petitioners. The judge in giving judgment pointed out that the word "oppression" is a word in common use and understanding in the English language. He did not have the advantage, which we have had, of the subsequent decision of the House of Lords in *Scottish Co-operative Wholesale Society Ltd.* v. *Meyer*,[28] but I think it is fair to say that the

[27] 1952 S.C. 49. [28] [1958] 3 W.L.R. 404.

decision of the House of Lords in that case has abundantly justified what the judge in this case said with regard to the meaning of the word "oppression." Viscount Simonds was content to take its ordinary dictionary sense, that is to say, what the ordinary man would understand is the meaning of the word, and Lord Morton of Henryton said that he was not disposed to give a narrow meaning to the word.

That being so, it seems to me that the question which arises in this case, as indeed in almost any other case of this character, is a pure question of fact to be determined in accordance with the circumstances of the particular case. In the course of the argument it was suggested that the approach to this issue of fact was in some ways analogous to the approach to the question of fact which arises in a matrimonial cause where the petition is on the grounds of cruelty. I am disposed to think there is some force in the suggestion that there is a similarity between the two proceedings, and I venture to make these two comments on the correct way to approach the question of fact which arises in a case such as this. The first is that in my judgment it is quite impossible to lay down a priori certain categories of conduct which in all circumstances either are or are not capable in law of amounting to conduct which is oppressive within the meaning of the section; in other words, each case has to be examined in the light of its own particular facts and, I would venture to add, in the light of the personality of the individual persons concerned. The second matter to which I want to refer has really been dealt with by the judge and has been referred to by my Lords, and it is this, that one must be careful to study the course of conduct complained of as a whole. I would like to refer to what the judge said in his judgment in a passage which has already been read, and which I venture to read again: "But I would just "observe in passing that it does not say 'who complains of acts "'of oppression'; it says 'that the affairs of the company are "'being conducted in a manner oppressive.' In other words, I "think it invites attention not to events considered in isolation, "but to events considered as part of a consecutive story." I respectfully venture to adopt that as the correct approach, and that is the approach which the judge made in this case.

Now approaching the case, as I think, in the right way, the judge had the inestimable advantage of hearing oral evidence from the two persons most immediately concerned with the dispute ["the father"], and his son Cyril, one of the petitioners. Where the judge below has had the advantage of actually seeing witnesses and hearing them cross-examined, we should naturally be slow to interfere with the conclusions of fact at which he has arrived. In this case seeing those two witnesses and hearing their evidence was important, as I think, for two reasons. First, it was important in this case, as in all others, for the purpose of assessing their credibility as witnesses. As to that the judge has told us something (the passage to which I refer has

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already been read) about what he thought of the credibility of the father. Secondly, in a case like this, where so much depends on the personality of the principal persons concerned and on the way in which those personalities reacted on each other, it seems to me that the judge, who actually saw the persons concerned and saw them under stress in cross-examination, had abundant opportunity of weighing up the personality of the people concerned, a matter which I think is of vital importance in deciding whether the conduct of one was oppressive in relation to the other. Having those inestimable advantages and having, as I have said, approached the question in the right way, the judge came to the conclusion that the petitioners' case was made out, and the father had been guilty of conducting the affairs of the company in an oppressive manner.

I have no intention of going into detail in regard to any of the particular incidents to which my Lord has already referred, but viewing the conduct complained of as a whole, i.e. as a course of conduct extending over the years, it appears to me that there was abundant evidence to justify the judge in his conclusion of fact. Ever since what I may call the Australia incident in 1948, the evidence shows that by one means or another the father has sought to impose his will in the conduct of the affairs of the company to the exclusion of the wishes of other people who might be concerned. Mr. Milner Holland pointed out in his address that the various matters complained of fall into different categories, according to the method adopted by the father. One method complained of was his use or abuse of his voting power, primarily to secure the election to the board of people who were his nominees. Another method which he adopted was to use the mere threat of his voting power to impose his wishes on the rest of the Board. The third method adopted was simply to go behind the backs of the board and, after a decision had been taken by the board, to take it upon himself to countermand it on his own authority and to give his own instructions. So far as the election of members of the board were concerned, I would like to express my agreement with what has already fallen from my Lord. It is not the mere fact that the father in this case sought to get his own friends on to the board; what is objected to, and as I think rightly objected to, was securing the election of the particular people concerned with the avowed object of securing people who would be "certainties," to use the word which the father himself used. But the most dangerous and most oppressive form of conduct is, I think, the habit that the father had of going behind properly constituted decisions of the board and taking it upon himself to countermand them. It seems to me that such conduct cuts at the very root of proper company procedure and makes it virtually impossible for the business of a company to be carried on. The result which it led to can well be seen in some of the transcripts of meeting which have been placed before us. I venture to think it is an illuminating

comment on the state of affairs which has arisen if it becomes necessary, whenever any meeting is held, to have a recording machine which will take down every word that is said by anybody, and to have solicitors sitting at the elbows of the various parties. How it can be expected that a company's affairs will be properly conducted in that atmosphere, I do not understand. I am abundantly satisfied that all this led inevitably to damage to the interests of the company. There was some evidence of actual financial loss, for instance, in connexion with the failure to renew the lease with which my Lord has already dealt. But of far more importance than that, as it seems to me, was this very fact to which I have referred, that it was becoming increasingly difficult to carry on business at all; and I would add to that the damaging effect that the acrimonious discussions between the father and the other directors was having upon the members of the staff, particularly the senior members of the staff. In this connexion I think it is not altogether without significance that both the senior cashier and the secretary of the company should have sworn the affidavits which have been filed in support of the petition.

It may be thought, possibly, that the best evidence of oppressive conduct in this case is to be found in the answer which the father himself gave in the course of his cross-examination and which, to make sure it was in accordance with what he wished to say, was written down in the judge's notebook. I venture to repeat the answer which was then given and recorded. "I still "believe that I am entitled to disregard resolutions of the board "so long as I hold the requisite proportion of the control shares." That of course was quite different from what he had said in the concluding paragraph of the affidavit which he had previously sworn. I do not pause to quote it, but the effect of it was to say that by that time he had recognised that it was not always possible for him to have his own way, and that his previous efforts to do so had been under a misapprehension. Mr. Milner Holland has argued before us that at any rate since 1949 the father, for all that he said in his affidavit, has in fact known perfectly well, or at least has had the means of knowing, that he was no longer entitled to control the company. Reference has been made to advice given by a solicitor in 1949, and again to the repetitive advice given by the solicitor who sat by the father at the board meetings in 1955, 1956 and 1957. As has been pointed out already, the judge appears to have accepted Mr. Milner Holland's contention and to have come to the conclusion that the father did know perfectly well that he was going outside his powers. For myself I doubt very much whether it makes very much difference whether the father did or did not know that he was exceeding his powers, because, in the view which I take, oppressive conduct would not cease to be oppressive merely if it were unconscious, though of course it may be said—If I may be forgiven for once more borrowing a phrase used in connexion with

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a matrimonial cause—that which is done consciously strikes with a sharper edge. It seems to me that the question whether the conduct complained of was conscious or unconscious is more material on the question of what relief ought to be accorded. If, as the judge thought, the father persisted in his conduct well knowing it to be wrong, there can of course be less assurance of the discontinuance of such conduct in future, and therefore possibly all the more need for a stringent order to protect the interests of the shareholders. In conclusion, without discussing it in detail, I desire to associate myself with what my Lord has said with regard to the submissions made to us by Mr. Harold Brown, and I refer particularly to the submission that he made to us that it does not lie in the mouth of these petitioners to complain, having regard to the facts, first, that they acquired their shareholding very largely by way of gift in the first instance from their father himself and, secondly, that from the outset of the formation of the company it was recognised that the father himself intended to retain control.

For these reasons, and for those which my Lords have already given, I do not think there is any other course open to us but to dismiss the appeal. I am satisfied that this company was suffering damage, and is in danger of suffering further damage from the oppressive manner in which its affairs were conducted by the father; and I am satisfied that the petitioners, as shareholders (and I stress the words "as shareholders") and not merely as directors, were suffering and are in danger of suffering further from the damage inflicted on the company.

Appeal dismissed.
Leave to appeal refused.

Solicitors: *Haslewoods for Bosley & Co., Brighton; Henry Pumfrey & Son.*

J. A. G.

[COURT OF APPEAL.]

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Husband and Wife—Judicial separation—Form of decree—Practice—Adultery with three women found against husband—Only one of three women intervening—Direction to amend decree to show judge's findings—No valid distinction sustainable between man and woman served with proceedings and found guilty of adultery.

Husband and Wife — Collusion — Abandonment of charge — Leaving charge in abeyance.

Barrister—Private audience with judge—Case in open court—Matrimonial case—Right to be sparingly exercised.

A wife whose husband was domiciled in South Africa petitioned in 1953 for a decree of judicial separation. Her avowed purpose

was to obtain an order for alimony at a rate fixed by the court. She alleged against her husband cruelty and adultery with, among others, an unknown woman in 1949, with C. C. in 1952, and with S. N. (who was an intervener in the suit) in 1953 and thereafter. She asked the court to exercise its discretion in respect of her own adultery with H. in 1952. By his answer the husband admitted the adultery with C. C. and asked in turn for certain relief.

Before the hearing leading counsel for both parties saw the trial judge in his private room. At the hearing, counsel for the wife stated that the charges of cruelty would be left in abeyance; and the hearing proceeded as an undefended suit, the husband admitting the adultery with the unknown woman in 1949, with C. C. in 1952, and with the intervener S. N. in 1953 and thereafter. The judge found the adultery with three women proved and granted the wife a decree.

The formal decree, however, recited only the wife's adultery (in respect of which the court exercised its discretion in her favour) and the husband's admitted adultery with the intervener S. N. which had taken place after the wife's own adultery. An explanatory letter from the divorce registry stated that the decree was drawn in accordance with well-established practice, in that a woman was not named in a decree unless she had by intervening acquired the status of a male co-respondent.

The wife appealed, asking that the decree in her favour be set aside and that there should be a rehearing of her suit:—

Held (1) that the judge had not erred in not pronouncing on the charges of cruelty, since the wife had, by her counsel, agreed that those charges should be left in abeyance; nor was there evidence of a collusive arrangement, for to abandon or to leave in abeyance certain charges without consideration did not constitute collusion.

Butler v. *Butler* (1890) 15 P.D. 66 distinguished.

(2) That the decree of judicial separation should be amended to show the adultery with three women as found by the judge, for to leave it in its original form might prejudice the wife on any application for alimony.

Per curiam: There is no reason in principle why the practice of embodying in a decree of judicial separation the name of a man who has been served with proceedings and found by the court to be guilty of adultery should not apply similarly in the case of a woman.

Miller (formerly *Kozubowski*) v. *Kozubowski* [1956] 1 W.L.R. 93; [1956] 1 All E.R. 177n. applied.

The right of counsel to seek audience of the judge in his private room should be sparingly exercised in suits for divorce or judicial separation, for such suits are heard in open court, and nothing should be done to impair public confidence by even giving room for suspicion that any part of a public trial is being conducted behind closed doors.

APPEAL from Davies J.

A wife residing in the United Kingdom presented a petition for judicial separation dated December 23, 1953, against her husband, who was domiciled in the Union of South Africa. The petition, as amended at later dates, charged him with cruelty, and also with numerous specific acts of adultery with, among others, an unknown woman in October, 1949; with one Charlotte Coleson between May and December, 1952; with one Maureen Swanson

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in March, 1953; and with one Seignon Nystrom in May and October, 1953. A supplemental petition contained further allegations of adultery with Nystrom after the date of the original petition.

The husband by his answer admitted the adultery with Coleson, denied other adultery, and charged the wife with adultery with one Hall, against whom he claimed damages; and he prayed in his turn for judicial separation and for the exercise of the court's discretion in his favour in respect of his admitted adultery. The wife admitted adultery with Hall, beginning in October, 1952, namely, before the date of her petition, and asked the court to exercise its discretion in her favour.

The proceedings were avowedly instituted with the object of obtaining for the wife and children an order for alimony at a rate fixed by the court. Before the hearing there were frequent communications between the advisers of the parties. The wife swore (in an affidavit which was before the Court of Appeal and was referred to extensively in the judgment of the court) that efforts were made by her husband to get her to abandon the allegations of cruelty and the charges of adultery against Nystrom and Swanson, and to proceed only on the admitted adultery, but that she had firmly refused to do so.

Before the case was opened in court, leading counsel for both parties saw the judge in his private room.

When the case was opened leading counsel for the wife stated that the majority of the issues raised on the pleadings would not now be before the court. Summarizing the matters raised, he said: "On the petition and supplemental petition there are "charges of adultery with an unknown woman in 1949; that is "not now contested; with the intervener Seignon Nystrom in "1953, 1954, 1955 and 1956 . . . and that is not now contested. "There is an allegation of adultery . . . with a woman called "Charlotte Coleson in 1952 . . . and that is admitted in the "respondent's answer. There remains a charge of adultery "against the intervener, Maureen Swanson . . . in 1953 . . . I do "not propose to proceed with that charge. . . . In addition there "are charges of cruelty over a long period of the married life. . . . "It is not necessary for me to proceed with those charges today. "I want to make it quite clear in open court that I am in no way "abandoning or dropping those charges, but I am content in the "circumstances to prove the adultery and to let those charges "remain in abeyance. . . . I propose to proceed to prove the case "of adultery against the unknown woman, Charlotte Coleson "(which is admitted in the answer), and the woman Nystrom."

Counsel for the husband then made a statement on his behalf, and said, inter alia, that "a long-drawn-out fight . . . would "inevitably require a long and reasoned judgment from your "Lordship, which would receive eminent publicity . . . that "would be most adverse to the interests and welfare of the "children." Counsel then stated that it was better for the

husband that the wife rather than he should obtain a judicial separation, because she, as a woman, was in the privileged position of being able to petition for divorce in this country, while the husband, being domiciled in South Africa, would have to petition in that country. It was conceded that the wife should have the custody of the children, and it was stated that the husband was willing to maintain his wife and children properly. Counsel continued: "In these circumstances my client came to "the decision that it would be right and proper for him not to "defend these proceedings. So far as the adultery is concerned, "other than that charged against Miss Maureen Swanson, which "he wholly denies, he is taking the course which has been men-"tioned to your Lordship." A statement was then made by counsel for the intervener Swanson.

Those statements were made in the presence and hearing of the wife. She herself then gave evidence, and evidence in proof of the charges of admitted adultery was given on her behalf. At its conclusion her counsel asked for a decree on the ground of the husband's adultery with the unknown woman in 1949, with Charlotte Coleson, and with Seignon Nystrom. The judge replied: "Yes"; and he then acceded to an application that the intervener Swanson be dismissed from the suit.

The formal decree of judicial separation, however, showed on its face only that the court had exercised its discretion in favour of the wife in respect of her admitted adultery with Hall and pronounced the decree "by reason that the respondent has been "guilty of adultery with Seignon Nystrom, one of the inter-"veners . . ."; the effect of that being to show that the wife had committed adultery before her husband.

The wife entered a notice of appeal, asking that the decree of May 12, 1958, in her favour be set aside, and that there should be a rehearing of the suit on the grounds, inter alia, that the court had not inquired into the charges of cruelty against the husband; that those charges should have been heard, proved, and pronounced on by the court; and that though the court had accepted the husband's admissions of misconduct with an unknown woman in 1949 and with Charlotte Coleson, it had not decreed the judicial separation on the grounds of such adultery.

Before the hearing of the appeal, a letter was received by the husband's solicitors on behalf of the senior registrar to the divorce registry in reply to their request for an explanation as to the form of the decree complained of. The letter (which was read to the Court of Appeal) was as follows:

"The practice of the Registry on these matters is clear and of "very long standing. From 1857 onwards the woman named in "divorce proceedings seems to have enjoyed a privileged status. "She is, if possible, served with the proceedings, but she is not "made a co-respondent as a male adulterer is; unless she herself "intervenes or is made a respondent by direction of the court "(in practice under rule 5 (1)) her name never appears in the

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"title of the suit or in the decree. (The review of this subject in "*Leach* v. *Leach and Harrower*[1] may be of interest in this "connexion.) The only public mention of her name is therefore "in evidence at the hearing. It is not the practice to differentiate "between divorce decrees and judicial separations in this respect. "If the woman named does become an intervener or respondent "and thereby appears in the title of the suit, she is treated for "the purposes of the decree in the same way as a co-respondent. "A co-respondent is named in the body of the decree only if "(*a*) there is an order for costs against him, or (*b*) if there is a "specific finding of adultery against him: see *Miller* v. "*Kozubowski*.[2]

"The official notes indicate that the judge did find adultery "with the unknown woman and Coleson and Nystrom; but of "these three only Nystrom had by intervening acquired the status "equivalent to that of a co-respondent which resulted in her "being named in the decree. The decree is therefore drawn up "in accordance with the practice which is so well established that "the registry must clearly follow it unless formally directed to "do otherwise. It is interesting to note that although the Royal "Commission on Marriage and Divorce recommended abolishing "the distinction between women named and co-respondents (see "para. 946 of their report), this is not among the suggestions "which have so far been implemented."

The case is reported mainly on the decision as to the form of the decree of judicial separation, and the observations of the court as to the propriety of counsel seeing the judge in his private room before the hearing of a petition in open court.

The wife petitioner in person.

H. J. Phillimore Q.C. and *Victor Williams* for the respondent husband.

Joseph Jackson for the intervener Nystrom.

S. H. Noakes for the intervener Swanson.

R. J. S. Harvey for the party cited, Hall.

Cur. adv. vult.

December 18, HODSON L.J., reading the judgment of the court, said that although the decree was in her favour, the wife sought to appeal, not against the reasons for the decision, which would not be permitted, but against the failure, as she said, of the court to adjudicate on issues raised by her. His Lordship continued: She maintains that this failure to adjudicate will or may prejudice her in any application she may make here or elsewhere for divorce, or for ancillary relief by way of alimony or maintenance, and seeks a rehearing of the suit.

She says first that the gravamen of her complaint against her husband has always been his misconduct towards her amounting

[1] [1958] 1 W.L.R. 146; [1958] 1 All E.R. 320.

[2] [1956] 1 W.L.R. 93; [1956] 1 All E.R. 177n.

to cruelty, and that she has never abandoned the charge or assented to its being allowed to remain in abeyance. In the second place, she maintains that she proved a series of adulteries on the part of her husband which the judge found to have been established, but that only one of these found place in the formal decree of the court. In the third place, she says that the charges of cruelty were not put before the court because her counsel and solicitors without her instructions entered into a collusive agreement with their opposite numbers acting for her husband, and agreed that in consideration of her abandoning the cruelty charges and one adultery charge he would not proceed against a man with whom she had committed adultery, and would pay the costs of the woman concerned in a charge to be abandoned, and also would pay her solicitor and client costs. This agreement, she says, was carried out at the hearing, with the exception that nothing was done about solicitor and client costs. In this connexion she complains that, without her knowledge that such a thing was going to occur, her counsel and her husband's counsel saw the judge in his private room before the public hearing of the case.

The proceedings were avowedly instituted with the object of obtaining an order of the court for the wife's support. She had received in the past a substantial allowance from her husband, which had been reduced, and her intention was to obtain an order for alimony at a rate fixed by the court. A claim for alimony pendente lite and permanent alimony were included in the petition, and there were negotiations between the parties with a view to settling the rate of alimony, which never came to fruition. According to her affidavit sworn in certain custody proceedings, the husband was endeavouring directly and through a go-between to persuade her to take proceedings for divorce against him in consideration of a substantial money payment amounting to £100,000. The wife never accepted this offer, and no such proceedings were instituted in collusion with the husband.

[His Lordship then referred to the contents of the petition and supplemental petition and to the husband's answer, read from the statements of counsel when the case was opened, and continued:] Both these statements were made in the presence and hearing of the wife, and she recognizes that in allowing these statements to be made, apparently, so far as her counsel was concerned, on her authority, she was permitting the court to believe that she was not seeking at that time any adjudication on the cruelty charges. She seeks to explain the situation by saying that she was expressly told to keep quiet in court, and that during the hearing and before the hearing commenced she was in such a condition that she was not capable of giving, and did not give, any instructions to her counsel to proceed on the lines stated by him, at any rate so far as the charges of cruelty were concerned.

So far as the intervener Swanson is concerned, she does not now seek to reopen this matter, and, as we understand her, does

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not now maintain that the charges against this woman were abandoned without instructions. Her contention is that the charges of cruelty should have been proceeded with.

[His Lordship then read passages from an affidavit sworn by the wife which dealt mainly with her complaint that the charges of cruelty ought to have been tried and pronounced upon—on which the case is not fully reported—and continued:] In our opinion the wife cannot escape from the position that the charge of cruelty was left in abeyance on her instructions, albeit reluctantly given. She herself in a passage from the affidavit which has been read shows that she told counsel to do the best that he could for her after she had been told that she would have to abandon the charges of cruelty and the charge of adultery against Swanson. At the same time she made it plain that she was not going to drop the charges against Nystrom. This was done in emphatic language by which she told her solicitor to tell the husband's solicitors to drop dead. It would seem, therefore, that she was then in command of the situation. There is no question but that the cruelty charges were not abandoned, notwithstanding one sentence of her counsel's statement which we think was not intended to be inconsistent with what he had previously said. In these circumstances there is no question of any judgment against the wife involving the cruelty allegations.

[His Lordship then referred to other matters relevant to the same complaints, and concluded:] In our opinion the wife has not succeeded in showing that the court was in error in not pronouncing on the cruelty charges or that they were left in abeyance without her instructions.

On the second matter raised on this appeal as to the form of the decree, counsel for the husband agrees that the form of the decree does not set out the findings of the judge. The wife justly points out that a reference to the record, including the final order and pleadings in the case, reveals only that she had committed adultery, and that her husband had subsequently committed adultery with Nystrom. That, on an application for alimony, might well lead the court to infer that she was disentitled to any alimony except possibly by way of compassionate allowance.

In *Miller* (formerly *Kozubowski*) v. *Kozubowski* [1] Mr. Commissioner Latey acceded to an application to have embodied in the decree of judicial separation the name of a man who had been served with proceedings and who had been found by the court to be guilty of adultery.

We see no reason in principle why this practice should not be followed in the case of a woman who has been served with a petition and found guilty of adultery. The decree should, we think, be amended to give effect to the judge's findings on the issues on which he was asked to adjudicate and did adjudicate.

[1] [1956] 1 W.L.R. 93; [1956] 1 All E.R. 177n.

The record will then show that the husband had embarked on his adulterous career before the wife.

On the third matter, we have already said that the wife gave authority to her counsel to proceed with the suit in accordance with the statement made by counsel. She cannot, therefore, be heard on appeal to this court to say that there was a collusive agreement between herself and the husband in the prosecution of the suit. Since, however, she has maintained that she was not a party to any agreement, it is right to say that on the statements made by counsel to the court the judge was not in error in finding, as he impliedly did, that there was no collusion, and pronouncing a decree accordingly. There is nothing in those statements which indicates that the parties were acting in collusion. It cannot be incumbent on the parties to proceed with any allegations made in the suit to the bitter end once those charges have been made, and it does not seem to us that if, for reasons which seem good to the parties, charges are abandoned or left unproved without consideration, the court must regard the proceedings as collusive and dismiss the petition. This is not a case where the parties by agreement between them have prevented material matters from being brought before the court. *Butler* v. *Butler* [2] was a wholly different case, in that it was found on the facts that there was a concluded agreement between the parties which involved the suppression of a charge, and the decision of the court turned on whether or not that could not be collusive because there was doubt as to the truth of the allegation.

There remains the complaint that the judge wrongfully saw counsel in his room before the hearing. The court was not informed, neither did it inquire, as to the purpose of the visit of counsel to the judge. It remains the fact that the judge was satisfied as to the absence of collusion at the conclusion of the hearing.

We are, however, bound to say that, although, as history shows, the right of counsel to seek the assistance of the court has always been retained where questions of honour or professional conduct are concerned, it seems that this right should be sparingly exercised, for the responsibility for presentation of cases to the court is the responsibility of counsel. We do not, of course, seek by giving an example to close the list of cases where audience may be properly sought. In cases such as the present the right should but rarely be exercised, for there can be no compromise, and the judge is himself to be asked to hear the case in which the application is made, and in so doing to determine not only questions of law but also issues of fact. Suits for divorce and judicial separation are heard in open court notwithstanding the restrictions on newspaper reporting imposed by Parliament, and nothing should be

[2] (1890) 15 P.D. 66.

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done to impair public confidence by even giving room for suspicion that any part of a public trial is being conducted behind closed doors. These considerations were no doubt present to the mind of the judge when he allowed counsel to see him, and we see no reason for holding that because in fact the judge did see counsel the proceedings were defective.

The appeal will be allowed, therefore, to the extent necessary to correct the record and no further.

Appeal dismissed, save as to form of decree. Decree varied accordingly. No order for costs, save those of the second intervener, Swanson.

Solicitors: *G. & G. Keith; Summer & Co.; Withers & Co.*

M. M. H.

[HOUSE OF LORDS]

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Nov. 11, 12, 13; *Dec.* 18.

* SMITH . . . . . APPELLANT;

AND

AUSTIN LIFTS LTD. AND OTHERS . . . RESPONDENTS.

Presumption—Rebuttable—Occupier—Change of condition of premises—Whether effected by occupier.

Occupiers' Liability—Knowledge of invitee of danger—"Full appreciation"—Workman used to premises.

Negligence—Safe system of work—Access to place of work—Work on third party's premises.

A fitter employed by a company whose business was maintaining and repairing lifts was sent by his employers to overhaul the lift at certain premises in which the machine house was on the roof and access to it was up a fixed ladder and through double doors the base of which was 11 feet 5 inches above roof level, those doors being secured by two bolts on the inside of the left-hand door at top and bottom and another bolt on the outside of the right-hand door. He had often been there in the course of his duty and knew that the left-hand door was defective because the lower hinge was broken. He had reported this to his employers who had informed the occupiers four times but the occupiers did not remedy it. The last time the employee had been at the premises he could not bolt the defective door nor replace it in position so he had tied the doors together with wire. On his subsequent visit he found the left-hand door jammed inside the machine house and the right-hand door open. The evidence was that this change in the condition of the doors was brought about by some human agency. At the top of the ladder he tested the left-hand door for handhold, grasping it low down. It seemed safe and he grasped it higher up to help

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† *Present*: VISCOUNT SIMONDS, LORD MORTON OF HENRYTON, LORD REID, LORD SOMERVELL OF HARROW and LORD DENNING.

himself in, but it gave way and he fell, sustaining injury. In an action against his employers and the occupiers the trial judge held them both liable in the proportions of 20 per cent. and 80 per cent. respectively. The Court of Appeal held that they were not liable. On appeal:—

Held, (1) that the occupiers were liable to the plaintiff as invitee, although he knew that the doors were defective.

Per Viscount Simonds, Lord Morton and Lord Somervell. Because an inference of fact should be drawn that the change in condition of the doors was by the act of the occupiers or their servant, and the plaintiff did not fully appreciate the risk created by them for him.

Per Lord Reid and Lord Denning. Because, although that inference could not be drawn, the plaintiff did not fully appreciate the danger.

(2) (Lord Reid dissenting) that the employers were in breach of their duty to the employee in failing to see that the place where he was required to work was reasonably safe.

Per Viscount Simonds. I deprecate any tendency to treat the relation of employer and skilled workman as equivalent to that of a nurse and imbecile child.

London Graving Dock Co. Ltd. v. *Horton* [1951] A.C. 737; [1951] 1 T.L.R. 949; [1951] 2 All E.R. 1, applied.

Decision of the Court of Appeal reversed.

APPEAL from the Court of Appeal (Lord Evershed M.R., Morris and Pearce L.JJ.).

This was an appeal by Harry Smith, who was plaintiff in the action, from an order of the Court of Appeal dated July 16, 1957, whereby it was ordered that the appeal of the second-named respondents (the second defendants) Annie Mary McDonald, married woman, Evelyn Louisa Beere, married woman, and Audrey Metcalfe Daglish, married woman (executrices of the estate of G. R. S. Baker, deceased), should be allowed and that the appeal of the first-named respondents (the first defendants), Austin Lifts Ltd. should also be allowed and that the judgment of Oliver J. dated February 17, 1957, be wholly set aside.

The facts are fully set out in their Lordships' opinions.

Martin Jukes Q.C. and *R. P. Smith* for the appellant.

George Waller Q.C. and *C. P. Heptonstall* for the first-named respondents.

H. Nelson Q.C. and *H. C. Scott* for the second respondents.

The following authorities, besides those cited in their Lordships' opinions, were referred to in argument: *M'Quilter* v. *Goulandris Brothers Ltd.*[1]; *Indermaur* v. *Dames*[2]; *Greene* v. *Chelsea Borough Council*[3]; *Slater* v. *Clay Cross Co. Ltd.*[4]; *Wells* v. *Cooper*[5]; *Woodward* v. *Hastings Corporation*[6]; *Howard* v.

[1] 1951 S.L.T. 75.
[2] (1866) L.R. 1 C.P. 274.
[3] [1954] 2 Q.B. 127; [1954] 3 W.L.R. 12; [1954] 2 All E.R. 318.
[4] [1956] 2 Q.B. 264; [1956] 3 W.L.R. 232; [1956] 2 All E.R. 625.
[5] [1958] 2 Q.B. 265; [1958] 3 W.L.R. 128; [1958] 2 All E.R. 527.
[6] [1945] K.B. 174; 61 T.L.R. 94; [1944] 2 All E.R. 565.

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Furness Houlder Argentine Lines Ltd.[7] and *Garcia* v. *Harland & Wolff Ltd.*[8]

Taylor v. *Sims and Sims*[9] and *A. C. Billings & Sons Ltd.* v. *Riden*[10] were not referred to in argument.

Their Lordships took time for consideration.

Dec. 18. VISCOUNT SIMONDS. My Lords, the appellant, a fitter in the employment of the first respondents, Austin Lifts Ltd., in the course of that employment on May 14, 1955, suffered a somewhat serious injury on certain premises in Newcastle-upon-Tyne of which the other respondents, whom I will call "the "second respondents," were the occupiers. He accordingly brought the action against them out of which this appeal arises, claiming (to put it briefly) that they had respectively failed to observe the duty of care that they owed to him.

The first respondents carry on the business of repairing and maintaining lifts and were at the relevant time under contract with the second respondents to repair and maintain a lift upon the premises that I have mentioned. The winding mechanism of this lift was situate in a machine house upon the roof of the premises and access to it was gained by means of a fixed iron ladder leading to double doors at the entrance to the machine house. The base of these doors was at a height of 11 feet 5 inches above the roof. Before the day of the accident the appellant had, in the course of his duty, paid many visits to the machine house and was well aware that the lift door was in a defective condition owing in particular to the lower hinge being broken, so that it was suspended from the upper hinge. He or another had reported this to his employers and they in turn had on no less than four occasions reported it to the second respondents three times in their monthly routine reports of February, March and April, 1955, and once in a letter of April 21, 1955. In each of the routine reports the same remark was made: "Machine house "door broken." In the letter it was said: "The machine room "doors need refixing in position." There was, I think, nothing in these reports to suggest any danger, and I would suppose that they were a warning to the occupiers that, if the doors were not repaired, the machinery would be exposed to the weather. At any rate, the second respondents took no action upon the reports apart from a single incident which has had great importance in the case and to which I will presently refer, nor did the first respondents think it fit to pay any special visit of inspection.

Before I come to the day of the accident I must say something more about the doors. They were designed to be secured by bolts on the inside of the left door at top and bottom and by a

[7] [1936] 2 All E.R. 781; 41 Com. Cas. 290.

[8] [1943] K.B. 731; 60 T.L.R. 16; [1943] 2 All E.R. 477.

[9] (1942) 167 L.T. 414; 58 T.L.R. 339; [1942] 2 All E.R. 375.

[10] [1958] A.C. 240; [1957] 3 W.L.R. 496; [1957] 3 All E.R. 1.

bolt on the outside of the right-hand door about midway between top and bottom. It appeared from the evidence that the top bolt on the left side was never bolted and it may be disregarded. This being so, there seem to have been two ways of getting from the ladder into the machine house, either by undoing the outside bolt, pulling up the inside bolt on the left door, opening both doors and climbing in with the aid of such handhold as could be obtained from the machine within, or by undoing the outside bolt. opening the right door only and climbing in through the gap left by that opening with the aid of a handhold upon the left door which was still closed. There was some discussion which was the "proper" or "natural" way of entry. I think that nothing turns on this. Either way was a proper and natural way, but the latter way only so long as the left door was secure.

On April 27 the appellant visited the premises for the last time before the day of the accident. As I have said, the lower hinge of the left door was then broken and he so found it. It hung suspended from the upper hinge. He could not bolt it in nor replace the door in its proper position. He did the best he could and that was to tie the doors together with wire to keep them closed. On May 14 he went to the premises again to replace some wire ropes. Two other employees of the first respondent, Wells and Fincram, accompanied or preceded him. On his arrival he found the right door open and the left door jammed inside the machine house. He mounted the ladder and decided to enter by the right door. He tested the left door for a handhold. In his own words: "I put my left hand on to the "door and gave a tug to try to budge it, it seemed safe enough; "I tried to get in; I put my right hand on the floor and the left "on the door, and the door gave and caused me to lose balance "and I fell off the ladder altogether." Two other things should be mentioned. First, it seems clear that, when he gave the door the preliminary tug to test it, he held it near the floor, but, when he put his weight upon it to lever himself up, he held it higher up, and it was this which caused the door to give. The door remained jammed at the bottom. Secondly, Wells, who had earlier on the same day climbed the ladder and entered the machine house, found the left door jammed in and the right door open. He made a safe entry.

My Lords, the case has, I think, taken a somewhat unusual course. The learned trial judge, Oliver J., decided in favour of the appellant against both his employers and the occupiers, but was reversed by the Court of Appeal on the ground that his findings of fact were not justified by the evidence. There was, I think, no difference of opinion about the relevant law. The learned Master of the Rolls himself, after concluding that neither defendants were liable, said that, if the findings of the learned judge which he had recited could have been justified on the evidence, the result might well have been otherwise. Such a conclusion might well involve a prolonged consideration of all

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the evidence, but it appears to me that there is little in dispute and that the case must turn upon the proper inference to be drawn upon a very few salient points.

Let me take first the case of the second respondents, the occupiers. Their relation to the appellant was that of invitor and invitee and the relevant law was that applicable before the recent Act. I should, therefore, but for a single fact, have had no doubt that they were under no liability for the appellant's accident. If on May 14 the appellant had found the condition of the doors just as he had left them or even if the wire had been untied and the left door was swinging loose, I should have thought that the law as laid down in *London Graving Dock Co. Ltd.* v. *Horton*[1] was fatal to the appellant's claim. But a fact, which was to my mind decisive, intervened. The doors on May 14 were not as they had been left on April 17. On the contrary, the left door had by some means been lifted and wedged down so as to give the appearance of security. Yet it was not secure: apparently firm, it gave when the appellant used it to lever himself up. This was the direct cause of the accident. It must be asked, then, how was the condition of the doors altered? The learned judge drew the inference that it was by the act of the occupiers or their servant. The Court of Appeal held that there was no evidence from which this inference could be drawn. Now, I do not say it would be necessarily conclusive against the appellant if such an inference could not be drawn. But it is not necessary to determine that. For, if it can and should be drawn, then it is, in my opinion, clear that an unusual danger was created for the appellant which not only was or should have been known to the second respondents but was due to their own act. It may be said at once that the evidence is unclear and that any conclusion must rest on a balance of probabilities. But some conclusion must be reached and I think that the learned judge reached the right one. By what agency was the wire removed and the door lifted and wedged? Surely by a human agency, though a freakish wind was suggested. And if by a human agency, then whose was the hand? Not that of an eccentric trespasser but that of a servant or agent of either the first or the second respondents. Here lies the choice and, weighing the probabilities as best I can, I accept the conclusion of the learned judge. The deed was done between April 27 and May 14. On the later day Wells was the first of the employers' workmen on the scene and found the left door jammed. It was not suggested to him nor to the appellant nor to Mr. Lickley, the managing director of the first respondents, that any visit had been paid to the machine house between the two days. The evidence of Mr. Lickley appears rather to negative it. I am left with the second respondents and, though I do not ignore the fact that they were not physically in occupation of these premises nor the evidence

[1] [1951] A.C. 737; [1951] 1 T.L.R. 949; [1951] 2 All E.R. 1.

of Mr. Webb, their agent, I find it inherently probable that, having been repeatedly warned about the condition of the doors, they should have taken some steps, however temporary and inadequate, to remedy the situation. The premises were theirs; the duty to repair the doors was theirs, though they may have tried to shift it; the responsibility for what was done must be theirs, unless they can prove that it lay with another. That they did not prove and in fact made little effort to prove. In the result, therefore, I conclude that the appellant as invitee did not fully appreciate the risk which had been created for him by the second respondents. He had, it is true, an apprehension of some risk, for he had given the door a preliminary tug, but he did not appreciate, nor could have reasonably been expected to appreciate, that, though resistant to a tug at the bottom, the door would give way if pressure was applied higher up. Upon this part of the case the judgment of the Court of Appeal should be set aside and that of the learned judge restored, and I would only add that I do not intend to cast any doubt on the authority of such cases as *Christmas* v. *General Cleaning Contractors Ltd.*[2] and *Bates* v. *Parker*,[3] which are clearly distinguishable.

I turn, then, to the first respondents, the employers. Here I have greater difficulty. It was their duty to see that the place at which their workmen were to work was reasonably safe. That is a generalization which can only be applied after a consideration of what is in all the circumstances reasonable, and it is, I think, always important to bear in mind a principle emphasized in *Winter* v. *Cardiff Rural District Council*[4] that there is a sphere in which it is reasonable to leave to a skilled workman the decision whether the difficulty that he encounters is one in which he needs help. I deprecate any tendency to treat the relation of employer and skilled workman as equivalent to that of a nurse and imbecile child. But, that being said, I am not prepared to differ from the majority of your Lordships that here the learned judge was justified in deciding that the employers fell short of the duty of reasonable care which they owed to the appellant. I will not elaborate this point upon which your Lordships, feeling more strongly, will no doubt speak more convincingly.

Upon the footing that the employers and the occupiers were both responsible in law for the accident to the appellant, I see no reason for altering the apportionment of damages made by the learned judge. It only remains to say that upon the facts as found by him no case for finding contributory negligence by the appellant was made out.

The judgment of the Court of Appeal must, in my opinion, be set aside and the judgment of Oliver J. restored with costs here and below.

[2] [1952] 1 K.B. 141; [1951] 2 T.L.R. 1218; [1952] 1 All E.R. 39, H.L.; [1953] A.C. 180; [1953] 2 W.L.R. 6; [1952] 2 All E.R. 1110.

[3] [1953] 2 Q.B. 231; [1953] 2 W.L.R. 642; [1953] 1 All E.R. 768.

[4] [1950] 1 All E.R. 819.

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LORD MORTON OF HENRYTON. My Lords, I have arrived at the conclusion, though with considerable doubt, that this appeal should be allowed and the order of Oliver J. restored.

I shall refer to the appellant as "the plaintiff," to the first respondents, Austin Lifts Ltd., who were the employers of the plaintiff, as "Austins," and to the other respondents, the occupiers of "Baker's Buildings," the block of office buildings whereon the accident occurred, as "the occupiers."

I find it convenient to consider first the case against the occupiers. The learned judge drew the inference that the left-hand door had been forced inside the machine house by a servant or agent of the occupiers. I use the word "forced" because the lower edge of the door overlapped the floor of the machine house by one inch and the upper edge of the door overlapped the roof of the machine house by three-quarters of an inch. It would therefore be necessary to lift the door inside the machine house, holding it at an angle, and then to push it inwards until it became wedged between the roof and the floor. It was, of course, possible to hold the door at an angle because the lower hinge was gone.

Was the learned judge justified in drawing the inference which I have just mentioned? It was not suggested that any employee of Austins visited the machine house between April 27 and May 14, 1955, but four possible answers were suggested to the question: "How did the door become fixed in the position in "which the plaintiff found it on the afternoon of May 14?" They were: (1) The wind blew it into that position. (2) It was moved into that position by (*a*) the witness Wells, who went into the machine house on May 14 before the plaintiff arrived there, or (*b*) a servant or agent of the occupiers, or (*c*) some other person.

My Lords, I would rule out the first answer because, even if one accepts the possibility of wind blowing into that position a door which had the overlaps already mentioned, it hardly seems possible that any wind could have undone the wire with which the plaintiff had fastened the two doors together on April 17. Answer (2) (*a*) must also be ruled out, for Wells said that he found the left-hand door wedged in, and the right-hand door open, when he first went up the ladder, and the learned judge accepted his evidence. Answer (2) (*c*) is difficult to accept. It is difficult to believe that anyone working in the office of a tenant in Baker's Buildings would get out on the roof of the building, climb some 12 feet up an almost perpendicular ladder exposed to the wind, and, finding himself confronted by two doors wired together, would undo the wire and force the left-hand door into the position in which Wells and the plaintiff found it. The only other possible answer is (2) (*b*), that some servant of the occupiers or of the agents, Messrs. Storey, Son & Partner, who managed this block of offices for the occupiers, had gone up to inspect the damage to the door between April 27 and May 14, had undone the wire

for the purposes of his inspection and had fixed the left-hand door in the position in which the plaintiff found it on May 14.

On April 20, 1955, Austins had written to Messrs. Storey, Son & Partner a letter whereof the relevant parts are as follows:

"For the attention of Mr. Sisterson.

"Dear Sir,

"In connection with recent correspondence and our discussion "last week, we have had an examination made of the general "state of the four Austin lifts in Baker's Buildings with which "you are concerned. . . . No. 3 Lift. . . . The machine room "doors need refixing in position. . . . We should be glad to have "the opportunity of discussing the whole question of those lifts "again at your convenience."

The next day, April 21, Austins sent a written report to Messrs. Storey, Son & Partner which contained the item "Machine house "door broken." A similar report had been made on February 2 and March 2, after monthly inspections by employees of Austins.

In view of these three reports, and the letter of April 20, it seems to me quite likely that Mr. Sisterson, the addressee of the letter, or someone instructed by him, went up to inspect the doors which "needed refixing" before he attended the suggested discussion, and for the purposes of any proper inspection it would have been necessary to undo the wire. It is true that counsel for the occupiers called as a witness Mr. Webb, who was "the "manager for the estate agents who manage the property," and he took the view that Austins were liable to repair the doors. He also said that Austins had never requested him to do any repairs to the door. The lifts maintenance contract entered into by Austins is in evidence, and I think Mr. Webb's view was clearly wrong, but in any event this evidence does little or nothing to make less likely a visit of inspection by Mr. Sisterson or someone instructed by him.

For these reasons, my Lords, I think the learned judge was quite justified in drawing the inference that the occupiers, by their servants or agents, had brought about the state of affairs which confronted the plaintiff on the afternoon of May 14. If this is so, I feel no doubt that the door, in the position in which he found it, constituted a trap, and was a new and unusual danger, which the occupiers, by their servant or agent, had brought into existence and of which the plaintiff was ignorant. This being so, the plaintiff is entitled to damages as against the occupiers, unless it can be said that he used the door as a hand-hold to help him into the machine house "with full appreciation "of the danger," to quote the words of Lord Porter in *London Graving Dock Co. Ltd.* v. *Horton.*[5]

My Lords, I have felt great doubt on this point. The plaintiff knew that the lower hinge of the door was broken, and his account of the accident, as given in his evidence in chief, was as follows:

[5] [1951] A.C. 737, 747.

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"I was holding on to the ladder; I got as near to the top of the "ladder as possible; I put my left hand on to the door and gave "a tug to try to budge it, it seemed safe enough; I tried to get "in; I put my right hand on the floor and the left hand on the "door, and the door gave and caused me to lose balance and I fell "off the ladder altogether."

"OLIVER J.: Did the door open? A. No, the door did not "come away altogether, it just gave."

Later he added: "the door gave just a few inches and caused "me to lose balance." Now it seems to me, my Lords, that when the plaintiff "gave the door a tug to try to budge it" he must have appreciated that if the door gave way he was in danger of falling. To that extent and at that moment he "appreciated "the danger." Then, after giving it a tug, as he said, "it "seemed safe enough." In cross-examination he was asked: "Did you put a considerable proportion of your weight upon it?" (that is, upon the door), and he said: "Yes, when I first tried it." He was then asked: "But did you do that when you were trying "to scramble in?" and answered: "Yes, I had to, to get my "right hand on the wheel house floor." So it is clear that, after giving the door a tug, he believed for a moment, wrongly, that it would not move if he used it as a handhold.

I understand that the majority of your Lordships are of opinion that in these circumstances the plaintiff can be said not to have had "full appreciation of the danger," within the meaning of the rule stated by Lord Porter and accepted by the majority of this House in *Horton's* case.[5] I have doubts on the point, but they are not strong enough to lead me to dissent.

I now turn to the case against Austins. My Lords, I would hold Austins liable because they were the plaintiff's employers, and they did not take reasonable care for his safety. I would accept, as did the Master of the Rolls, the language of Lord Oaksey in *Paris* v. *Stepney Borough Council*[6]: "The standard "of care which the law demands is the care which an ordinarily "prudent employer would take in all the circumstances." Oliver J. held that Austins fell short of that standard and I agree with him.

What were the circumstances? From February 2 onwards Austins knew that the left-hand door was broken. They knew because their employees had reported the fact to them. Austins reported it four times to Messrs. Storey, Son & Partner, in the three notices and letter the terms whereof I have already set out. I can well understand that, having reported it on February 2, they expected Messrs. Storey to put it right, but when this did not happen before the inspection on March 2, and their employees again reported the condition of the door, they should have taken steps to see that it was put right before the next inspection. True, they did not own the machine house and its doors, but

[6] [1951] A.C. 367, 384; [1951] 1 T.L.R. 25; [1951] 1 All E.R. 42.

they could have insisted on Messrs. Storey either repairing the door or allowing Austins to repair it. I think it is clear that the condition of the left-hand door made entry to the machine house from the top of the ladder distinctly more dangerous. Oliver J. held that "the proper way of getting in was . . . to draw the bolt, "supposing it to be shut, open the right-hand door back against "the building and then, having first ascertained that the bottom "of the left-hand door, at any rate, was securely bolted on the "floor, use that shut and held-fast door as a means of getting in "by holding on to it when one has to take one's hands off the "top of the ladder as, of course, one has, in order to get in." He was justified in holding that this was at least *a* proper way to get in. The plaintiff normally opened both doors, but other witnesses used the method described by the learned judge, and it was rendered impossible by the absence of the lower hinge.

My Lords, Austins knew of the state of disrepair of the door throughout the period from February 2 to May 14, and I agree with the learned judge's comment: "I should hold that the "employer would be under a duty in the circumstances, after he "had been communicating again and again with the occupiers "and nothing had been done, to go and see if it had been done "and see if the place was safe or reasonably safe for his servant. "In those circumstances, on the facts of this case, it seems to "me that I must say that the employer is in part liable."

For these reasons, my Lords, I think that the plaintiff ought to succeed against both respondents, and I would not disturb the learned judge's apportionment of the blame as to 80 per cent. to the occupiers and as to 20 per cent. to Austins.

I see no ground for holding that the plaintiff was guilty of contributory negligence. He was confronted by a trap, and he fell into it.

I would allow the appeal and restore the order of Oliver J.

LORD REID. My Lords, the duties of the first and second respondents were different. The first respondents were not occupiers of the premises and they had no obligation to repair the door. But it was their duty to take such steps, if any, as a reasonable employer, careful of the safety of his servants, could and would have taken in light of the knowledge of the situation which the first respondents had or ought to have had. They knew what the situation was when the doors were in proper repair, and they had received reports from their servants after the preceding three monthly inspections made under their contract with the occupiers to maintain the lifts. We know nothing of what was reported to the employers on the first two occasions except that in routine reports to the occupiers following the inspections they added—"Remarks. Hole in car floor. Machine "house door broken." The last inspection was made by the appellant, apparently on April 27, 1955; he merely says that he "reported the unsatisfactory condition of that door" to his

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employers. There is nothing in the evidence to suggest that at that time he thought this was in any way dangerous, he only said that "it was not a very easy thing to get up" and that he made no complaint. If it could have been said that he had reported that there was any danger, that would have been such a strong point in his favour that it is impossible to suppose that it would not have been brought out in the evidence.

If the employers' managing director is to be believed—and there is no suggestion that he was not a reliable witness—these reports did not cause him to think that there was any danger. He knew the place and he only thought that the condition of the doors would make it more difficult to get in to the wheel house. He was concerned that the machinery there should be protected from the weather but he understood that, notwithstanding the condition of the doors, they were being kept shut. The appellant had in fact tied them together with wire because owing to the damage they could not be bolted. In the routine report to the occupiers which followed this inspection by the appellant, the employers repeated the same "remarks" as before and in a letter dealing with a number of defects in the lifts they said: "The machine room doors need refixing in position."

In fact I do not think that there was any substantial danger for a skilled and experienced man like the appellant if the condition of the doors had remained as it was in April. Certainly there was not then the kind of danger which caused the accident. But an argument was submitted that by their pleadings the first respondents have admitted that there was serious danger and that they cannot now be heard to say that there was not. In their defence in support of a plea of volenti non fit injuria it is said: "Well knowing that the said doors had been in a serious and "dangerous state of disrepair on the occasion of his previous visit "to the machine house, the plaintiff . . . voluntarily incurred "the risk . . ." In Further and Better Particulars there is some confusion between the state of affairs in April and that at the time of the accident. I hesitate to express an opinion on a matter of English pleading but I find that Lord Evershed M.R. said: "The "particular paragraph I think was intended (though I am bound "to say it was not clearly so expressed) by way of an alternative "plea—saying in other words that if it was in a dangerous con-"dition then the plaintiff knew all about it and voluntarily "accepted the risk." I think, therefore, that I should disregard what is in the pleadings, particularly as this does not expressly relate to what the first respondents knew or ought to have known.

What then was the first respondents' duty after receiving the appellant's report in April? It was not argued that they had failed in their duty to him before that by letting him use this route to the wheel house in April. Oliver J. said: "In this case "the employer knew just as well as the occupier the condition of "the thing. He was put on inquiry. I do not say that he knew "that the door had not been secured, but I should hold that

"he would be under a duty in the circumstances, after he had "been communicating again and again with the occupiers and "nothing had been done, to go and see if it had been done and "see if the place was reasonably safe for his servant." Why was he put on inquiry? I would agree that he would be if he knew or ought to have known that there was any substantial danger.

There was in April a potential danger, but that potential danger had existed from the time when the lower hinge of the door gave way sometime before February. What happened to the loose door between the April and May visits could have happened at any time during the preceding two months and I do not see why the mere lapse of time since the hinge gave way put a heavier duty on the first respondents.

These respondents could not reasonably have done any more than they did prior to the day of the accident, May 14. They urged the second respondents to repair the doors. The second respondents did not do so because they held that this was the duty of the first respondents under their contract. In this the second respondents were held to be wrong and they now accept the finding that it was their obligation to make the repair. Of course, the first respondents might have repaired the door themselves but that would have been tantamount to an admission that the second respondents were right in their interpretation of the contract and we do not know what further difficulties this would have created. In any event it is not found as a ground of fault that the first respondents ought to have repaired but did not repair the doors. And to have made an inspection some time before the day of the accident would have been of little value because the condition could deteriorate rapidly: we do not know how long before the day of the accident the door became jammed.

So the first respondents had to choose on the day of the accident between sending the appellant to work as they did and making an inspection before any of their servants went up the ladder into the wheel house. They sent three men that day and their managing director said in evidence: "If the men were sent "out by the foreman it was their responsibility to organise the "work there and overcome any small snags: if they wanted "additional help they could communicate with the works or with "the property owners." I think that he was justified in taking that course and, if authority be required, I would refer to the speeches in this House in *Winter* v. *Cardiff Rural District Council* [7] and to the judgments in the Court of Appeal in *Wilson* v. *Tyneside Window Cleaning Co.*[8] I find it hard to believe that any employer in real life would in similar circumstances have made a special inspection before allowing experienced men to go to work.

There must be countless cases where an experienced man is

[7] [1950] 1 All E.R. 819.

[8] [1958] 2 Q.B. 110; [1958] 2 W.L.R. 900; [1958] 2 All E.R. 265.

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sent to do work in places the present condition of which is unknown to him or his employers. He is left to use his own judgment when he sees what the conditions are. No doubt it is a question of degree whether the conditions, on the information which the employer has, are likely to be so bad that it is unfair to leave it to the man himself to decide what to do. But the present case appears to me to fall far short of that. I think it not unimportant to note that another man, Wells, who accompanied the appellant, went up the ladder and entered the wheel house more than once during the day but before the accident happened to the appellant, and that he used precisely the same method as that used by the appellant but did not suffer from any movement of the jammed door when he took hold of it. I I would dismiss the appeal as regards the first respondents.

Turning to the case against the second respondents, I am unable to agree that there are grounds for inferring that the door was jammed by some person for whom they are responsible. Mr. Webb, the person who manages the property for the second respondents, said that he did not act on the first respondents' reports to do any work on the doors: his reason, as I have already said, was that he thought that this was the responsibility of the first respondents. It must, in my view, be accepted that no one did anything to the doors on his instructions because he was not cross-examined on this point. I agree that on the evidence of Wells it must be accepted that the door was already jammed when the first respondents' men arrived on May 14, so the jamming must have been done by some unauthorized person or by natural agency—the wind. It is not easy to imagine why any unauthorized person should go near the place and still more difficult to imagine why he should leave things in the condition in which they were found on May 14. The damaged door was jammed but the other door was left open to flap in the wind: there was nothing to which it could be fastened. I could understand the possibility of someone hearing the doors flapping and going up to stop that, but in fact what was done was most irrational and would not stop flapping. If this was done by some unauthorized person I cannot assume that he was a servant of Mr. Webb or of the second respondents or that he was acting within the scope of his employment in doing it; there does not appear to have been a caretaker in the building.

I am not at all satisfied that the wind could not have jammed the door. Looking at the plans it is not easy to see how this could happen but a strong wind can do unexpected things, and the plans represent the doors after repair. They may not have been exactly the same before. The doors had previously been tied together with wire, but we do not know what kind of wire or whether the force of the wind might have broken it. Moreover, Wells, a witness for the plaintiff, in his evidence twice refers to the jammed door as having been "blown in." He was not cross-examined about this and no one else appears to have said

anything about how the door had come to be jammed. I cannot now say in the absence of evidence that that was impossible, and, even if it was, to find that the person who jammed the door was some one for whose action the second respondents were responsible seems to me to be a guess rather than a legitimate inference.

But that does not mean that the second respondents must succeed. It is true that they knew no more of the facts than the appellant did. But that is not enough to bring them within the shelter of *London Graving Dock Co. Ltd.* v. *Horton.*[9] The primary duty of an invitor is to do all that is reasonable to remove unusual danger to the invitee of which he has or ought to have knowledge. It would have been reasonable and indeed easy to repair this door. But by reason of *Horton's* case [9] the invitor is not in breach of duty if by means of his warning or otherwise the invitee recognises "the full significance of the risk" (per Lord Porter [10]) or has "full knowledge of the nature and the extent of "the danger" (per Lord Normand [11]). The test is not whether he agreed or whether he was free to agree to accept the risk: it is whether he had a sufficient appreciation of the danger. In this case the appellant saw the position and realized that there might be danger because he tested whether the door would hold before putting his weight on it. But in my view his appreciation of the danger fell a good deal short of what is required. Another man might have had a greater appreciation but as I read the speeches of the majority in *Horton's* case,[12] the test which they require is subjective. The other defence open to these respondents is that this was not an unusual danger of which they had or ought to have had knowledge. This appears to me to raise difficult questions. I do not think that any useful purpose would be served by discussing it in detail because the doubts which I have with regard to it are not sufficient to require me to dissent from the conclusion that this appeal as regards the second respondents should be allowed.

LORD SOMERVELL OF HARROW. My Lords, I think that the door in the position in which the plaintiff found it was a trap. It appeared to be firm but shifted at the crucial moment when he put weight on it in order to raise himself into the loft. To use the door in this way was a natural way to get in though the plaintiff normally opened both doors. He could not do that when the door was jammed as it was.

He knew the door was defective, but did he realize the full extent of the risk? The learned trial judge clearly regarded him as a reasonably careful man and not himself to blame. He reasonably thought it was firm and would afford sufficient and steady support. It did not and that constituted the risk which

[9] [1951] A.C. 737.
[10] Ibid. 748.
[11] Ibid. 755.
[12] [1951] A.C. 737.

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he did not fully appreciate (*London Graving Dock Co. Ltd.* v. *Horton* [13]).

I will now consider whether the second defendants, the occupiers, are liable. I have come to the conclusion that the Court of Appeal were wrong in refusing to accept the judge's finding that a servant of the occupiers had "fixed" the door. It remains somewhat of a mystery but that is, in my opinion, the most probable conclusion. The plaintiff had left the doors wired on April 27. On the morning of May 14 Wells found the wire gone and the defective door in the same place as it was found by the plaintiff later in the day. There was no suggestion that any of the employers' men had been there in the interval. It seems impossible to me that the wind could have done it, or that some unknown third party had busied himself in the matter. Mr. Webb for the occupiers said they did not act on any of the four reports to do any work on the door. The most probable explanation seems to me, as it did to the learned judge, that someone on behalf of the occupiers, having had these four reports went to see what was the matter. The occupiers therefore knew of the trap and the plaintiff reasonably did not appreciate the danger. I therefore agree with the learned judge that the second defendants are liable.

All the points in this case are near the borderline. The learned judge thought the employers was also liable. There are many circumstances of possible risk in which an employer is justified when his men are sent out to do work in relying on them to look after themselves. The liability of the employers in this case could only arise after the first or perhaps after the second report when they realized the occupiers had done nothing. This door was rather over a foot above the top rung of the ladder, a place where danger might arise. The learned judge came to the conclusion that the employers should have gone and seen if the place was reasonably safe. I am not prepared to disagree with this finding.

I accept the learned judge's apportionment of liability. I would allow the appeal and reinstate the judge's order.

LORD DENNING. My Lords, in this case your Lordships are called on to consider the duties which arise when an employer sends his servant to work on premises occupied by somebody else. The rules of the common law have recently been modified by the Occupiers' Liability Act, 1957, but that Act only came into force on January 1, 1958, and does not affect this case.

Let me first consider the claim of the workman against the *occupiers*. This workman was beyond doubt an invitee. He came on to the premises in order to do repairs to the lift. His work took him to the machinery in the machine house. The ordinary means of access to it was to go up an iron ladder to a pair of

[13] [1951] A.C. 737, 747.

doors which opened the way into the machine house. The occupiers might reasonably expect him to use that means of access to get to the place where he had to work. It was in those circumstances their duty to take reasonable care to see that that means of access was reasonably safe. Just as a householder, who calls in a plumber, must take reasonable care to see that the staircase up to the bathroom is reasonably safe, so also these occupiers were under a duty of care to this workman. It is very different from the cases of the window-cleaners on which Mr. Nelson relied, such as the *Christmas* case [14] and *Bates* v. *Parker*.[15] In those cases the householders did not provide any means of access to the window. They left it to the window-cleaner to provide his own means, and they would reasonably expect him to take his own safeguards against the risks incidental to his work, such as ill-balanced weights or loose ply-wood. So also if a householder employs a builder to do repairs on the roof. It is for the builder to put up his own staging and take his own safeguards. But in this case the workman was using the means of access provided by the occupiers and that makes all the difference.

Was, then, this duty broken by the occupiers? I think it clearly was. The doors opening to the machine house were, at all material times, "in a state of disrepair. The hinges were in an "advanced state of corrosion and the lower hinge of the left-hand "door had come away from its supports." Such was the position admitted by the lift repairers and the case seems to have been fought at the trial on the basis that the admission was correct. I should have thought that those defects made the means of access unsafe. The left-hand door might come off in the wind. It might give way when being opened by a workman. Or in some way or other, owing to the defects, someone might be injured. The particular manner is neither here nor there. The occupiers ought to have remedied the defects. Time after time the lift repairers told them the machine house door was broken and needed refixing. Yet the occupiers did nothing. That was, to my mind, a want of reasonable care on their part.

But can this workman, Harry Smith, recover for it? If the negligence of the occupiers was a cause of the accident, then prima facie he can recover against them. But there is a point to be considered on causation. It appears that by the time Harry Smith came to get in, the left-hand door had become jammed against the floor of the machine house. There was no direct evidence to show how this happened. It was unlikely to be due to the wind or to a stranger. More than likely it was due to some servant of the occupiers or a servant of the lift repairers. It is probable that one of these—seeing the defective condition of the door—tried to jam it so as to make it more secure. But,

[14] [1952] 1 K.B. 141, H.L.; [1953] A.C. 180.

[15] [1953] 2 Q.B. 231.

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however it happened, it was a direct consequence of the want of repair and it does not break the chain of causation. Then when Harry Smith came to get in, he held on to the jammed door so as to help himself in. It gave way, he fell and was injured. On those facts, his injury sems to me to be a direct consequence of the negligence of the occupiers in not repairing the door, for which he can recover against them unless he is to be defeated by *Horton's* case.[16]

The Court of Appeal held that he was defeated by *Horton's* case[16]: because, as the Master of the Rolls put it, "the plaintiff "himself knew everything there was to know about the condition "of the doors."

My Lords, I agree that he knew all about the defect, but I do not think he knew all about the danger arising from it. And *Horton's* case[16] only applies when an invitee has, in Lord Porter's words,[17] "full appreciation of the danger," or, in Lord Normand's words[18] "full knowledge of the nature and of the extent of the "danger," and nevertheless goes on and incurs it. His knowledge is a personal disability on him, which arises from his own individual state of mind, regarded subjectively by reference to his own appreciation of the danger and not objectively by reference to what a reasonable man would appreciate. It is not enough that he should know of the defective condition of the premises. It is not enough that he should realize there is some risk. He must know and appreciate the full extent of the danger. If he was in any way mistaken about the danger, so that the state of affairs was in fact more dangerous than he thought it was, then he can recover. Put in homely fashion it comes to this: If a man, faced with a dangerous means of getting across a gap, mistakes the risk, saying to himself: "I know it is a bit risky, "but so long as I am careful I shall be all right," he is under no disability. But if he truly measures the risk, saying: "No "matter how careful I am, it is very likely I shall fall" and still goes on, he cannot recover. That was Horton's state of mind. He fully appreciated the risk, indeed he and his workmates had complained of it, but still he went on. Whereas, in the present case, Harry Smith, the plaintiff, tested the door—"it seemed safe "enough," he said—and only then, when he had assured himself of its safety, did he go on. He did not fully appreciate the danger and can recover.

I now turn to the claim of the workman against his own employers: and here again I must make reference to *Horton's* case[19]: for it seems remarkable that Horton did not sue his employers as well as the occupiers. The report in the Court of

[16] [1951] A.C. 737.
[17] Ibid. 747.
[18] Ibid. 755.
[19] [1951] A.C. 737.

Appeal [20] shows that complaints had been made to the employers' foreman about the insufficiency of the staging, and in those circumstances one would have thought that it was the employers' duty to take reasonable care for the safety of the men—either by requiring the occupiers to make the staging safe or by withdrawing the men from the use of it. And it is, of course, quite clear that if Horton had sued his employers, it would have been no defence for them to say that he had full knowledge of the nature and extent of the danger: see *Smith* v. *Charles Baker & Sons*.[21]

But it must be remembered that at the date when Horton brought his case—it was in 1948—it was commonly supposed that a man, placed as he was, could not sue his employers. It was often said at that time that employers who send their men out to work on the premises of other people have no responsibility for the safety of those premises: and that it was for the occupiers to see that the premises were safe for the workmen and not for the employers to do so, see, for instance, *Taylor* v. *Sims & Sims* [22] by Lewis J.

So Horton only sued the occupiers. He failed against them, but the speeches in this House contained some hints that he would have done better to sue his employers. Lord Porter said [23] that the duty of occupier to invitee "is to be judged by a less "exacting standard" than that of employer to employee: and Lord Normand distinctly said [24] that, if Horton were allowed to succeed against the occupiers, it would mean that "the invitor "would owe to the invitee the same duty as an employer owes "to his employees."

It seems to me fairly clear that if Horton had sued his own employers, he would have succeeded. Notwithstanding what was said in *Taylor* v. *Sims & Sims* [25] it has since been held, I think rightly, that employers who send their workmen to work on the premises of others cannot renounce all responsibility for their safety. The employers still have an overriding duty to take reasonable care not to expose their men to unnecessary risk. They must, for instance, take reasonable care to devise a safe system of work, see *General Cleaning Contractors Ltd.* v. *Christmas* [26]: and if they know or ought to know of a danger on the premises to which they send their men, they ought to take reasonable care to safeguard them from it. What is reasonable care depends, of course, on the circumstances, see *Wilson* v. *Tyneside Window Cleaning Co.*[27]

[20] [1950] 1 K.B. 421, 426; 66 T.L.R. (Pt. 1) 246; [1950] 1 All E.R. 180.
[21] [1891] A.C. 325; 7 T.L.R. 679.
[22] (1942) 167 L.T. 414, 415; 58 T.L.R. 339; [1942] 2 All E.R. 375.
[23] [1951] A.C. 737, 747.
[24] Ibid. 756.
[25] 167 L.T. 414.
[26] [1953] A.C. 180.
[27] [1958] 2 Q.B. 110.

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Applying this principle, I think the judge was entitled in this case to find the employers liable. If the workmen had not reported any difficulty or defect on the premises, the employers would not have been responsible. They would have been entitled to assume that the means of access provided by the occupiers was reasonably safe. But when the workmen reported—as they did—that the machine house door was broken and needed refixing in position, the employers were, I think, put upon inquiry as to whether the means of access provided by these doors was reasonably safe. They ought to have done something but they did nothing beyond report the defect to the occupiers. Report after report, four in all, produced no result. Thereupon the employers ought, I should have thought—and indeed as the judge thought—to have gone themselves to see if the means of access was reasonably safe. If they had done so, they would have found it unsafe and would have done something. They might have insisted on the door being mended, or they might have sent a long ladder to enable the men to get safely to the machinery. Having done nothing, they cannot escape liability.

I find myself, therefore, in full agreement with the learned judge. I see no reason for disturbing his finding, implicit rather than expressed, that the plaintiff was not guilty of contributory negligence; or the proportions in which he divided the responsibility between the occupiers and the employers.

My Lords, I would not leave this case without drawing attention to one feature of *Horton's* case [28] which has sometimes been overlooked. Horton's knowledge of the danger was so complete that it would have given rise to the inference that he had willingly accepted the risk as his, but for the fact that he was fettered by his contract of service. It was solely due to his contract of service that he was not in a position to choose freely between acceptance of the risk and rejection of it. So the defence of volenti non fit injuria did not apply. But his contract of service was no concern of the occupiers: and in a contest with them, Horton had to be regarded in law as a free agent, free to choose, although he was not so in fact. Lord Normand pointed this out [29]: "The plaintiff's contract of service with his employer "cannot be pleaded by or against the invitor who is a stranger "to it . . . He cannot, in my opinion, sue as an invitee and at "the same time found upon his contract of service as restricting "his freedom to act." If that was the turning point of the decision, as I think it was, it means that *Horton's* case was a particular decision on the position of a servant who sues the occupier of the premises on which he is working instead of the employer who sent him there. It does not otherwise affect the general principle that knowledge of the danger is not a bar in itself but only a factor in considering whether the plaintiff

[28] [1951] A.C. 737. [29] Ibid. 756.

willingly accepted the risk as his, see *Letang* v. *Ottawa Electric Railway Co.*[30]: or alternatively, whether the accident was due wholly or in part to his own fault, see *A. C. Billings & Sons Ltd.* v. *Riden.*[31]

Appeal allowed.

Solicitors: *Rowley Ashworth & Co.; T. D. Jones & Co. for Linsley & Mortimer, Newcastle-upon-Tyne; Isadore Goldman & Son for Crute & Sons, Newcastle-upon-Tyne.*

F. C.

[30] [1926] A.C. 725; 42 T.L.R. 596.

[31] [1958] A.C. 240; [1957] 3 W.L.R. 496; [1957] 3 All E.R. 1.

[COURT OF APPEAL.]

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Nov. 24, 25, 26, 27, 28.
Lord Evershed M.R., Lord Cohen and Sellers L.J.

* TOWNSEND (BUILDERS) LTD. *v.* CINEMA NEWS AND PROPERTY MANAGEMENT LTD.

[Plaint No. M. 1335A.]

Contract — Illegality — Waiver — Waiver by local authority of compliance with by-law.
Building—By-law—Construction—Public Health (London) Act, 1891 (54 & 55 *Vict. c.* 76), *s.* 39 (1)—*Water-Closet By-laws No.* 2.
By-law—Waiver—Building by-law—Waiver by local authority.

By by-law 2 of the Water-Closet By-laws made by the London County Council under section 39 (1) of the Public Health (London) Act, 1891, "a builder constructing a water-closet in connexion "with a building shall comply with the following requirements . . . "(2) Entrance and entrance lobby. Such water-closet shall not be "situate within or entered from any room used for human habita-"tion . . . Provided always that a water-closet used exclusively with "a bedroom or dressing room may be entered directly from such "room."

The plaintiff company were builders and by a building agreement of November 8, 1952, agreed with the defendants to do certain work on premises occupied by the defendants' director. The work was to be done in accordance with specifications prepared by a firm of architects who were brought in as third parties. It included turning a room on the first floor into a bathroom with water-closet, with two doors giving access to it from each of the two adjoining bedrooms, and further cutting a second door giving access to a bathroom with water-closet on the second floor, so that two separate bedrooms had access to it. The building contract provided by condition 3 that the builders were to comply with any regulations of any local authority. The builders failed to give notice of the proposed work to the local authority and it was completed in January, 1953. The local authority objected that the work infringed by-law 2, in that both the bathrooms-cum-water-closets had doors opening into two rooms. However, upon an undertaking being given on July 2, 1953, on behalf of the defendants that when the director's wife, who was to occupy the first floor rooms, ceased to do so, the by-laws would be

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complied with, the local authority did not insist on the immediate compliance with them. The rooms were occupied by the director's wife until her death in March, 1955. In these proceedings the builders sought to recover from the defendants £150, which represented the cost of the work on the two bathrooms. The defendants refused to pay that sum on the ground that the work done was illegal work. The builders contended that the building regulations were void for unreasonableness, injustice or uncertainty:—

Held, (1) that the court will always be slow to hold that by-laws are invalid, and that it should be slower to do so in proceedings to which the local authority concerned was not a party, and that on its true construction by-law 2 of the London County Council's Water-Closet By-laws was not invalid.

Observations of Lord Russell of Killowen in *Kruse* v. *Johnson* [1898] 2 Q.B. 91, 99 applied.

(2) That the contract was not illegal, and as regards performance thereof the bathrooms could not be said to be "illegal bathrooms" after July 2, 1953, since the local authority had then waived compliance with the relevant regulations, and that the builders were not therefore disabled from recovering the sum of £150 on the ground of illegality.

Strongman (1945) Ltd. v. *Sincock* [1955] 2 Q.B. 525; [1955] 3 W.L.R. 360; [1955] 3 All E.R. 90 distinguished.

APPEAL from a decision of Judge Sir Edgar Dale given at Westminster County Court.

The plaintiffs, Townsend (Builders) Ltd. (hereinafter called "Townsend"), were a firm of builders. By a building agreement dated November 18, 1952, they agreed with the defendants, Cinema News and Property Management Ltd., the owners of 92, Cheyne Walk, to do certain work to those premises in accordance with plans and specifications prepared by David A. Wilkie & Partners (hereinafter called "Wilkie"), a firm of architects. By condition 3 (a) Townsend undertook to comply with and give all notices required by any Act of Parliament or any regulation or by-law. The property was to be occupied by Samuel Harris, a director of the defendants, and his wife. It was held for the purposes of the action that there was no relevant distinction between the defendant company and Harris, and that he acted for the company throughout, and he was treated as the effective defendant to the action.

The specification provided for a bedroom on the first floor to be turned into a bathroom with water-closet, communicating by two doors with the two adjoining bedrooms. The specification also provided for a second door to be made on the second floor from an already existing bathroom with water-closet, which already communicated directly with one bedroom, so as to give direct access to it from another bedroom. The work was finished in January, 1953. It was found, as a fact, that the notice which should have been served on the sanitary authority pursuant to by-law 9 of the London County Council Water-Closet By-laws had not been served. By April, 1953, the local authority was contending that the work on the two bathrooms-cum-water-closets did not comply with by-law 2 of the by-laws.

At that time the intention was that one of the bedrooms on the first floor having direct access to the bathroom-cum-water-closet was to be occupied by the wife of Harris, who was then a very sick woman. Dr. Weir, the medical officer of health of the local authority, by letter of June 30, 1953, wrote to Harris offering to recommend that the local authority should not insist on compliance with the by-laws while the bedrooms were occupied by Harris's wife, if he would undertake, when the condition for which the concession was made had ceased to exist, to comply with the by-laws. Harris replied on July 2 giving the required undertaking. His wife continued to use the premises until she died in March, 1955.

Harris had refused to pay Townsend the sum of £150, which represented the cost of the work done to the two bathrooms, on the ground that such work was illegal work. In these proceedings Townsend sought to recover the sum of £150 from the defendants. They counterclaimed for damages for £493, the alleged cost of reinstating the two rooms on the first and second floors of the property to their original condition. Wilkie was brought in by third party notices being served both by Townsend and the defendants.

The county court judge gave judgment for Townsend for £150 against the defendants, rejecting the defence based on illegality. The counterclaim was treated as having failed. He held that Wilkie had been guilty of negligence, and he awarded damages to the defendants against Wilkie.

All three parties appealed.

The appeal raised various questions in regard to the assessment of damages and other matters which do not call for report.

M. A. B. King-Hamilton Q.C. and *Norman Wiggins* for the defendants.

Hugh Forbes for the plaintiff Townsend.

David Gardam for the third party Wilkie.

The following cases were cited in argument which are not referred to in the judgments: *Sharpe* v. *San Paulo Railway Co.*[1]; *R. F. Brown & Co.* v. *T. & J. Harrison*[2]; *Green* v. *Premier Glynrhonwy Slate Co. Ltd.*[3]; *Arlidge* v. *Islington Corporation*[4]; *The King* v. *Broad*[5]; *Woolfe* v. *Wexler*[6]; *Hanak* v. *Green*[7]; *Candler* v. *Crane, Christmas & Co.*[8]; *Brightman & Co.* v. *Tate*[9]; and reference was also made to Hudson on Building Contracts, 7th ed., p. 155; Halsbury's Laws of England, 3rd ed., vol. 3, p. 527, para. 1046.

[1] (1873) 8 Ch.App. 597.
[2] (1927) 43 T.L.R. 394.
[3] [1928] 1 K.B. 561.
[4] [1909] 2 K.B. 127.
[5] [1915] A.C. 1100.
[6] [1951] 2 K.B. 154; [1951] 1 All E.R. 635.
[7] [1958] 2 Q.B. 9; [1958] 2 W.L.R. 755; [1958] 2 All E.R. 141.
[8] [1951] 2 K.B. 164; [1951] 1 All E.R. 426.
[9] [1919] 1 K.B. 463.

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LORD EVERSHED M.R., having stated the facts and read the relevant by-laws, continued: Both Townsend and Harris have appealed; and Wilkie has given the usual form of cross-notice by a respondent. It therefore follows that all the issues in this complicated matter have been raised and are before us for decision. I will first go to the by-laws and consider the argument that Mr. Gardam put—with great force—that these by-laws are void for unreasonableness, injustice and uncertainty, and can, therefore, be wholly disregarded. If that argument is right, there never was any breach of contract: nothing is wrong with the work done; and all this elaborate litigation has been based upon a false premise.

As was stated in *Kruse* v. *Johnson*,[1] on which Mr. Gardam particularly relied, this court will be always slow to hold that by-laws are invalid. That case came before the Divisional Court of the Queen's Bench Division and the short facts were these: "At a court of summary jurisdiction . . . the "respondent, a superintendent of police, preferred an information "against the appellant for that he, on the day therein specified, "did sing in a certain highway, within fifty yards of a dwelling-"house there, after being required by a constable to desist, "contrary to"—the by-law; and the question was whether the by-law, which prevented not only Mr. Kruse but other vocalists from singing in the neighbourhood, was or was not invalid. The by-law there the subject of attack was held not to be invalid. In the course of his judgment Lord Russell of Killowen C.J. used this language[2]: "In this class of case it is right that the courts "should jealously watch the exercise of these powers, and guard "against their unnecessary or unreasonable exercise to the public "disadvantage. But, when the court is called upon to consider "the by-laws of public representative bodies clothed with the "ample authority which I have described, and exercising "that authority accompanied by the checks and safeguards "which I have mentioned, I think the consideration of such "by-laws ought to be approached from a different standpoint. "They ought to be supported if possible. They ought to be, as "has been said, 'benevolently' interpreted, and credit ought to "be given to those who have to administer them that they will "be reasonably administered."

I respectfully adopt all that passage, and, adopting it, express my conclusion that, in the present case, it has not been established, to my satisfaction, that we should treat these by-laws as invalid, on the ground of unreasonableness, injustice, or indeed obscurity in their language; and I would add that a court will be all the slower to hold invalid by-laws in proceedings to which the local authority concerned are not parties. Since, however, much argument has turned upon these by-laws, it would, I hope, not be entirely inappropriate if I said just this much about them.

[1] [1898] 2 Q.B. 91. [2] Ibid. 99.

in case the matter should come to the attention of the local authority concerned. The by-laws do, as framed, create some problems of difficulty. By-law 2 is one directed to builders—"A builder constructing a water-closet . . . shall comply with "the following requirements"; and if he fails to do so he is liable to have proceedings brought against him and to be fined. "A "builder constructing a water-closet . . ." That phrase assumes that work is in the course of being carried out by a builder; and what he has to comply with is then set out in paragraph 2, where it provides: "Such water-closet shall not be "situated within nor entered from any room used for human "habitation"; with a proviso that a water-closet "used "exclusively with a bedroom . . . may be entered directly from "such room."

If you take the present case as an example, then, of course, at the time Townsend was doing this work the water-closet which he was constructing—as a matter indeed of self-evident necessity—was not being "used": and it is equally clear that, although a builder may be told that the room to which access from the water-closet may be had will be used as a bedroom, it may be that the building owner will afterwards decide to use it as a nursery, scullery, schoolroom, or in any other way.

I mention these matters, because I cannot help thinking that it might be that on some future appropriate occasion the actual language might be made clearer, to show the builder what really he was intended to do or not to do. And what I have said has a further specific reference because of the words of the proviso—"Provided always that a water-closet used exclusively "with a bedroom or dressing room may be entered directly from "such room." Upon that proviso, a wealth of argument was presented to the court below, and to this court, on the question whether the word "or" was, strictly speaking, disjunctive or not. It was said that, construing that proviso (as Lord Russell C.J. said) "benevolently," if you had a water-closet which was accessible from two rooms, one being a bedroom and the other the dressing room of the person using the bedroom as such, then that was something excepted by the proviso; and, of course, as a matter of common sense, there may appear to be quite a lot for the view that if the bedroom and dressing room are used by the same person there would be no great harm in saying that he could get to his lavatory and bathroom from the dressing room as well as from the bedroom. The judge indeed so construed this proviso; and it was for that reason that he was able to assess the damages on the footing that the north-west room on the first floor did not, as constructed and supposedly used, involve non-compliance with this regulation. My own inclination is in the opposite direction: that is to say, giving such benevolence to the art of construction as I can, I am not satisfied that this proviso exempts from the earlier prohibition a water-closet, access to which

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may be had both from a bedroom and a dressing room, albeit that the dressing room is the dressing room of the occupant of the bedroom. The difficulty in the way of the other view seems to me to arise principally from the last five words, "entered directly "from such room"—singular. But in any case, I for my part agree with Mr. King-Hamilton that, when the matter comes finally for determination, the point is here academic, for although the local authority were told by Wilkie, or someone in his service, that the two rooms were respectively the bedroom and dressing room of Mrs. Harris, that was not the fact. As I have said, the intention was, and the fact was, that when the rooms came into use both rooms were used as bedrooms, so that, as regards the first floor, the situation was the same as it was on the second floor, namely, the work resulted in a bathroom-cum-lavatory directly accessible from two bedrooms occupied independently.

[His Lordship considered certain further evidence and continued:] It will be convenient for me to deal next with the argument founded on illegality. This is not a case, be it observed, where the contract can be said to be itself illegal, or to involve, on its face, the doing of something that was illegal, unless you are to say that the specifications which are part of the contract showed, upon the face of them, that what was going to be done, if it was done precisely as specified, would involve non-compliance. It was on that ground, alleged by Mr. King-Hamilton (putting it picturesquely), that the work contracted for was work to make an "illegal" bathroom, and, that being so, it could not lie in the mouth of the contractor to claim payment for doing that illegal work. I have said that the judge rejected that argument; and so do I.

We were referred to the case, in 1955, before this court, of *Strongman (1945) Ltd.* v. *Sincock*.[3] We are all familiar with the many cases which arose when building work was found to have been done without a building licence under the defence regulations having been obtained. Although it was not always other than distasteful, it enabled a defendant, who had had work done and who had enjoyed the benefit of it, to say that he was not bound to pay for it, because he and the builder had been party to what was in effect an illegal contract. To make that point clear, it is worth noting what was the regulation which was invoked in *Strongman's* case.[3] It was regulation 56A of the Defence (General) Regulations, 1939: "Subject to the provisions "of this regulation the execution in the United Kingdom . . . of "any operation specified . . . shall be unlawful" unless a licence had been obtained. That, of course, is a very clear, positive statement that the work, as such, without a licence, is unlawful. The case with which we are concerned is of a somewhat milder complexion. The by-law in question was made under section 39 of the Public Health (London) Act, 1891, which states that "The

[3] [1955] 2 Q.B. 525; [1955] 3 W.L.R. 360; [1955] 3 All E.R. 90.

"county council shall make by-laws with respect to water-"closets . . . "; and, in subsection (3), "It shall be the duty of "every sanitary authority to observe and enforce the by-laws."

The by-laws provide that: "A builder constructing a water-"closet . . . shall comply with"—certain requirements: if he fails to do so (as Mr. Gardam observed) he is liable to have invoked against him the powers under the Public Health (London) Act, 1936, and in particular section 109, which provides that, if it is apparent on an examination that work has been done otherwise than in accordance with by-laws, then that person is liable to a fine. It would be a question whether the petty sessional court before whom the case came thought the case deserved a fine or not. But, observe, there is no fundamental illegality pervading the whole work and the whole contract. It is true to say, no doubt, that, if I have correctly construed paragraph 2, then the bathroom and lavatory, as eventually it was made and left, having the access from two independent rooms, was not in compliance with the by-law; and therefore ex facie, being contrary to the by-law, an offence had been committed. But the first thing to observe as regards Townsend (and the same applies to Harris) is that, according to the judge's finding, though Townsend knew of the existence of the by-law he did not know, at any rate, until the work was far advanced, that what he had been called upon by his contract to do, and what the architect had invited him to do, involved non-compliance with the by-laws. That obviously would have a very substantial effect in any proceedings which might be brought against him. It is, secondly, made quite clear by the course of events in this case, which began in January, 1953, and ended with the compromise agreement in June and July, that the local authority felt it to be within their power (and no doubt rightly) to relax, or not strictly to enforce, the by-law; for they made the compromise arrangement in which they said: "We "will not take any steps: we will leave matters as they are "during Mrs. Harris's occupation"; and I note (though to what extent it was in the forefront of anybody's mind I do not know), that they were prepared not only (so to speak) to put the telescope to their blind eye when looking at the first floor, but they observed the same complacency on the second floor also. And thirdly, it it is to be observed that the work as done was not (like work done without a licence) illegal per se without more: it would only not comply with the by-laws unless something else was also done: as Dr. Weir stated in his letter, the work could be made to comply simply by partitioning the water-closet within the bathroom.

If you test the matter by asking: On July 3—that is, the day after Harris had written the letter to Dr. Weir—was this bathroom (in Mr. King-Hamilton's phrase) "illegal"? I think the inevitable answer is: "No, it was not"; and, that being so, it seems to me that Townsend cannot be met, when he sues for the cost of the work he has done, with this charge that he

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provided his client with an "illegal" bathroom and, therefore, could not get paid for the work which Harris and his wife proceeded thereafter to enjoy in exactly the same way as Harris had originally intended.

Without, therefore, saying more upon that matter, I think that, on the facts of the present case, the judge was well entitled to say that Townsend is not disabled from recovering the £150 on the ground of illegality. There was somewhat faintly presented (if Mr. King-Hamilton will allow me to say so) the suggestion that the work was quite worthless anyway. But I have perhaps said enough to show that the enjoyment by Mr. Harris for two years during his wife's life (and, indeed, ever since until he sold the house) seems to me to dispose of the notion that the work—which was done exactly as he had asked for it to be done—was worthless. It therefore follows that, so far as the appeal of Harris against the judgment sought to set aside the judgment for £150, that appeal fails.

[His Lordship next considered the question of damages, which does not call for report.]

LORD COHEN. I agree so entirely with what has been said by the Master of the Rolls that I only desire to add one or two observations on the question of illegality.

As the Master of the Rolls pointed out, it is quite plain from the terms of the contract that there is nothing inherently illegal in it. Indeed, it might be said that condition 3 was so framed as to prevent the possibility of any such illegality. The illegality relied on by Mr. King-Hamilton here was solely in the performance, and it might well be that that would have been enough if there had been no subsequent waiver by the local authority of the strict enforcement of the relevant regulations, and if the arrangement in the correspondence had not been made. But, that having been made, it seems to me that the position is radically altered. Harris no doubt could have refused, before that arrangement was reached, to honour the final certificate, either on the ground of illegality or on the ground that, having regard to condition 3, the work done was not within the contract. It seems to me that when he has obtained that modification from the local authority, and then continued to enjoy the benefit of the work done by Townsend at least for the period of his wife's lifetime, and, indeed, so far as we know, down to the date on which he sold the property, we are in no way deviating from the principles laid down in the cases cited (to which my Lord has referred) if we say that in those circumstances Harris cannot both have his cake and eat it, and that the defence of illegality fails.

I do not think I can usefully add anything on any of the other points. For the reasons my Lord has suggested, I concur in the order which he proposes.

SELLERS L.J. I agree so fully with my Lord's judgment, and

the further observations of the noble Lord that I do not seek to add any words of my own to the judgment with regard to these matters. But I am prompted to refer to some observations of Channell J. and, indeed, to adopt them, having regard to the general observations that my Lord has made with regard to the regulations. Channell J., in 1903, in *Salt* v. *Scott Hall*,[4] said: "It seems to me that all by-laws relating to the construction of "buildings ought to have something in the nature of a dispensing "power, enabling the local authority or its surveyor or other "officer to say that a particular building is of an exceptional "character, and that the hard and fast rules laid down by the "by-laws as to the mode of construction ought not to apply to it. "But I think it would be most mischievous to hold that the "absence of such a dispensing power necessarily made the by-law "bad." I think the only justification for what happened in this case was that there were perhaps special circumstances relating to this particular property.

Order below varied.

Solicitors: *Dod, Longstaffe & Fenwick; W. J. Fraser & Sons; Sydney Redfern & Co.*

B. A. B.

[4] [1903] 2 K.B. 245, 248; 19 T.L.R. 518.

[PRIVY COUNCIL.]

J. C.†
1959
Jan. 14.

* ERNEST CLARENCE HILL . . . . APPELLANT;

AND

ERNEST CARLTON HILL . . . . RESPONDENT.

ON APPEAL FROM THE COURT OF ORDINARY OF BARBADOS.

Husband and Wife — Marriage — Validity — Statutory requirements — Barbados—Failure to comply literally with statutory requirements —Substantial compliance—Presumption of validity—Rebuttable only by decisive evidence—(Barbados) Marriage Act, 1904–1909, *s.* 2.
Presumption—Legality—Marriage—Validity.
Barbados—Marriage—Validity.

Section 2 of the Marriage Act, 1904–1909, of Barbados, which applies to any minister of the Christian religion, authorizes a minister to solemnize matrimony according to the form and ceremony in use by the persuasion to which he belongs, "provided that whenever the form and ceremony used shall be other than that of "the Anglican Church in this island each of the parties shall in "some part of the ceremony make" declarations that "I know not "of any lawful impediment" to the marriage, and that he (or

† *Present*: LORD SOMERVELL OF HARROW, LORD DENNING, and the RT. HON. L. M. D. DE SILVA.

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she) takes the other party to be his (or her) lawful wedded wife (or husband):—

Held, that a failure to comply literally with the proviso does not invalidate such a marriage. It must, however, be clear that each party intended to contract a Christian marriage, and there must be in the service passages which make plain the necessity for the absence of lawful impediment and the taking of one another to be the lawful wedded wife or husband.

Catterall v. *Sweetman* (1845) 1 Rob.Eccl. 304, at 320, and *Beamish* v. *Beamish* (1861) 9 H.L.C. 274, at 339 considered.

Where there is conflicting evidence as to what happened at the ceremony, a balance of probabilities is insufficient to rebut the presumption of validity; to defeat the presumption the evidence must be decisive. Further, the presumption applies equally where cohabitation preceded as well as followed the ceremony.

Piers v. *Piers* (1849) 2 H.L.C. 331 followed.

Judgment of the Court of Ordinary of Barbados affirmed.

APPEAL (No. 30 of 1957), by special leave, from a judgment of the Chief Judge (Collymore C.J.) in the Court of Ordinary of Barbados (October 19, 1956), dismissing a petition by the appellant for a declaration that a marriage between Ernest Clarence Hill and Marion Allanzena Green was invalid and to grant probate in solemn form of a will dated September 19, 1952.

Ernest Clarence Hill (hereafter called "the deceased") died on April 30, 1955. He was over 80 years of age. The deceased had been married in early life. There were three surviving children of that marriage. It was common ground that the wife of that marriage had died before October, 1954, when the ceremony in issue took place.

Since about 1925 the deceased had cohabited with Marion Allanzena Green and he continued to do so until his death. She bore him eight children, of whom the appellant was one. The will made provision for Miss Green and several of the said children and under it the appellant and Miss Green were appointed executors. The appellant filed the will for probate on April 6, 1956. On June 21, 1956, a caveat was entered on behalf of the respondent as heir-at-law. He petitioned for letters of administration on the basis that the deceased had died intestate the will having been revoked by a subsequent marriage.

In October, 1954, the deceased suffered from dysentery and a strangulated hernia. His physical state was critical. An operation was necessary and was performed at Dr. Bayley's Clinic on October 25. It was doubtful whether he would survive. He did so and left the clinic on November 1.

Miss Green said in her evidence that on the evening—after the operation—"he told me to go and bring the Reverend and he "would marry me." The Reverend was one Winter, a Christian minister of the New Testament Church of God in Barbados. Winter, who died before the trial, and Mrs. Winter, who gave evidence, were friends of the deceased and Miss Green and the family. Miss Green told Mrs. Winter, whom she saw on the 26th, what the deceased had said to her. Mrs. Winter told her

husband and as a result Mrs. Winter took Miss Green on the morning of the 27th to get the licence which was necessary as no banns had been published.

On the evening of the 27th a ceremony of marriage took place between the deceased and Miss Green. Two witnesses were present, one of whom gave evidence, the other not being available. Mrs. Winter was present and two of the children.

Two questions arose on this appeal: (1) Whether at the time of the marriage ceremony the deceased had sufficient capacity to understand the nature and consequences of the marriage; and (2) whether the marriage was invalid because requirements prescribed by the Barbados Marriage Act, 1904–1909, s. 2, proviso, were not complied with, namely, that each of the parties to the ceremony should make declarations before the minister to the effect that no impediment existed, and that each took the other to be his (or her) wedded wife (or husband).

Collymore C.J. dismissed the appellant's petition and refused probate of the will on the ground that the evidence did not satisfy him that the ceremony of marriage was not a valid one. In arriving at his decision he relied on the presumption of validity as stated in Halsbury's Laws of England, 2nd ed., vol. 16, p. 599: "Where there is evidence of a ceremony of marriage having been "gone through, followed by the cohabitation of the parties, "everything necessary for the validity of the marriage will be "presumed, in the absence of decisive evidence to the "contrary, . . ."

1958. December 1, 2, 3. *Neil Lawson Q.C.* and *John Wilmers* for the appellant.

John Latey Q.C. and *E. Bruce Campbell* for the respondent.

The following cases, in addition to those referred to in the judgment, were cited in argument: *Cunninghams* v. *Cunninghams* [1]; *Sastry Velaider Aronegary* v. *Sembecutty Vaigalie* [2]; *In re Shepard, George* v. *Thyer* [3]; *Pope* v. *Clarke* [4]; *Montreal Street Railway Co.* v. *Normandin* [5]; *Standen* v. *Standen* [6]; *Reed* v. *Passer* [7]; *Reg.* v. *Millis* [8]; *Catterall* v. *Catterall* [9]; *Wolfenden* v. *Wolfenden* [10]; *The Lauderdale Peerage* [11]; *Harrod* v. *Harrod* [12]; *Campbell* v. *Corley* [13]; *Greaves* v. *Greaves* [14]; *Moss* v. *Moss* [15]; *Wylie* v. *Patton* [16]; *In re Peet, decd.* [17]; *De Thoren* v. *Attorney-General* [18]; *Dormer* v. *Williams.* [19]

[1] (1814) 2 Dow H.L. 482.
[2] (1881) 6 App.Cas. 364.
[3] [1904] 1 Ch. 456.
[4] [1953] 1 W.L.R. 1060; [1953] 2 All E.R. 704.
[5] [1917] A.C. 170; 33 T.L.R. 174.
[6] (1791) Peake (Add.Cas.) N.P. 45.
[7] (1795) Peake N.P. 303.
[8] (1844) 10 Cl. & F. 534.
[9] (1847) 1 Rob.Eccl. 580.
[10] [1946] P. 61; 62 T.L.R. 10; [1945] 2 All E.R. 539.
[11] (1885) 10 App.Cas. 692.
[12] (1854) 1 Kay & John. 4.
[13] (1856) 4 W.Rptr. 675.
[14] (1872) L.R. 2 P. & D. 423.
[15] [1897] P. 263; 13 T.L.R. 459.
[16] [1930] 1 D.L.R. 747.
[17] [1952] 2 All E.R. 599.
[18] (1876) 1 App.Cas. 686.
[19] (1838) 1 Curt.Eccl. 870.

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1959. January 14. The judgment of their Lordships was delivered by LORD SOMERVELL OF HARROW, who stated the facts and continued: The appellant submits that the deceased had not capacity in that he was not sufficiently capable of understanding the contract of marriage. It is convenient to consider this point first. The Lordships accept the formulation of the test as laid down by Singleton L.J. in *In re Park, decd. Park* v. *Park*[1]: "Was the deceased . . . capable of understanding the nature of "the contract into which he was entering, or was his mental "condition such that he was incapable of understanding it? To "ascertain the nature of the contract of marriage a man must "be mentally capable of appreciating that it involves the respon-"sibilities normally attaching to marriage." The onus is on the appellant to negative capacity.

The deceased had been married before. Winter, as one would expect, had previously urged him to marry Miss Green. The idea was not a new one. The deceased told Miss Green on October 25 that he would marry her. Dr. Emtage said that after his operation his general condition improved rather rapidly:—"he "talked to me every day normally. He answered my questions "normally. Of course my questions were only professional." Gill the witness (who was not cross-examined) said "When we "got there Rev. Winter asked Mr. Hill if he knew who he was. "He said 'Yes.' He asked if he knew what he had come there "about. He said 'Yes, to marry him to Miss Green.'" One Thomas went to see the deceased two days after he returned home. The deceased remembered his name and Thomas said he had heard he was married. "He"—the deceased—"said "there was no difference between the first and the second": referring to his two marriages.

In their Lordships' opinion the point as to capacity clearly fails.

The appellant submits that the marriage was invalid as to form. This raises in the first place a question on the construction of section 2 of the Marriage Act. That section applies to "any minister of the Christian religion, . . . according to the "usage of the persuasion to which he may belong." The earlier part of the section deals with the publishing of banns, which does not arise here because of the licence: it then proceeds to authorize the ministers as set out above "to solemnise matrimony between "the said parties according to such form and ceremony as shall "be in use or be adopted by the persuasion to which the minister "solemnising such marriage shall belong; provided that when-"ever the form and ceremony used shall be other than that of the "Anglican Church in this Island each of the parties shall in some "part of the ceremony make the following declaration:—'I do "'solemnly declare that I know not of any lawful impediment

[1] [1954] P. 89, 127; [1953] 2 W.L.R. 1012; [1953] 2 All E.R. 1411.

" ' why I, A.B. may not be joined together in matrimony to C.D.
" ' here present.'

" And each of the parties shall say to the other:—' I call upon
" ' these persons here present to witness that I, A.B. do take thee,
" ' C.D., to be my lawful wedded wife (*or* husband).' And pro-
" vided also that there be no lawful impediment to the marriage
" of such parties."

If the first proviso has to be literally complied with the marriage was invalid. Neither the deceased nor Miss Green made the declarations as set out. There are a number of cases in which courts have had to determine whether provisions are mandatory or directory. It depends in each case on the general subject-matter of the statute in relation to the provision in issue. Marriage is admittedly sui generis and no help is to be got from decisions in other fields. In *Catterall* v. *Sweetman* [2] Dr. Lushington had to decide whether non-compliance with the provisions of a local Marriage Act nullified a marriage. He said [3]:

" In any case of doubt, I ought never to pronounce a marriage
" null and void. In this case I do entertain (to express my
" opinion in the weakest terms) the gravest doubt as to this act
" creating a nullity. I think so, firstly, because I find no instance
" of any words in any Marriage Act being held to import a nullity,
" if the act did not expressly create a nullity. Secondly, if this
" interpretation should be at variance with decisions of other
" courts on other matters, it must always be remembered that
" marriage is essentially distinguished from every other species
" of contract. . . ."

" In *Beamish* v. *Beamish* [4] the House of Lords considered the question whether a man in holy orders could officiate at his own marriage. It was decided he could not. In delivering his opinion Lord Campbell L.C. said [5]: " It was argued, as a conclusive
" objection, that, the bridegroom officiating as clergyman, it
" would be utterly impossible for him to use the language of the
" marriage service in the Prayer Book, or to follow the directions
" of the Rubric respecting the opening address to the congregation;
" the adjuration to the couple about to be married, as to confess-
" ing any lawful impediment to their union; the demand, ' Who
" ' giveth this woman away to be married to this man? ' the
" putting on of the ring on the finger of the bride, and in pro-
" nouncing the benediction. But none of these is absolutely
" essential to the validity of the marriage, although very fit to be
" strictly observed: and marriages have been held to be valid
" where each of these parts of the service has been omitted, the
" essential part of the service being the reciprocal taking each
" other for wedded wife and wedded husband till parted by death,
" and having joined hands, being declared married persons."
The judges were dealing, of course, with an Anglican marriage and the provisions of the rubric.

[2] (1845) 1 Rob.Eccl. 304.
[3] Ibid. 320.
[4] (1861) 9 H.L.C. 274.
[5] Ibid. 339.

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Their Lordships are of opinion that a failure to comply literally with the proviso does not invalidate the marriage. It must, however, be clear that each party intended to contract a Christian marriage and there must be in the service passages which make plain the necessity for the absence of lawful impediment and the taking of one another to be the lawful wedded wife or husband.

Mrs. Winter produced the book which her husband used. It was the Book of Common Order of the Church of Scotland. (It had interleaved a page from another marriage service similar to that in the Revised Prayer Book of the Church of England.) The service in the book contains the following passage:—"Into "this holy estate these two persons now desire to enter. Where-"fore if any one can shew any just cause why they may not law-"fully be joined together in marriage, let him now declare it. "Also I require and charge you both, as you shall answer at the "day of judgment, that if either of you know any just cause "why you may not lawfully be joined together in marriage, you "do now confess it."

Under an alternative form in the book the parties do not have each to make a declaration but only reply to a question: "Do "you, N., take this woman, N., to be your wedded wife; and do "you, in the presence of God and before this congregation (or, "these witnesses), promise and covenant to be to her a loving, "faithful, and dutiful husband, until God shall separate you by "death? I do."

Owing to the state of the deceased it would be natural that Winter should use this form. In their Lordships' opinion this form if carried out would be a compliance with the proviso. There is some conflict of evidence as to what happened and there are some gaps in the evidence. The Chief Judge, in upholding the validity of the marriage relied on the presumption of validity as stated in Halsbury's Laws of England, 2nd ed., vol. 16, p. 599: "Where there is evidence of a ceremony of marriage having been "gone through, followed by the cohabitation of the parties, "everything necessary for the validity of the marriage will be "presumed, in the absence of decisive evidence to the contrary, "even though it may be necessary to presume the grant of a "special licence."

It was submitted that the presumption as so worded could not apply with full force to this case where cohabitation preceded as well as followed the ceremony. There is no substance in this, as the presumption is laid down clearly in *Piers* v. *Piers*,[6] and in that case the parties had, as here, cohabited and had children for many years before the ceremony. It is clear that a balance of probabilities is insufficient to rebut the presumption. Various epithets have been used, but their Lordships accept the word in the passage cited by the judge—the evidence must be decisive.

[6] (1849) 2 H.L.C. 331.

It would need very strong evidence to justify a conclusion that Winter did not conduct the service in accordance with the form in his book. It was plainly to all concerned a marriage ceremony. Gill remembered Winter "speaking about just cause, etc." He saw the bride and bridegroom holding hands, though it may be this was not essential. There was no ring. He did not hear the deceased say anything. Mrs. Winter said that the deceased answered audibly. Mrs. Hill (as their Lordships are holding she became), gave evidence which was consistent with the deceased not realizing what was happening. She said she did not hold hands and took no part in the service. There is, therefore, a conflict of evidence, but in their Lordships' opinion there is no sufficiently satisfactory or decisive evidence to establish the invalidity of this ceremony.

The result of Winter's good intention is very unfortunate for Mrs. Hill and the children. Their Lordships would like to associate themselves with the concluding observations of the judge.

Their Lordships will humbly advise Her Majesty that the appeal should be dismissed. Their Lordships think that the appellant was justified in bringing this appeal in a difficult case and that the costs of each side should come out of the estate.

Solicitors: *Rashleigh & Co.; Minet, May & Co.*

C. C.

[COURT OF APPEAL.]

* HENRY BOOT & SONS LTD. *v.* LONDON COUNTY COUNCIL.

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Lord Somervell, Morris and Pearce L.JJ.

[1957 H. No. 824.]

Building—Contract—London County Council standard contract—"Rise "and fall" clause—"Rates of wages payable"—Holiday credits included in rates of wages.

Master and Servant—Wages—Holidays with pay—Whether weekly credits "wages" within meaning of building contract.

Contract — Construction — Extrinsic evidence — Ambiguity — Whether correspondence as to meaning of clause admissible.

In 1952 and 1953 the plaintiffs, building contractors, entered into contracts with the defendant council to erect blocks of flats. The contracts were in the standard form issued by the defendants, which contained a "rise and fall" clause, providing that if during the currency of a contract "the rates of wages payable for any "labour employed in the execution of the works" should in conformity with agreements between associations of employers and trade unions or with the decisions of a competent authority be increased above or decreased below the corresponding rates in force at the date of the contractor's tender, increasing or decreasing the cost to the contractor in carrying out the works, then an allowance equivalent to the net increase or decrease should form an addition to or deduction from the amount otherwise payable to the contractor.

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The plaintiffs were parties to schemes arranged by the building trade under which they, as employers, made weekly payments by way of credits for providing holidays with pay for the workmen. During the currency of the contracts increases were made in the payments or credits and the plaintiffs contended that these holiday payments or credits fell within the words in the "rise and fall" clause—"rates of wages payable."

The council rejected the plaintiffs' claim and Pilcher J., to whom the dispute was referred as an agreed special case, decided in the council's favour.

The plaintiffs appealed:—

Held, that the sums payable under the holiday scheme, being a weekly sum which had to be credited to the workmen each week, were included in the expression "rates of wages payable."

Decision of Pilcher J. (1958) 56 L.G.R. 51 reversed.

APPEAL from Pilcher J.[1]

The plaintiff building contractors, Henry Boot & Sons Ltd., entered in 1952 and 1953 into contracts to erect blocks of flats for the defendants, the London County Council. The contracts, which were in a standard form issued by the council, contained a "rise and fall" term (clause 23A) that "if during the currency "of their contract the rates of wages payable for any labour "employed in the execution of the works shall in conformity with "agreements between associations of employers and trade unions, "or with the decisions of a competent authority be increased "above or decreased below the corresponding rates in force at "the date of the contractor's tender . . . and the increase or "decrease shall result in an increase or decrease of cost to the "contractor in carrying out the works, then an allowance equiva-"lent to the net increase or decrease of cost . . . as certified by "the architect shall, subject to the provisions hereinafter con-"tained, form an addition to or deduction from the amount other-"wise payable under this contract."

The plaintiffs were parties to schemes organized by the building trade, under which they made weekly payments at agreed rates for providing holidays with pay for the workmen. After an increase had been made in the rates of payment or credits applicable the plaintiffs asserted, and the defendants denied, that the holiday payments fell within the words "the rates of wages pay-"able" contained in clause 23A of the contract. The plaintiffs claimed a total of £896 5s. 9d. in respect of their increased expenses due to annual holiday credits paid to their workmen engaged upon the erection of the flats and a further £215 17s. in respect of increases in public holiday credits.

The parties agreed to submit the question thus raised to a judge of the High Court and a stated case came before Pilcher J., who on November 29, 1957, gave judgment for the defendants, holding that the payments or credits under the holiday pay schemes were not wages.

The plaintiffs appealed.

[1] (1958) 56 L.G.R. 51.

R. D. Stewart-Brown Q.C. and *David H. Gardam* for the plaintiffs.

Michael Hoare for the defendants.

The following case cited in argument is not referred to in the judgments: *Hewlett* v. *Allen*.[2]

LORD SOMERVELL. This is an appeal from the decision of Pilcher J., which raises a point of construction, and I think a difficult one; and the court is much indebted for the arguments of counsel on each side.

It arises in this way. There was a building contract between the two parties, the plaintiffs and the defendants, which contained a clause providing for a certain extra sum to be paid to the contractor in circumstances which will emerge when I read the clause. [His Lordship read clause 23A and continued:] The question is whether certain sums which arise under the provisions of the Building and Civil Engineering Holidays Scheme Management Ltd. fall within the words of that clause. Broadly speaking, the idea of this holidays scheme is that a sum is put aside each week for each employee who is then able, when the time comes for him to take his holidays, to draw out the amount standing to his credit. The question, put shortly, is whether the sum credited to the employees under the provisions which I will read in a moment are within the clause which I have just read, so that the contractor is entitled to demand payment if those holiday sums are increased, as they were in the present case.

There is no doubt that this scheme applies, and that it falls within the words "agreements between associations of employers "and trade unions." Paragraph 2 of the annual holidays scheme reads: "In respect of holidays, each operative covered by "the scheme shall from the calendar week beginning on the first "Monday after the appointed day (as defined in clause 15 hereof) "be credited by the employer first employing him in that calendar "week, and by the employer first employing him in each subse-"quent calendar week, with the sum of two shillings, except in "the case of persons (male or female) under the age of eighteen "years, when the sum shall be one shilling and sixpence." There are various other provisions, to one or two of which I may refer later in this judgment, but that sets out the general nature of the payments in question.

If those weekly sums are increased, is that an increase in the "rates of wages payable for any labour employed"? The judge decided that they were not, for reasons to which I will refer later. He relied on another clause in the contract, which, with respect, I do not think is of real assistance in solving the problem which we have to solve. It is said, on the one hand, that these, of course, are weekly sums; they are credited to workmen, and

[2] [1894] A.C. 383.

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therefore prima facie are, or might be said to be, included in their "rates of wages." What the employee gets at one time is £x plus 2s. 3d., and another time £x plus 4s. 6d. Therefore, it is said that his "rate of wages" has gone up. On the other hand, it is submitted on behalf of the London County Council that the words are inapt to cover credits of this kind. It is said that "rates of wages" means only the ordinary wages in the ordinary sense; and Mr. Hoare, on behalf of the London County Council, quite rightly, if I may say so, drew our attention to a number of provisions in the scheme itself in what is called the Working Rule Agreement agreed by the London Regional Joint Committee and approved by the National Joint Council for the Building Industry, which is admittedly incorporated, and can be looked at. In all these provisions, as he said, a distinction is drawn between holiday payments and what I would describe as "wages," at any rate in the narrower sense of rates per hour, and so on.

I do not propose to go through the various provisions, to which Mr. Hoare quite rightly drew our attention, differentiating between the holiday payments and what I call (without begging the question) "wages" in the narrow sense, because I accept his submission that they arise under different documents, and are dealt with in different ways. But the question is whether they are within the expression "rates of wages" in this clause 23A of the agreement. That clause, of course, is dealing with increases or deceases in the rates of wages; and I have come to the conclusion that a weekly sum which has to be credited to a man each week is within the expression "rates of wages" in this clause. It is not a point which is capable of much elaboration; but if there is an increase in the amount by which each employee is credited at the beginning of each week in respect of this holiday scheme, it seems to me natural enough, for the purpose of this clause at any rate, to say that the "rates of wages" in respect of him have been increased.

The judge relied on clause 59 in the contract, and it was pointed out that that was an optional clause in the sense that, although this contractor adopted it, it was a clause which might not be adopted in other contracts in this general form. I do not myself think that is very important, but I will read the clause, and then say why I do not think it really helps. The clause reads: "The contractor shall be paid in respect of all "day work ordered by the achitect"—that, we were told, meant small variations—"at the rates of wages actually and properly "paid to the persons employed on such work but not exceeding "the rates which at the time of the execution of the work have "been established (by machinery of negotiation or arbitration) "for the trade or industry in the district where work is carried "out . . . with the addition thereto of the first percentage "inserted by the contractor in his tender/quotation (namely, 15 "per cent.) to cover supervision, use of plant, machinery, profit, "all employers' contributions to national insurance, payment for

"holiday wages and all contingencies." The judge said that as "rates of wages" in that clause expressly excluded payment of holiday wages, he thought it right to put the same meaning on the words "rates of wages" where they occur in clause 23A.

When one considers it, clause 59 is, in a sense, a double-edged weapon. It seems to me that a converse argument might be based on it. It might be asked, as it was thought necessary in clause 59 to make it clear by express words that payments for holiday wages were something not covered by "rates of "wages actually paid," why was that not done in clause 23A if it was intended that holiday payments or receipts should be excluded from "rates of wages"? For that reason, which I need not elaborate, I feel that the clause which the judge relied on does not, as it were, bear the weight which he placed upon it in construing clause 23A; and that is why, in the first instance, I addressed myself to the construction of clause 23A apart from this clause.

A further point was submitted on behalf of the London County Council. Certain correspondence took place as to this very point. The first letter is a letter dated January, 1949, some two years before the contract in connexion with which the present controversy has arisen, from the clerk to the defendant council addressed to the London Master Builders Association, of which the plaintiffs were members. It is in these terms: "Consideration has "recently been given to the need for the retention of the up-and-"down clause"—that is the clause in question—"in the council's "building and civil engineering, etc., contracts, and it has been "decided to continue the arrangements for another year from "January, 1949. Some modification has, however, been made "in the scope of the clause. Hitherto the clause has covered "increases in wage rates, national insurance, holiday pay, fares, "guaranteed time, prices of all materials and transport. In "future it will normally provide only for variations in wage rates "and in the prices of a limited range of main materials, to be "designated in each contract." The plaintiffs were informed of this letter, and were also informed that the association replied to that letter to the effect that it was not possible for the association to accept the proposal contained in the said letter; and the defendants wrote back maintaining their decision.

On November 6, 1951, with reference to another contract then subsisting between the plaintiffs and the defendants, but before the entering into of this contract, the defendants again wrote and said: "With reference to our recent conversation on increased "costs, I have to confirm that clause 23A (a) of the contract "restricts the increase or decrease to the rates of wages payable "only. Increases in the cost of holiday pay stamps are, there-"fore, not allowable."

It is submitted that if this court were of opinion (as I am of opinion) that, construing the clause, it covered these payments, this letter (or the effect of it) ought to be admitted in

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order to resolve an ambiguity if the words are thought to be capable of more than one meaning. Reliance was placed on the decisions in *Bank of New Zealand* v. *Simpson*[1] and *Charrington & Co.* v. *Wooder.*[2] Those were cases which decided that where the words used are susceptible of more than one meaning, extrinsic evidence is admissible to show what were the facts which the negotiating parties had in their minds when they used the words the application of which is in controversy between the parties.

I do not think that the defendants can bring this letter within those words. The rule was stated by Blackburn J., quoting himself from his work on Contract of Sale, in *Grant* v. *Fletcher*[3]: "The general rule seems to be that all facts are admissible which "tend to show the sense which words bear with reference to "surrounding circumstances of and concerning which the words "were used, but that such facts as only tend to show that the "writer only intended to use words bearing a particular sense "are to be rejected." These words fall within the latter part of that sentence. The letter is on the face of it saying: "This is "what we say these words mean"; and I think that the plaintiffs were entitled to say: "We do not agree with that; we "accept your contract, and let the court decide whether you are "right, or we are."

The defendants could, of course, have altered the contract by putting in express words, but they did not choose to do so; and therefore I think it falls to this court to follow the ordinary rule, and construe the contract as it was agreed between the parties. For those reasons, I would allow the appeal.

MORRIS L.J. I agree fully with the judgment which my Lord has delivered; and although we are differing from the learned judge, I do not wish to add to what my Lord has said.

PEARCE L.J. I agree.

Appeal allowed.
Conditional leave to appeal to House of Lords.

Solicitors: *Masons; J. G. Barr.*

A. W. G.

[1] [1900] A.C. 182.
[2] [1914] A.C. 71.
[3] (1826) 5 B. & C. 436.

[COURT OF APPEAL.]

* BILAINKIN *v.* BILAINKIN.

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1958
Dec. 16, 17.

Hodson and Ormerod L.JJ.

Infant—Custody—Divorce Court—Removal from jurisdiction—Order—Variation—Order as to custody varied by divorce registrar to give mother right to take child out of jurisdiction during school holidays without the written consent of the father—Whether registrar may dispense generally with father's written consent.

A mother, who had been given the custody of a child on the dissolution of her marriage with the father in 1949, applied to the registrar of the Divorce Division for leave to take the child abroad during the school term. The registrar of his own motion altered the form of the order as to custody to comply with the wording approved by Lord Merriman P. on March 8, 1955,[1] and directed that the father should be informed of that variation. The father was also served with a summons, but did not appear and was not represented on the hearing of the mother's application. The registrar granted the specific application to take the child abroad during the school term, and—again of his own motion—struck out of the new order as to custody the words requiring that the written consent of the father should be obtained to take the child out of the jurisdiction. Relying on that variation, the mother sent the child abroad during the school holidays unaccompanied by herself and without obtaining the father's written consent. On appeal by the father:—

Held, varying the order, that the registrar should not have altered the form of the order as laid down so as to dispense generally with the written consent of the father, and that the words struck out should be restored.

INTERLOCUTORY APPEAL from Wallington J.

The mother of an infant girl, of whom she had been granted custody on the dissolution of her marriage with the father in 1949, applied on March 14, 1958, to the registrar of the Divorce Division for leave to take the child out of the jurisdiction during the school term in June, 1958. She served a summons on the father for the hearing of her application on April 7. Mr. Registrar Compton Miller, to whom the application was made in March, suggested of his own motion that the terms of the order as to custody should be altered from their original form to the new wording for the restriction against taking out of the jurisdiction a child, the subject of a custody order, as approved by Lord Merriman P. on March 8, 1955.[1]

[1] Rayden on Divorce, 7th ed., p. 1185, para. 16: " . . . 'And it is " 'directed that the said child be not " 'removed from the jurisdiction until " 'he or she attains the age of 18 " 'years without leave but provided " 'that if the (petitioner) do give a " 'general written undertaking to the " 'court to return the said child to the " 'jurisdiction when called upon to do " 'so, the (petitioner) may, [with " 'the written consent of the " '(respondent)], remove the said " 'child from the jurisdiction during " 'the school holdidays [for any " 'period specified in such written " 'consent].' "

" The words in square brackets " should be omitted if the decree is " on the ground of incurable unsound- " ness of mind."

" This wording should be in future " used in all decrees and orders unless " the judge otherwise directs."

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The order as to custody was accordingly amended in that form in draft, and the registrar directed that the father should be informed of the alteration. He was so informed by the mother's solicitors by letter. The father was unable to attend the hearing of the application on April 7, and the registrar gave his consent to the child being taken out of the jurisdiction during the school term by her mother, but struck out of the new form of order as to custody the words "with the written consent of the "respondent."

Relying on that variation, the mother, in August, 1958, allowed the child to go out of the jurisdiction to Belgium during the school holidays unaccompanied by herself. The father learned that the child had gone abroad without his consent in writing and without the leave of the court having been obtained; and when he asked for information from the mother's solicitors as to the circumstances in which the child had left the jurisdiction and as to who had accompanied her, he did not receive the information asked for.

On November 3, 1958, the father applied to Wallington J. to be granted access to and to be granted custody of the child. The judge refused to grant the father access or to alter the order as to custody in his favour. The father appealed; and during the hearing of the appeal he stated that he wished also to give notice to appeal against the variation of the order as to custody in relation to the restriction against taking the child out of the jurisdiction made by the registrar in March, 1958 (supra). The case is reported only on the court's direction as to varying an order as to custody containing a limitation on taking a child out of the jurisdiction of the court.

The father in person.

Roger Gray for the mother.

The appellant father submitted that the registrar had no jurisdiction to vary the order as to custody in the way he had done; that any such variation dispensing with his written consent could be made only by a judge; and that the mother was in contempt of court in allowing the child to go out of the jurisdiction without the written consent of the father.

Roger Gray, for the mother, said that the registrar had of his own motion proposed that the order for custody should be altered in the way it had been, and had dispensed with the father's consent generally. The father had had the opportunity of being present at the hearing on April 7, but did not avail himself of the opportunity.

[HODSON L.J. That does not mean that the mother can take the child out of the jurisdiction without the father's consent for ever after.]

[ORMEROD L.J. It does not seem to me that the registrar carried out the President's instruction. The words in brackets are only to be omitted in the case of a respondent who is insane. It was quite irregular to leave those words out of the order.]

[HODSON L.J. If the registrar had any power to alter the form at all, he should have altered it in the form approved by the President; and that has not been done. He has given a general direction and he ought not to have done that. If on the specific application to take the child out of the jurisdiction the father did not appear, the registrar could make the specific order without his consent; but he cannot give a general direction dispensing with the father's consent.]

[ORMEROD L.J. As the form of order now stands, the mother is able to take the child out of the jurisdiction during any school holiday without the consent of the father or of the court.]

HODSON L.J. having dismissed the appeal as to access and custody, continued: There is only one other matter which has to be considered, and that is the form of the order. The girl was taken away from this country in the summer, in June, during term time, by leave of the court. Although the father does not approve or did not approve of that interruption of the education of his daughter, nevertheless the leave was given, and no complaint can be made of that. But it appears that the order for custody, which contains a limitation on the taking of the child out of the jurisdiction, was altered by the registrar in purported compliance with the direction given by Lord Merriman which appears at p. 1185 of Rayden on Divorce in this form: "The President has approved the following new wording for "the restriction against taking out of the jurisdiction a child "the subject of a custody order: 'And it is directed that the "'said child be not removed from the jurisdiction until he or "'she attains the age of 18 years without leave but provided "'that if the (petitioner) do give a general written undertaking to "'the court to return the said child to the jurisdiction when "'called upon to do so, the (petitioner) may, [with the written "'consent of the (respondent)], remove the said child from the "'jurisdiction during the school holidays [for any period speci- "'fied in such written consent].'" Some of those words were in brackets, for reasons which do not apply to this case. But, for some reason or other, which has not been explained to us, the registrar before whom this matter came for leave removed the reference to the written consent of the respondent which the direction of the President would seem plainly to require. No doubt the question of custody can be reviewed from time to time, but I see no reason why that direction was not complied with; and, for my part, I think that those words "with the written "consent of the respondent" should in future appear in the custody order. So there will be that variation.

This matter became of some practical importance because, relying on that variation of the order, the mother took the child abroad, not by herself, but sending somebody else in her place, to Belgium for a week in the summer holidays, and for some reason or other the father was not told who was accompanying

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the child. He not unnaturally complained that he did not know, and maintained that in a case of a child of this age and sex it was desirable that she should, if not accompanied by her mother, be accompanied by some responsible person of whom he had at any rate the opportunity of disapproving. But that difficulty, I hope, will not occur again if the order is amended so as to comply with the direction of the President.

[ORMEROD L.J. concurred in dismissing the appeal as to access but allowing the order as to custody to be amended so as to comply with the direction of Lord Merriman P.]

Order varied accordingly.

Solicitors: *Goodman, Derrick & Co.*

M. M. H.

[QUEEN'S BENCH DIVISION.]

1958
Nov. 3, 4
Streatfeild J.

* BIRTLEY DISTRICT CO-OPERATIVE SOCIETY LTD. *v.* WINDY NOOK AND DISTRICT INDUSTRIAL CO-OPERATIVE SOCIETY.

Arbitration—Award—Action to enforce—Misconduct—Counterclaim to set award aside—Whether such counterclaim possible.

In an action for a declaration that an arbitration award in favour of the plaintiffs was binding on the defendants, the defendants applied for leave to plead by way of counterclaim to have the award of the arbitrators set aside on the ground of misconduct:—

Held, (1) that misconduct of the arbitrator could not be pleaded as a defence to an action to enforce an award.

Scrimaglio v. *Thornett & Fehr* (1924) 131 L.T. 174 applied.

(2) That, a fortiori, since one could not bring an action by writ to set aside an award on the ground of misconduct by an arbitrator (the procedure being by motion to the High Court), one could not do so by way of counterclaim.

(3) That, on the facts of the present case, there was no ground for extending the time for the defendants to enter notice of motion to set aside the award under Ord. 59, r. 39.

ACTION.

The plaintiffs, Birtley District Co-operative Society Ltd., by writ dated May 5, 1957, claimed, inter alia, against the defendants, Windy Nook and District Industrial Co-operative Society, a declaration that an award made on September 18, 1956, as a result of an arbitration between the plaintiffs and the defendants, was binding on the defendants and that they were thereby precluded from providing co-operative services contrary to the terms of the award. At the trial of the action the defendants sought leave to plead by way of counterclaim that the award be set aside

on the ground of alleged misconduct by the arbitrators. This report is solely concerned with that preliminary point.

Sir Frank Soskice Q.C. and *R. A. MacCrindle* for the plaintiffs.
Gerald Gardiner Q.C. and *C. F. Dehn* for the defendants.

The cases cited in argument on this point are referred to in the judgment.

STREATFEILD J. I have no doubt in my own mind what my ruling upon this question should be. It is that I refuse leave for this counterclaim to be proceeded with.

As it has been indicated to me, and is obvious, that whatever may be my decision in this case a higher court will certainly have to reconsider it, I had better state my reasons.

By the counterclaim, so-called, although in my view it is virtually a defence to this action, the defendants seek to set aside the award of arbitrators on the ground of alleged misconduct. The particulars of the alleged misconduct are to be found, so the particulars set out, only in the correspondence which has been disclosed in this action.

An arbitration is governed by its own particular procedure laid down by the Arbitration Act, 1950, and R.S.C., Ord. 59, r. 39, and Ord. 52, rr. 3 and 4, and the procedure for setting aside an award under that Act is by motion to the High Court. In practice that means before a single judge, the case being entered in the special paper and the application and motion made within six weeks of the award. There is, of course, power to extend time for good cause. That is the procedure for setting aside an award as well as for remitting it to the arbitrators on the ground of misconduct.

That has not been done in this case. Instead, an action to enforce the award has been brought, and it is now sought, as I have indicated, really by way of defence, although in name by counterclaim, to set aside that award by reason of misconduct. It is quite clear from a decision of the Court of Appeal which is binding upon me (*Scrimaglio* v. *Thornett & Fehr*[1]) that misconduct of the arbitrator cannot be pleaded as a defence to an action to enforce the award. I say no more about that than just that. That decision is binding upon me. It could not be pleaded by way of defence.

It has also been said in *Pedler* v. *Hardy*[2] that it is very doubtful whether it can be pleaded by way of counterclaim. For myself I would put it even higher; I would have thought that it was a fortiori, because there is no such thing as an action commenced by writ to set aside an award for misconduct of the arbitrator. The Act of 1950 and the Rules of the Supreme Court lay down the procedure that it is on motion to the High Court

[1] (1924) 131 L.T. 174.

[2] (1902) 18 T.L.R. 591.

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and not by action, and if there cannot be a substantive claim in an action to set aside an award for misconduct, when one bears in mind that a counterclaim is a substantive claim it seems to me even stronger that there cannot be a counterclaim on that ground.

Therefore, for that reason alone I would come to the conclusion that it would be wrong to grant leave to enter this counterclaim.

I judge it also by another yardstick and I put myself into the position notionally of a judge in entertaining an application for extension of time to move the court to set aside an award under Ord. 59, r. 39. The position then would be this. The defendants here in fact did move the court, and there is no doubt that it was in respect of an arbitration under the Act of 1950, because their notice of motion is headed "In the matter of the Arbitration "Act, 1950." They already have applied to the court by way of motion to set aside the award on different grounds. Pearson J. refused to set it aside on those grounds and accordingly in September, 1956, the award, having been remitted to the arbitrators, was amended by them in accordance with the motion to remit the award taken out by the plaintiffs.

In December, 1957, and I am going to take that date as being in favour of the defendants, discovery in this action was completed, so that all of the ammunition available for the defendants to set aside the award on the ground of misconduct of the arbitrators was then in their possession, and it matters not whether it was the defendants or their solicitors. Indeed, I would hesitate to believe that the defendants, who have shown so much keenness in this matter, were not perfectly aware of the contents of that correspondence, but that does not matter one way or the other.

That being in their possession in December, 1957—of course they had not got it at the time when they first applied to set aside this award, but granting them a reasonable time, even a month, after December, 1957, to consider the rather voluminous correspondence—I then have to ask myself whether, if an application had then been made for leave to extend the time to move the court to set aside the award, I should have granted that application for extension of time. So, if one takes a month or even two months or even three months after December, 1957, I feel that beyond that time I certainly should not have granted extension of time.

Here again in favour of the defendants I will not say November, 1958, because in fact they took out a summons before the master which was adjourned into court in October, 1958, but in October, 1958, having had all the information in that correspondence for some ten months, for the first time there is a suggestion of setting aside this award on the ground of misconduct. Under those circumstances, had the application come

before me then in the form of leave to extend the time, I should undoubtedly have refused it.

Therefore, in so far as I have any discretion in this matter, I should certainly not exercise that discretion in favour of the defendants.

As I have said, I do not think that the procedure is admissible in any event to allow this counterclaim, but, even if it was regarded as a practical alternative to the procedure by way of motion, it would still, to my mind, be well out of time, and speaking for myself I should not extend the time.

For both of those reasons, therefore, I would refuse leave to enter this counterclaim.

Application refused.

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Streatfeild J.

Solicitors: *Herbert Reeves & Co. for William Mark Pybus & Sons, Newcastle-upon-Tyne; Sharpe, Pritchard & Co. for Watson, Burton, Booth & Robinson, Newcastle-upon-Tyne.*

C. J. E.

[COURT OF APPEAL.]

* COLLINS AND ANOTHER *v.* CLAUGHTON.

[Plaint No. OP. 70.]

C. A.

1958 *Nov.* 24, 25; *Dec.* 15.

Jenkins and Romer L.JJ., Roxburgh J.

Landlord and Tenant—Rent restriction—Surrender of tenancy—Whether giving up of physical possession necessary for valid surrender.

On May 10, 1956, the defendant, who was then statutory tenant of a dwelling-house within the Rent Acts, wrote a letter, which both he and his wife signed, to one of the plaintiffs, the landlords, in the following terms: "As I have come to an agreement with my "wife on changing name in rent book into her name . . . would "you be kind enough to grant same as she is going to see [the rent] "is paid in the future herself." The plaintiffs agreed to this proposal, and thereupon the rent book was changed into the wife's name and she paid the rent instead of the defendant. In January, 1957, the defendant's wife left him and he remained in occupation of the premises. On September 14 the wife gave notice to the plaintiffs that she was terminating the tenancy on October 14, 1957. The defendant thereupon offered to pay the rent but the plaintiffs refused and subsequently they commenced proceedings against him claiming possession of the premises on the footing that he was a trespasser.

The county court judge granted an order for possession, holding that the letter of May 10, 1956, acted upon by all parties, operated as a notional surrender of the statutory tenancy, and the creation of a new tenancy in the wife.

On appeal:—

Held, dismissing the appeal (1) that (apart from the Rent Acts) the defendant's tenancy was terminated in May, 1956, by operation of law.

Foster v. *Robinson* [1951] 1 K.B. 149; 66 T.L.R. (Pt. 2) 120; [1950] 2 All E.R. 342 applied.

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(2) That there was nothing in the Rent Acts which made it a prerequisite for the surrender of a statutory tenancy that there should be a giving up of physical possession.

Observations of Lord Greene M.R. in *Brown* v. *Draper* [1944] 1 K.B. 309, 313; 60 T.L.R. 219; [1944] 1 All E.R. 246, as explained by Lord Evershed M.R. in *Foster* v. *Robinson* [1951] 1 K.B. 149, 154, 158, 159, applied.

Observations of Asquith L.J. in *Rogers* v. *Hyde* [1951] 2 K.B. 923, 930; [1951] 2 All E.R. 79 considered.

Appeal from Judge McKee, sitting at Leeds County Court.

This was an appeal by the defendant, Fred Claughton, from an order of Judge McKee, dated April 24, 1958, made at Leeds County Court, ordering the defendant to give to the plaintiff landlords possession of a dwelling-house known as 15, Wyther Lane, Leeds.

The facts are set out in the judgment of the court.

Donald Herrod for the defendant.

C. P. Heptonstall for the plaintiffs.

The following cases, in addition to those referred to in the judgment, were cited in argument: *Brown* v. *Brash* [1]; *Turner* v. *Watts* [2]; *Metcalfe* v. *Boyce* [3]; *North West Building Society* v. *Elvy and Gillings*.[4]

Cur. adv. vult.

December 15, 1958. Jenkins L.J. The judgment about to be read by my brother Roxburgh is the judgment of the court.

Roxburgh J. This is an appeal by the defendant, Fred Claughton, from an order made by Judge McKee in the Leeds County Court, whereby it was ordered that the plaintiffs should recover possession of a dwelling-house known as 15, Wyther Lane, Leeds.

The defendant is in occupation of the dwelling-house. It was originally let to him on February 8, 1945. He was frequently in arrear with his rent, and there were proceedings against him in court, and it is common ground that on May 10, 1956, he was a statutory tenant of rent controlled premises. The defendant was also involved in matrimonial difficulties. His wife left home, but there was a reconciliation, and the defendant said in evidence that one of the terms of the reconciliation was that the rent book should be put into her name. The defendant and his wife signed a letter to one of the two plaintiffs (who were the landlords), dated May 10, 1956, in the following terms: "As I have come to an "agreement with my wife on changing name on rent book into "her name, Amy, would you be kind enough to grant same as

[1] [1948] 2 K.B. 247, 254; 64 T.L.R. 266; [1948] 1 All E.R. 922.

[2] (1927) 44 T.L.R. 105.

[3] [1927] 1 K.B. 758; 43 T.L.R. 149.

[4] [1952] C.P.L. 805.

" she is going to see it is paid in the future herself. You will see " I paid £6 8s. last Monday up to last month ending April 16. I " am enclosing book and stamped envelope for you so as to post " it back. I am letting my wife sign this letter along with me."

The landlords readily agreed and the rent book was changed into the wife's name, and thenceforward she paid the rent, and the defendant did not. Both continued in occupation of the house, until in January, 1957, the wife again left home. She took unsuccessful proceedings for desertion. In August, 1957, she forced an entry, removed her furniture and never returned again, leaving the defendant still in occupation. He offered to pay rent but this was refused. On September 14, 1957, the wife gave notice to the landlords that she was terminating the tenancy on October 14, 1957, and, accordingly, the landlords claimed possession from the defendant upon the footing that he was a trespasser. The judge held that the letter of May 10, 1956, acted upon by all parties, operated as a notional surrender of the statutory tenancy and the commencement of a new tenancy in the wife.

The foundation of the argument for the defendant, both in the county court and before us, has been laid upon passages in the judgment of the court delivered by Lord Greene M.R. in *Brown* v. *Draper*,[1] especially the following: " A tenant remaining " in possession cannot lawfully contract not to avail himself of " the protection which the Acts give him, if and when the land- " lord takes proceedings against him to recover possession. If " he wishes to place himself outside the protection of the Acts " without putting the landlord to the necessity of taking proceed- " ings, his proper course is to deliver up possession. Unless and " until he does so, he is under the shelter of the Act, whether or " not he so desires. No contract, and a fortiori, no mere state- " ment of his wishes or intentions, can deprive him of the " statutory protection."

In *Brown* v. *Draper*[2] it was held that on the facts of the case the tenant had not delivered up possession, and the same conclusion was reached in *Old Gates Estates Ltd* v. *Alexander*.[3] This is also true of *Middleton* v. *Baldock*.[4] But these cases bear no close resemblance to the present.

The questions involved in the present appeal are (1) whether (apart from the Rent Acts) the transaction indicated by the letter of May 10, 1956, which was acted upon by all parties, would have effected a surrender by operation of law of the defendant's tenancy and the creation of a tenancy in favour of his wife, and (2) if so, whether the Rent Acts prevent the transaction from having this effect. The defendant remained in occupation throughout, and, accordingly, this question resolves itself into the question whether the passage in Lord Greene's judgment in

[1] [1944] 1 K.B. 309, 313; 60 T.L.R. 219; [1944] 1 All E.R. 246.
[2] [1944] 1 K.B. 309.
[3] [1950] 1 K.B. 311; 65 T.L.R. 719; [1949] 2 All E.R. 822.
[4] [1950] 1 K.B. 657; 66 T.L.R. (Pt. 1) 650; [1950] 1 All E.R. 708.

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Brown v. *Draper*,[5] which has been cited, required physical possession to be given up, and if so, whether it has been modified by subsequent decisions of this court.

The test to be applied in the solution of the first question is to be found in *Foster* v. *Robinson*.[6] The premises in that case were rent controlled but the tenant at the time of surrender by operation of law was a contractual and not a statutory tenant. When he became unfit to work by reason of age and infirmity in 1946, the landlord told him that he could live in his cottage rent free until he died, and the tenant accepted the offer and paid no further rent. It was held in this court that as a result of this arrangement, the original tenancy had been surrendered by operation of law. Lord Evershed M.R. states the problem thus[7]: "If there is a new arrangement which the tenant is asserting by "his conduct, then he is estopped from denying that the landlord "was capable of entering into that new arrangement; and, if "the new arrangement could not be entered into while the old "agreement subsisted, it follows that the tenant is equally "prevented from denying that the old agreement has gone."

Applying this test, the county court judge was right in holding that (apart from the Rent Acts) the defendant's tenancy was surrendered in May, 1956, by operation of law.

The bearing of the Rent Acts upon the problem needs further statement. Their application to a contractual tenant of rent controlled premises was, indeed, decided in *Foster* v. *Robinson*.[8] After pointing out that the tenant was a contractual tenant and not a statutory tenant, Lord Evershed M.R. said[9]: "It is fair "to say, however, that the observation of Lord Greene M.R. is "true generally, and that in the case of a rent controlled house "there must be either an actual yielding up of possession, or its "equivalent . . . or an order against the tenant . . ."

By the use of the phrase "or its equivalent" Lord Evershed was either construing or modifying Lord Greene's proposition, because the phrase "or its equivalent" necessarily embraces something which is not an actual yielding up of possession, and what he had in mind is made clear in the following passage[10]: "In my view there was, as a result of the agreement come to, a "delivery up of possession under the former tenancy and a "resuming of possession under a new transaction immediately "afterwards. To use the language of Cockburn C.J. in *Oastler* "v. *Henderson*,[11] there must be 'something amounting to a "'virtual taking of possession.' If the key had been handed over "and then been handed back the next minute that would have "symbolised the delivery up of possession, and I cannot think "that it vitally matters that that performance was not gone "through."

[5] [1944] 1 K.B. 309.
[6] [1951] 1 K.B. 149; 66 T.L.R. (Pt. 2) 120; [1950] 2 All E.R. 342.
[7] Ibid. 155.
[8] [1951] 1 K.B. 149.
[9] Ibid. 154.
[10] [1951] 1 K.B. 149, 158, 159.
[11] (1877) 2 Q.B.D. 575, 578.

Although *Foster* v. *Robinson* [12] concerned a contractual tenant, the reasoning upon which it was based was no less applicable to a statutory tenant, and perhaps that is why Asquith L.J. stated the proposition in broad terms in *Rogers* v. *Hyde* [13] as follows: "If it was a statutory tenancy, there is recent and binding "authority for the proposition that a contractual (and non-"protected) tenancy can replace a statutory tenancy by a notional "surrender and regrant or by other means: see, for instance, "*Foster* v. *Robinson*.[14]"

In *Murray Bull & Co. Ltd.* v. *Murray*,[15] McNair J. found great difficulty in agreeing with this view. But this court in *Bungalows (Maidenhead) Ltd.* v. *Mason* [16] disagreed with McNair J. on this point, and *Nightingale* v. *Courtney*,[17] in which a statutory tenant was concerned, proceeded upon the footing that the statutory tenancy could be replaced by a notional surrender followed by regrant, although on the facts it was held that this had not been done. It must, therefore, now be treated as settled that as a matter of law, a statutory tenant can effect a valid surrender by operation of law in the circumstances indicated by Lord Evershed M.R. in *Foster* v. *Robinson*.[18]

There was ample evidence on which the county court judge could hold that a valid surrender by operation of law had been effected by the defendant in the present case.

Accordingly, we are of opinion that the judge came to a right conclusion in this case, and would dismiss this appeal.

Appeal dismissed.

Solicitors: *Kingsley Wood & Co. for Wade, Kitson & Rigg, Leeds; Emsley & Son, Leeds.*

J. A. G.

[12] [1951] 1 K.B. 149.
[13] [1951] 2 K.B. 923, 930; [1951] 2 All E.R. 79.
[14] [1951] 1 K.B. 149.
[15] [1953] 1 Q.B. 211; [1952] 2 T.L.R. 1003; [1952] 2 All E.R. 1079.
[16] [1954] 1 W.L.R. 769; [1954] 1 All E.R. 1002.
[17] [1954] 1 Q.B. 399; [1954] 2 W.L.R. 266; [1954] 1 All E.R. 362.
[18] [1951] 1 K.B. 149.

[QUEEN'S BENCH DIVISION.]

* REGINA *v.* LIVERPOOL JUSTICES. *Ex parte* W.

1959
Jan. 16.

Lord Parker C.J., Donovan and Ashworth JJ.

Adoption—Male applicant; female infant—Adoption order—Validity—Duty to consider "special circumstances"—Guardian ad litem—Duty to make full report—Certiorari—Adoption Act, 1950 (14 *Geo.* 6, c. 26), *s.* 2 (2)—*Adoption of Children (Summary Jurisdiction) Rules,* 1949 (*S.I.* 1949, *No.* 2397), *rr.* 7, 9 (*as substituted by Adoption of Children (Summary Jurisdiction) Rules,* 1952 (*S.I.* 1952, *No.* 554), *r.* 3).

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REGINA
v.
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Ex parte W.

Crown Practice—Certiorari—Statutory provision overlooked—Jurisdiction of High Court to quash decision—Adoption order—Adoption Act, 1950, *s.* 2 (2).

A woman gave birth to an illegimate female child, and when the child was nearly five years old the mother went to live with a man, L., whom she later married. Five months after this she died. L. applied to the justices for an adoption order in respect of the child. In accordance with the Adoption of Children (Summary Jurisdiction) Rules, 1949, the local authority was appointed guardian ad litem and a child care officer of the authority made the necessary investigation and report to the justices. The officer knew that the child's grandmother wanted custody of the child and that she had consulted a solicitor for this purpose, but made no mention of these matters in his report. No notice of L.'s application was served on the grandmother, and the application was heard in her absence by the justices, who made an adoption order in favour of L. The grandmother moved for certiorari to quash the order on the grounds, inter alia, that the guardian ad litem failed to make a full investigation, and that the justices failed to have proper regard to section 2 (2) of the Adoption Act, 1950 [1]:—

Held, that as under section 2 (2) the justices should only make the order in special circumstances and as an exceptional measure, in the absence of any indication in the order that they had considered the provisions of that subsection, and having regard to the absence of any affidavit by the justices stating whether they had done so, the court was bound to infer that they had failed to consider these provisions, and certiorari must go.

Per curiam: the failure of the guardian ad litem to make a full report when purporting to carry out his duty under rule 7 of the Rules of 1949 [2] might well constitute another ground for certiorari; in the circumstances it was his duty to make the most exhaustive investigations and to lay all possible information before the justices; had he done so, the justices might well have issued notice of the application to the grandmother pursuant to the substituted rule 9 of the rules of 1949.

APPLICATION for an order of certiorari.

The applicant moved for an order of certiorari to quash an adoption order made by the Liverpool justices sitting as a juvenile court on June 16, 1958.

On May 8, 1952, the daughter of the applicant gave birth to an illegitimate female child. The child was brought up by the applicant and her daughter until April, 1957, when the latter went to live with one William Leigh, taking the child with her. On

[1] Adoption Act, 1950, s. 2 (2): "An adoption order shall not be "made in respect of an infant who is "a female in favour of a sole "applicant who is a male, unless the "court is satisfied that there are "special circumstances which justify "as an exceptional measure the "making of an adoption order."

[2] Adoption of Children (Summary Jurisdiction) Rules, 1949, r. 7: "It "shall be the duty of the guardian "ad litem to investigate as fully as "possible all circumstances relevant "to the proposed adoption with a "view to safeguarding the interests "of the infant before the court, and "to make a report to the court for "that purpose; . . ."

R. 9 (as substituted by Adoption of Children (Summary Jurisdiction) Rules, 1952): "At the time of "appointing a guardian ad litem, the "court . . . shall issue a notice . . . "to the following persons:— . . . "(*d*) any other person, . . . who in "the opinion of the court ought to be "a respondent to the application, . . ."

October 16, 1957, the daughter married Leigh and on March 12, 1958, she died.

Two days later Leigh gave notice to the welfare authority of his intention to adopt the child, who continued to live with him. About the same time the applicant decided to have the child made a ward of court. and applied for legal aid for this purpose. Leigh applied to the juvenile court for an adoption order, and the local authority was appointed guardian ad litem in accordance with rule 6 of the Adoption of Children (Summary Jurisdiction) Rules, 1949. In purported compliance with rule 7 of these rules, Kenneth Brian Redgrave, a child care officer of the local authority, made a report to the court. The only reference to the applicant was in the following terms: "The maternal grand-"mother seems not always to be clear as to the parentage of the "infant, and has on a number of occasions picked up the infant "from school and removed her to another part of the country. "These happenings occurred whilst the mother of the infant was "still alive, and they seem to have rather upset the infant, who "is now very frightened of her maternal relations and if she sees "them, or thinks she sees them, she runs into the house and "hides." It appeared that this was the only information about the applicant given to the justices. In fact, Redgrave knew that the applicant disapproved of Leigh and wanted custody of the child, and that she was consulting a solicitor for this purpose.

On June 16, 1958, the juvenile court proceeded to hear Leigh's application, and made an adoption order in his favour. The court had not directed that any notice of the proceedings be served on the applicant, and she did not appear, and there was no evidence that she was aware that the proceedings were taking place.

The grounds of the present application were, inter alia, (1) that the guardian ad litem failed to investigate as fully as possible all the circumstances relevant to the proposed adoption contrary to rule 7 of the Adoption of Children (Summary Jurisdiction) Rules, 1949; (2) that the guardian ad litem and/or the justices failed to have due and proper regard to section 2 (2) of the Adoption Act, 1950, in making the order, in that they failed to consider whether there were any special circumstances justifying an order being made in favour of Leigh.

J. R. Bickford Smith for the applicant

Glyn Burrell for the local authority as guardian ad litem.

Neither the justices nor the adopter appeared. The justices put in no affidavit.

The following authority, which was not referred to in the judgments, was cited in argument: *In re B. (An Infant)*.[3]

LORD PARKER C.J. In these proceedings Mr. Bickford Smith moves for an order of certiorari to quash an adoption order made on June 16, 1958, by the Liverpool justices sitting as a juvenile court.

[3] [1957] 3 All E.R. 193.

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[His Lordship stated the facts as set out above, and continued:] The vital section is section 2 (2) of the Adoption Act, 1950. Section 2 is in these terms: "(1) An adoption order shall "not be made in respect of an infant unless the applicant or, in "the case of a joint application, one of the applicants (*a*) has "attained the age of twenty-five and is at least twenty-one years "older than the infant; or (*b*) has attained the age of twenty-one "and is a relative of the infant; or (*c*) is the mother or father of "the infant. (2) An adoption order shall not be made in respect "of an infant who is a female in favour of a sole applicant who "is a male, unless the court is satisfied that there are special "circumstances which justify as an exceptional measure the "making of an adoption order." It is to be observed that the words are very strong, "an adoption order shall not be made "unless," and then not only must there be special circumstances, but the whole proceeding must be treated as an exceptional measure.

With regard to rules and regulations made under the Act, it is provided by the Adoption of Children (Summary Jurisdiction) Rules, 1949, that in such a case as this a guardian ad litem should be appointed as soon as the application is made, and in this case that was done and the local authority became the guardian ad litem. Then, by rule 7, it is provided: "It shall be the duty of "the guardian ad litem to investigate as fully as possible all "circumstances relevant to the proposed adoption with a view "to safeguarding the interests of the infant before the court, and "to make a report to the court for that purpose." That is quite general. It is the duty of the guardian ad litem to investigate the circumstances in all cases, but I venture to think that, having regard to section 2 (2), there is a duty on the guardian to make the most exhaustive investigations and to lay all possible information before the court because, as I have said, the court can only act on special circumstances and as an exceptional measure.

In 1952 an amended rule was substituted for rule 9 of the rules of 1949. It provided for the persons on whom the application should be served. By the amendment of 1952 it was provided that notice of the application should also be served on "any other "person, not being the infant, who in the opinion of the court "ought to be a respondent to the application."

A report dated June 12, 1958, was put in by Kenneth Brian Redgrave, a child care officer, which was signed by one Craig, who I understand was the head of the department, and the only reference to the grandmother was in these terms: [His Lordship read that part of the report which is set out above, and continued:] As far as we know that was the sole information in regard to the grandmother that was given to the justices, whereas, in fact, as we now know, the grandmother had been round and seen Redgrave on April 9, 1958, and had clearly conveyed the fact that she would like the custody of the child, and that she considered Leigh was unsuitable.

According to his affidavit Redgrave thought that she was aged and confused; that may well be, but at any rate she conveyed that amount of knowledge to him. Further, on April 14, a few days later, somebody rang up Redgrave from the probation office and said that the grandmother had called to see her after having seen a solicitor, and that the solicitor might be advising the grandmother or one of her daughters to apply for a custody order. So Redgrave clearly knew that there was a grandmother, that the grandmother disapproved of Leigh and wanted custody of the child, and that the grandmother was consulting a solicitor for the purpose. Not one word of that appeared in the report which was laid before the justices.

In those circumstances Mr. Bickford Smith, an behalf of the grandmother, asks for an order of certiorari, contending in the first place that it is clear that the justices must have overlooked subsection (2) of section 2 of the Act of 1950. He points out, what is undoubtedly true, that, in the grounds which have to be stated for the application for an order of certiorari it is contended, amongst other things, "that the justices failed to have due and "proper regard to section 2 (2) in making the said adoption "order." Despite that, the justices have put in no affidavit, as they are fully entitled to do, explaining that they did consider whether there were special circumstances and what they were. In the absence of any affidavit from the justices to that effect, and having regard to the fact that in the order they made they drew no attention at all to any special circumstances, I think that this court is bound to infer that in this case—and, of course, it is an exceptional case—they omitted altogether to consider the provisions of section 2 (2) of the Act. I should say in fairness to them, that as regards the consideration that they made no reference to the special circumstances in the order, they have followed meticulously the order prescribed by the First Schedule to the Rules of 1949, but the fact remains that there is no suggestion from beginning to end here that they ever did consider the provisions of subsection (2), and there is no reply to the contention raised in the grounds for application in this case.

I should add that there may well be—it is not necessary to decide—a second ground on which an order of certiorari will lie. It seems to me that the procedure envisaged in a case of this sort was not followed. I am referring to the procedure whereby the guardian ad litem is to make a full report to the court of the circumstances of the case. As I have said, I cannot treat the report that was put in as in any sense a full report, bearing in mind that this was a case under section 2 (2); and it is to be observed that if a full report had been put in referring to the visit by the grandmother, and referring to the telephone conversation, the justices might well have considered that pursuant to the amended rule 9 they ought to have the application served on the grandmother.

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For those reasons, it seems to me that the justices exceeded their jurisdiction and an order of certiorari must go. I should add that, of course, nothing that I have said should be taken as going in any way to the merits of the case. It may well be that on a further application and hearing the justices would be abundantly justified in saying that Leigh should adopt the child. On the other hand, they may come to a different conclusion. Nothing I have said should be taken to prejudge the issue in any way.

Donovan J. I agree. As my Lord has indicated, there may be special circumstances which would justify an adoption order in this case in favour of Leigh. Like the Lord Chief Justice, I say no more about that one way or the other. It is purely a matter for the justices, but under the express provisions of section 2 (2) of the Act of 1950 such an order clearly cannot be made unless the court is satisfied that such special circumstances do exist justifying such an order as an exceptional measure, and I think the inference here is overwhelming that this provision was overlooked.

Ashworth J. I agree.

Application allowed.

Solicitors: *Helder Roberts & Co. for John A. Behn, Twyford & Reece, Liverpool; Town Clerk, Liverpool.*

J. D. P.

[RESTRICTIVE PRACTICES COURT.]

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1958 *Oct.* 27, 28, 29, 30, 31; *Nov.* 3, 4, 5, 6, 7, 10, 11, 12, 13, 14, 17, 18, 19, 20, 21, 24, 25, 26, 27, 28; Dec. 1, 2, 3. 1959 *Jan.* 26.

* *In re* YARN SPINNERS' AGREEMENT.

[1957 No. 1 (E. & W.)]

Restrictive Practice—Restriction—Whether contrary to public interest—Price restriction—Cotton spinning industry—Minimum price scheme—Excess capacity—Preservation of price stability—Advantage to trade purchasers—Price of yarn higher than in free market—Loss of export trade—Whether benefits or advantages conferred on public—Whether any detriment to public—Serious and persistent adverse effect of removal of restrictions on general level of unemployment—Whether restrictions reasonable—Restrictive Trade Practices Act, 1956 (4 *&* 5 *Eliz.* 2, *c.* 68), *ss.* 20, 21 (1) (*b*), (*e*).

An agreement made between the members of the Yarn Spinners' Association, provided, inter alia, for a minimum price scheme and bound the members of the association not to sell yarn containing

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† *Present*: Devlin J. (President), Upjohn J., Pearson J., Sir Stanford Cooper, Mr. W. L. Heywood, Mr. W. Wallace and Mr. W. G. Campbell.

85 per cent. or more of cotton at a price lower than that fixed under the rules of the association. On a reference by the registrar of the agreement to the court, the association alleged that the restrictions to which its members were subject were not contrary to the public interest, on the ground that removal of the price restrictions would deny to the public as purchasers, consumers or users of any goods specific and substantial benefits within the meaning of paragraph (*b*), and would be likely to have a serious and persistent adverse effect on the general level of unemployment in eleven, alternatively four, areas, within paragraph (*e*) of section 21 (1) of the Restrictive Trade Practices Act, 1956, and that the restrictions were reasonable having regard to the balance between those circumstances and the detriment to the public (if any) resulting from this operation.

The following were among the findings made by the court. The spinners who were members of the association formed a section of the Lancashire cotton industry. The spinning industry was in the hands of about 225 concerns employing over 100,000 operatives and for the most part spinners were a separate body whose main customers were doublers and weavers. About a quarter of the yarn passed into the hands of doublers, and of all the yarn spun, whether single or double, 70 per cent. passed to the weavers, who manufactured from it cloth in an unfinished state which was passed on to merchant convertors for finishing. Most of the yarn consumed by the public reached it in the form of cotton goods and any increase or decrease in the price per pound of yarn had a diminished impact on shop prices. The minimum price was an artificial figure calculated on a hypothetical average cost. In theory the minimum price scheme was designed to tide spinners over short periods of recession and to guard against cut-throat competition such as happened in and after the slump of 1929–31; it was based on the theory that the spinning industry was subject to short but violent recessions and presupposed that periods of recession when the minimum prices were effective would be exceptional. In fact, for most of the time since 1952 most of the spinners had been operating at the minimum prices and the scheme appeared to ensure a reasonable return all the time to the majority of them. Since 1951, on the average, the prices for yarn had been higher than they would have been in a free market. Spinning was a contracting industry and the scheme had seriously retarded the natural process of high-cost producers closing down to match the falling demand, and at the time of the hearing there was a substantial amount of excess capacity over and above the reserve capacity which it was prudent to retain to meet any sudden increase in demand. The excess capacity would not be eliminated in the foreseeable future unless the scheme was abrogated: the industry could and should be made smaller and more compact. Notwithstanding the scheme mills had been closing down; that process would have been continued in any event, but removal of the scheme would accelerate it considerably and put out of business a number of mills which might have stayed on for very much longer, but the industry would not be left without sufficient capacity to meet ordinary demands of the home market and maintain if not increase its share of the export market. Public demand for cotton goods was steady, but there were fluctuations in the demand for yarn, although they were not enormous and not so severe as to call for exceptional measures to create and maintain reserve capacity. The operation of the restrictions encouraged the mills to spend money on modernisation and made it more likely that they would do so, but the resulting benefit to the public was not substantial. Quite a considerable export business had been lost, not so much in yarn as

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in cloth, through the rigidity of the scheme; exports of yarn and cloth did not form a large part of the country's export trade, but they were not insignificant. The scheme contributed to price stability and, on balance, it was advantageous to trade purchasers such as weavers.

The spinning industry was concentrated in a small area about 35 by 25 miles in extent, mostly in Lancashire. Under paragraph (*e*) the association, inter alia, relied on eleven areas in which about 100,000 employees or about 70 per cent. of the industry was situated; the court, in considering the association's contention under that paragraph, inter alia, made the following illustrative assumptions based on the Ministry of Labour figures for October, 1958: if abrogation of the scheme would cause 20 per cent. of the spinners and doublers to be thrown out of work and if only half of them obtained employment elsewhere, the general level of unemployment would be raised from 4·3 per cent. to 5·9 per cent. The labour force in the industry contained a large proportion of female and elderly labour whose chances of re-employment in the industry if thrown out of work by the removal of the scheme if, as anticipated, it resulted in a more compact industry, were not good:—

Held, (1) that the association had not shown that removal of the restrictions would deny to the shopping public any benefits or advantages within the meaning of paragraph (*b*) of section 21 (1).

(2) That price stability without the sacrifice of a free market would be a benefit, but that it could not be looked at in isolation and the court could not admit price stability as a benefit to the purchasing public and defer for subsequent consideration the question whether the loss of a free market was a detriment to the public generally. To hold as a general rule that price stabilisation as an alternative to a free market was a benefit to the purchasing public would be contrary to the general presumption embodied in the Act, so that what had to be considered was whether, in the circumstances, price stabilisation conferred a peculiar benefit sufficiently great to outweigh the loss of a free market, and, in the circumstances of the present case, stabilising the price of yarn did not confer any benefit on the purchasing public that was not outweighed by the loss of the chance of reductions in price that might be secured under free competition. The association, therefore, had not made out a case in respect of price stability under paragraph (*b*).

(3) That, in considering the effect of the removal of the restrictions on the general level of unemployment in the areas in question, the number of persons registered at the labour exchanges as seeking work could be taken as a working basis for calculations (bearing in mind that those figures were not comprehensive) but that the court had to apply a number of incalculable factors—such as the number of mills which would close down if the restrictions were removed, the number which would have closed down anyway, the proportion of those who would lose their jobs who were short-time workers already classified as unemployed, the number who would get work elsewhere and the length of time which it would take them to do so—and was required to act without certainty and on the balance of probabilities and to arrive at a general conclusion in the terms used in the Act. Although the court was unable to make any specific findings on those matters, or on the illustrative assumptions set out above, the closing of mills consequent upon the abrogation of the scheme to be expected in the eleven areas would have a serious adverse effect on the general level of unemployment in those areas, which effect would be persistent.

(4) (*a*) That although there would be no appreciable lowering of prices of cotton goods unless the cost in the intermediate processes also came down, a lowering of the price of yarn might start reductions which would mount up in a way which would in the end be of appreciable—though not of great—benefit to the public, and that, therefore, there was detriment to the public resulting from the operation of the restrictions in that the price of yarn might be lower than it was;

(*b*) that anything which appreciably hindered or diminished the export trade must be regarded as a public detriment, and the loss of export business, therefore, even though exports of yarn and cloth did not form a large part of the export trade of the country, was a detriment;

(*c*) that it was in the public interest that labour and capital should be employed as productively as possible, and the excess capacity in the industry, the cause of short-time working and idle plant, was also a public detriment.

(5) That if, sed quaere, the benefit to trade purchasers of yarn such as doublers and weavers resulting from the operation of the restrictions was a "specific" benefit to the "public" within the meaning of paragraph (*b*), and was a circumstance to be balanced against detriments, having regard to those detriments, restrictions which secured benefits only to a small class of trade purchasers were clearly unreasonable.

(6) That, having regard to the balance between the effect which removal of the restrictions would have on the general level of unemployment in the areas concerned and the detriments to the public resulting from the operation of the restrictions, in particular the waste of national resources in the form of excess capacity, the restrictions were unreasonable. The effect on the general level of unemployment was grave, but it was localised; the price of its avoidance would have to be paid nationally and it would not be until the excess capacity had been got rid of that the industry could be made into a more compact entity, a reorganisation which would ultimately be beneficial not merely to the nation and the consuming public, but to the industry itself and those employed in it.

The association, therefore, had not made out a case under section 21 as a whole and the restrictions must be declared contrary to the public interest.

Observations on the scope of section 20 (5).

REFERENCE.

The Registrar of Restrictive Trading Agreements, pursuant to section 20 (2) (*a*) of the Restrictive Trade Practices Act, 1956, referred to the court an agreement described as "The Yarn "Spinners' Agreement," numbered 79 on the register of agreements maintained under section 1 (2) of the Act, made between the members of the Yarn Spinners' Association together with and including all resolutions of the association made pursuant to the agreement. By a representation order made under rule 11 of the Restrictive Practices Court Rules, 1957, the association was made sole respondent to the proceedings on behalf of all its members.

The agreement, inter alia, provided for a minimum price scheme and standard conditions of sale, the prices and details of which were fixed by resolutions, and bound the members of the association not to sell yarn containing 85 per cent. or more of

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cotton at a price lower than that fixed under the rules. The association contended that the restrictions to which its members were subject were not contrary to the public interest by virtue of the circumstances set out in paragraphs (*b*), (*e*) and (*g*) of section 21 (1) of the Act [1]; similar pleas under paragraphs (*a*) and (*f*) of that subsection were abandoned during the course of the proceedings.

The facts are stated in the judgment of the court.

Sir Andrew Clark Q.C., *R. O. Wilberforce Q.C.* and *Geoffrey Tompkin* for the association.

A. A. Mocatta Q.C. and *J. R. Cumming-Bruce* for the registrar.

The following cases were cited in argument: *In re Chemists' Federation Agreement* [2]; *Tatem Steam Navigation Co. Ltd.* v. *Commissioners of Inland Revenue* [3]; *Elliot* v. *Duchess Mill Ltd.* [4]; *Ryhope Coal Co. Ltd.* v. *Foyer* [5]; *Fiat (England) Ltd.* v. *Williams* [6]; *Stewart and Young* v. *Walker* [7]; *Commissioners of Inland Revenue* v. *A. and G. Anderson* [8]; *Palser* v. *Grinling* [9];

[1] Restrictive Trade Practices Act, 1956, s. 21: "(1) For the purposes "of any proceedings before the "court . . . a restriction accepted in "pursuance of any agreement shall "be deemed to be contrary to the "public interest unless the court is "satisfied of any one or more of the "following circumstances . . . (*b*) "that the removal of the restriction "would deny to the public as pur-"chasers, consumers or users of any "goods other specific and substantial "benefits or advantages enjoyed "or likely to be enjoyed by them "as such, whether by virtue of the "restriction itself or of any arrange-"ments or operations resulting there-"from; . . . (*e*) that, having regard "to the conditions actually obtaining "or reasonably foreseen at the time "of the application, the removal of "the restriction would be likely to "have a serious and persistent "adverse effect on the general level "of unemployment in an area, or in "areas taken together, in which a "substantial proportion of the trade "or industry to which the agreement "relates is situated; . . . (*g*) that "the restriction is reasonably required "for purposes connected with the "maintenance of any other restriction "accepted by the parties . . . being "a restriction which is found by the "court not to be contrary to the "public interest upon grounds other "than those specified in this para-"graph . . . and is further satisfied ". . . that the restriction is not "unreasonable having regard to the "balance between those circum-"stances and any detriment to the "public or to persons not parties to "the agreement (being purchasers, "consumers or users of goods pro-"duced or sold by such parties, or "persons engaged or seeking to be-"come engaged in the trade or "business of selling such goods or of "producing or selling similar goods) "resulting or likely to result from "the operation of the restriction. "(2) In this section 'purchasers', "'consumers' and 'users' include "persons purchasing, consuming or "using for the purpose or in course "of trade or business or for public "purposes; and references in this "section to any one person include "references to any two or more "persons being inter-connected bodies "corporate or individuals carrying on "business in partnership with each "other."

[2] [1958] L.R. 1 R.P. 75; [1958] 1 W.L.R. 1192; [1958] 3 All E.R. 448.

[3] [1941] 2 K.B. 194; 57 T.L.R. 622; [1941] 2 All E.R. 616.

[4] [1927] 1 K.B. 182; 42 T.L.R. 707.

[5] (1881) 7 Q.B.D. 485.

[6] (1932) 17 T.C. 105.

[7] (1926) 11 T.C. 123.

[8] (1930, 1931) 16 T.C. 355.

[9] [1948] A.C. 291; 64 T.L.R. 2; [1948] 1 All E.R. 1.

McClay v. *Dixon*[10]; *Richardson* v. *London County Council*[11]; *Polurrian Steamship Co. Ltd.* v. *Young*[12]; *Bank Line Ltd.* v. *Capel*[13]; *Hirji Mulji* v. *Cheong Yue Steamship Co. Ltd.*[14]; *Attorney-General of the Commonwealth of Australia* v. *Adelaide Steamship Co. Ltd.*[15]

Cur. adv. vult.

January 26. DEVLIN J. read the following judgment of the court: The respondent in this case is the Yarn Spinners' Association and the agreement which the court has to consider is one which binds the members of the association not to sell yarn containing 85 per cent. or more of cotton at a price lower than that fixed under the rules of the association. The spinners, who are members of the association, form a section of the Lancashire cotton industry. The spinning industry is concentrated in a small area about 35 by 25 miles in extent stretching from Wigan through Bolton to Oldham, mostly in Lancashire but partly in adjoining counties. The industry is now in the hands of about 225 concerns which employ something over 100,000 operatives; exact figures are not available.

The spinners are at the base of the cotton industry. They buy imported raw cotton, classified as American or Egyptian types, and can be divided into three groups according to the character of the cotton which they spin. The largest contains the spinners of American type cotton, out of which the coarser yarns are spun; this forms 65 per cent. of the industry. Another group, containing 20 per cent. of the industry, spins cotton of Egyptian type, which makes a finer yarn; and the remaining 15 per cent. spins waste cotton, which is a by-product from the preparation of American and Egyptian cotton.

The yarn which is spun by the spinners is called "singles "yarn." About a quarter of it passes into the hands of another section of the trade, the doublers, who twist two or more threads of singles yarn into a double yarn for use where something stronger than the ordinary yarn is required. Of all the yarn spun, whether single or double, 70 per cent. passes to the weavers, who are a third section of the trade, about 5 per cent. is exported and the remaining 25 per cent. is used for a great variety of different purposes, such as hosiery and sewing thread. The weavers, who form a considerable part of the cotton industry but with whom this case is not strictly concerned, since they are not parties to the Yarn Spinners' Agreement, manufacture from the yarn cloth in an unfinished state, generally known as grey cloth. The cloth is passed on to the next section of the industry, who are the merchant converters. They have it finished—usually on

[10] [1944] 1 All E.R. 22.
[11] [1957] 1 W.L.R. 751; [1957] 2 All E.R. 330.
[12] [1915] 1 K.B. 922; 31 T.L.R. 211.
[13] [1919] A.C. 435; 35 T.L.R. 150.
[14] [1926] A.C. 497; 42 T.L.R. 359.
[15] [1913] A.C. 781; sub nom. *Rex* v. *Adelaide Steamship Co. Ltd.*, 29 T.L.R. 743.

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commission—to their own specification, that is to say, dyed or bleached or printed, and they then sell it to a garment maker for making up or to a wholesaler to pass on to a retailer or for export. The cotton industry is thus what is called a horizontal industry. There are one or two concerns which are responsible for the whole of the processing from the raw material to the finished article. But as a rule the processing is done in stages in which the goods pass from one producer to another. There are companies and firms who are concerned with more than one stage; there are spinners who are doublers or weavers and some who are all three. But for the most part the spinners are a separate body whose main customers are the weavers and the doublers. The doublers have an agreement between themselves similar to the one which we are considering; the weavers have no agreement.

The prosperity of the Lancashire cotton industry was built up on a vast export trade and until 1914 it was steadily expanding. In 1912 85 per cent. of the cotton piece goods spun, woven and finished in Lancashire were exported; by 1938 this percentage had fallen to 50 per cent., and since then it has declined to about 25 per cent. Much of the world trade in cotton has been taken from England by India, Pakistan, Japan and Hong Kong; and, indeed, in 1957, 20 per cent. of the cotton piece goods sold in England were imported from these four countries.

The spinning industry has shared in the general decline of cotton. In 1937 about 1,350 million pounds of cotton yarn was produced in the United Kingdom; by 1957 production had fallen to 720 million pounds. The number of spindles (that is, "mule "spindle equivalents" which it is convenient to take as the unit of capacity) has dropped from 39 to 28 million. In this decline the smaller concerns have suffered most, and the ownership of the industry is now more concentrated than it was; about 40 per cent. of the spindle capacity is now held by five concerns and about two-thirds by 30.

The 20 years from 1937 to 1957 have been a period of ups and downs. During the war, production was severely curtailed; one-third of the spinning capacity was closed down and production and employment fell to half the pre-war level. The Cotton Control was established and prices were fixed. At the end of the war, a technical committee was set up to investigate and report on prices which should be permitted in the cotton industry so long as it remained under Government control. A costings investigation was carried out, and in 1948 the committee made its recommendations about the method by which prices should be calculated. When in April, 1949, price control was removed, the association asked its members to treat the prices fixed under this report as minimum prices; and it was in this way that the minimum price scheme, which we have to consider, became inaugurated.

When price control was removed in 1949, clothes rationing

went also, with the result that for some time the supply was unequal to the demand. In the early part of 1951 the industry reached its highest post-war peak of activity. The amount of yarn produced in this year was nearly 1,000 million pounds. But by the summer of 1951 a recession had begun to develop; and in 1952 the industry had the worst of its post-war years, with a production of under 700 million pounds. Thereafter trade gradually improved until there was another recession in 1955. This continued until the Suez crisis at the end of 1956 caused a revival of demand, which did not, however, last beyond the middle of 1957. The industry has since been and is now in a recession comparable with that of 1952.

The decline in the industry has been specially marked in the finer counts or qualities of yarn. A count is the number of lengths of 840 yards of yarn which go to the pound in weight; therefore, the finer the yarn the higher the count. The machinery in a mill consists of preparation machinery as well as of spinning machinery. The former carries out those processes such as bale breaking, carding and combing, necessary to get the fibre right for spinning. The finer counts take longer to spin than the coarser, but there is not the same degree of difference in the preparation of fine and coarse. Therefore, a mill which is spinning the finer counts needs more spinning machinery in relation to preparation machinery than one which is spinning the coarser. In planning a mill it is usual to decide on the range of counts which the mill will normally spin so that preparation and spinning machinery can be correctly balanced. The middle figure of the range is known as the mill's "balanced count." Outside the range (unless it can be extended evenly at both ends) the mill cannot make the most economical use of its machinery. If it were to spin coarser counts, some spinning machinery would be idle; and if it were to spin finer counts, some preparation machinery would be idle.

Yarn is sold by the pound weight and the price varies a great deal according to the quality and count. A not unusual price might be 5s. or 6s. per lb. Most of the yarn consumed by the public reaches it in the form of cotton piece goods, and an increase or decrease in the price per pound of yarn has a very diminished impact upon shop prices. A reduction, for example, of 1d. per pound in the price of yarn to the weaver, would make a difference of not much more than a penny in the retail price of a 19s. 6d. shirt.

The calculation of the minimum prices to be applied under the scheme is inevitably complicated. There are two distinct types of cotton, with many different grades, possible mixtures and counts, and the scheme must cover all practical variations. In fact, more than 700 individual margins are listed in the association's schedules. The calculation, for any particular yarn, falls into two parts, if we ignore minor complications such as special forms of make-up.

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The first is the ascertainment of the "clean cotton cost" which takes into account the mixing cost; that is, the cost of the raw cotton used in the yarn, at the date of a sales contract for yarn, priced in accordance with rules regulated by the association, with certain gains and losses involved in processing at this stage, and an allowance for interest on variable working capital. A further element has been added in recent years; namely, a fixed amount of 1½d. per pound, designed, it is stated, to cover buying risks arising from the inadequacy of merchanting services in today's cotton market conditions.

The second is the determination of the appropriate minimum spinning cost margin for the yarn; this is designed to cover the spinners' conversion costs; that is to say, labour, overhead expenses and depreciation with, in addition, an allowance for interest on fixed capital.

Labour and overhead expenses for the margins are computed by a method based on that adopted by the technical committee which had reported in 1948. Returns from a representative number of mills, showing the actual costs (in pence per pound) for each count of yarn spun by the mills, are tabulated. The upper third of the costs for each count is excluded, and the medium costs figure is taken, from the remaining two-thirds, to be standard cost for that count in determining the margin, and this is enforced upon all members.

The amount included in the margin in respect of depreciation covers depreciation on buildings and machinery. The amount in respect of interest on fixed capital covers interest on land, buildings and machinery, and on fixed working capital, which is the non-cotton value (in other words, the conversion cost) of the partly processed yarn on the machines and of the yarn stocks held.

The capital cost on which the above depreciation and interest allowances are computed is based on the area, layout, building, plant, machinery and equipment which would be required to establish, separately, seven representative modern, freehold, ring-spinning mills of the most economical size and operating methods, each of which is balanced on a particular count, namely, 10's, 20's and 32's in American-type yarns and 54's, 74's, 100's and 130's in Egyptian-type yarns. The cost bases for land and buildings are the 1948 cost values; the basis for machinery and ancillary plant is the estimated 1955 replacement cost.

Thus, the minimum price is an artificial figure calculated on a hypothetical average cost. It does not represent the cost actually incurred by any individual mill and every mill will therefore be above or below it by a small or a large margin.

A spinner who can consistently purchase raw cotton shrewdly and skilfully when the market is in his favour will be able in this respect to make a profit out of the minimum price; for such a man the 1½d. per lb. allowance to cover buying risks will be pure gain. The method of calculating labour and overheads puts the

producer who is in the upper third at a disadvantage; if this were the only factor to be taken into account, he ought to be losing several pence on every pound sold at the minimum price. But what he loses in this way he may perhaps make up under the provisions for interest and depreciation. His high cost of production may be due to the fact that his buildings and machinery are old. If they were bought at pre-war prices and if their value has already been largely written off, a figure for interest and depreciation calculated on post-war values may easily provide a big enough margin to absorb the higher operational cost and provide a profit.

In theory, the minimum price is designed to tide the spinner over short periods of recession. Since there is no allowance in it for profit over and above interest on capital, one would suppose that the average spinner would not find it worth his while to remain in business for very long on the minimum price. But, as we have shown, without investigating the accounts of each spinner individually, it is impossible to say whether the minimum price gives him a profit or not; and the fact is that for most of the time since 1952 the majority of spinners have been operating at the minimum price. Indeed, the minimum price has now very nearly become the fixed price. When a spinner succeeds in obtaining a few pence per pound above the minimum price, he refers to it as a premium or surcharge; the figures we have show that the difference between minimum and maximum has never exceeded about 7½ per cent. and on the average it is much smaller, about 2 or 3 per cent. Moreover, the premium does not necessarily mean a better market price; it may mean a surcharge to compensate for special work. The greater part of the premiums earned since 1951 by one of the five big combines came from specialty yarns.

We have heard much general argument and evidence about the object of the scheme and its merits and demerits and also about the principles which underlie minimum price schemes generally. We do not intend to pass judgment for or against minimum price schemes in principle, either in the cotton trade or in any other. We shall confine ourselves to this particular scheme; but we think it would be useful, before we get down to the specific contentions made by the association, that we should state how the scheme has been presented to us generally and what are the general conclusions which lead us to our specific findings.

The scheme is designed to guard against cut-throat competition such as happened in and after the great slump of 1929–1931 and the recurrence of which is feared by all sections of the cotton trade. The scheme is based on the theory that the spinning industry is one in which there occur from time to time short but violent recessions. In these periods, it is said, some spinners will, unless restrained by common agreement, seek to maintain their output by selling below cost. In the long term

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this would be suicidal, but some mills will do it and take any price they can get because without cash they would have to close down. Before 1939 they could have shut down temporarily; their workpeople would have gone into the pool of unemployed and would have come back when things were better. If a mill were to do that now, it would lose its labour—or at least its key labour, the young and the skilled—for ever. So the only alternative to closing down is for it to carry on for whatever price it can get in the hope that if it can weather the depression it will make big profits when demand revives.

This is what is meant by cut-throat competition and, it is claimed, it is bad for the industry. If one firm lowers its prices below cost, others will be tempted or compelled to follow suit; and in the battle for diminishing trade the weakest will go to the wall. It is argued that this will not in the long run be in the public interest. At the depth of the depression the public may benefit for a short while from cut prices; but if the cutting of throats has decimated the industry, it will be left unequal to normal demands when the recession is over; there will then be a period of shortages and the mills that have survived will take advantage of them to charge abnormally high prices so as to recoup themselves for their losses. It is in the long run much better for the public, it is argued, that there should be a steady supply of the goods it wants when it wants them and at stable prices; and this benefit or advantage can be assured to the public only by a minimum price scheme.

We have had to consider whether this is a correct diagnosis of the conditions in the spinning industry and, if so, whether this minimum price scheme is well designed to deal with it. The theory on which the scheme is based seems to presuppose that periods of recession when minimum prices are effective will be exceptional and that the industry will normally be operating above them. This hardly seems to have been the case since 1952. Most American-type yarns—and the American types account for nearly two-thirds of the whole production—were only lifted off the minimum for two short periods, one of eighteen months from January, 1954, to August, 1955, and the other for less than a year after the Suez crisis. Egyptian-type yarns, as a whole, did better; they were on the minimum for two substantial periods of a year or more but were off it for about two-thirds of the whole period; and waste yarns have hardly been on at all. But, looking at the industry as a whole, it is difficult in the face of these figures to regard a recession—if what is meant by a recession is that the demand is not sufficient to push the price off the minimum—as exceptional.

In our judgment, this minimum price scheme is not what is sometimes called a "stop loss" scheme. It does not operate simply to prevent cut-throat competition and selling below cost when demand is exceptionally poor. By setting the operating cost margin at the middle of the lowest two-thirds, it may well

have been thought that, unless the periods when the minimum price was effective were very brief, high-cost producers would inevitably be eliminated. But it has not happened in that way. One way or another the minimum price appears to insure a reasonable return all the time to the majority of spinners. The fact is that the calculation of the prices is so far divorced from actuality that the total effect of the formulae may have been extremely difficult to foresee. It is a theoretical calculation, and in the words of the Weavers' Association, which is in a good position to judge, "the actual financial results (practical rather "than theoretical) achieved by most spinning firms—even "including some with low machinery activity—appear to be dis-"proportionately high." We are satisfied that since 1951 on the average the prices obtained for yarn have been higher than they would have been in a free market. Everyone agrees that spinning is a contracting industry; therefore reductions in capacity ought broadly to match the falling demand and high-cost producers ought to be closing down. The scheme has not altogether prevented the natural process but it has seriously retarded it. We are satisfied that there is now a substantial amount of excess capacity in the industry over and above the reserve capacity which it is prudent to keep in being to meet any sudden increase in demand. Since 1952 the spindle capacity in the industry has been running on the average only to the extent of about 70 per cent. In the United Kingdom in 1956/57 2,100 hours were worked per spindle per annum; in Hong Kong the corresponding figure was 8,100, in the U.S.A. 6,100, in India 5,900, in Japan 4,900 and in Germany 4,000. We are satisfied that this excess capacity will not in the foreseeable future be eliminated unless the scheme goes. We are satisfied that the industry can and ought to be made smaller and more compact.

These are our general conclusions. But this case, like every other brought under the Act, falls to be determined in accordance with specific findings. By the terms of the Act, the scheme is prima facie contrary to the public interest, and this court must so declare, unless the association can prove the existence of the circumstances defined in one or other of the seven categories in section 21. The association contends that the court should be satisfied either of the circumstances set out in category (*b*) or of those in category (*e*). Similar claims under categories (*a*) and (*f*) were abandoned in the course of the hearing.

In category (*b*) we must be satisfied that the removal of the restriction would deny to the public, as purchasers, consumers or users of any goods specific and substantial benefits or advantages enjoyed or likely to be enjoyed by them as such. The association contends that by virtue of the scheme a number of benefits is enjoyed by the shopping public which purchases cotton goods. Alternatively, it contends that benefits are enjoyed by purchasers of yarn; these are all trade purchasers, mainly weavers, and it is submitted that they constitute the yarn buying public.

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Since the sub-paragraph refers to "any goods," it appears capable of covering both yarn and the cotton goods into which it is made.

In his closing speech, Sir Andrew Clark very conveniently grouped the alleged benefits under nine broad heads and we shall take first those that are said to affect the public at large. The first of these is a sufficient preservation of the processing capacity and labour force; this is alleged in paragraph 6 (a) of the case to be valuable in meeting fluctuations in demand, in providing variety of goods for the shopping public and in times of national emergency or when particular sources of supply are scarce. We have already found that there is excess capacity in the industry. The question is therefore whether the abrogation of the scheme would not only destroy the excess capacity, as we believe it would, but would leave the industry without sufficient reserve capacity to meet a revival in demand. We think that after an initial period of uncertainty demand will probably recover from its present very low level. Buyers have allowed their stocks to get so low—partly no doubt because of the present uncertainty about the future of the scheme—that we do not believe their commitments will enable them to hold off much longer. But, even allowing for some revival, we think it inevitable that in the near future a number of mills will have to close down; there are high-cost producers who we do not believe will be able to carry on without the protection of the scheme. Nevertheless, subject to the initial dislocation which must inevitably follow on the abandonment of the scheme, we see no reason to believe that the industry will be left without sufficient capacity to meet all the ordinary demands of the home market and to maintain, if not increase, its share of the export market. It is, however, claimed that it is not enough that there should be sufficient capacity to meet all ordinary demands; there must be reserve capacity to cope with the fluctuations in demand that occur in the industry. There are undoubtedly fluctuations in the demand for yarn. They are not enormous: the economists who gave evidence on behalf of the association spoke of them as being high in comparison with other industries but not unique: the quarterly figures of production over the last six or seven years show an average fluctuation of 10 per cent. either way. This is not a fluctuation in the public demand for cotton goods, which remains quite steady. It is a fluctuation in the demand for yarn, largely due to the horizontal character of the industry. In times of uncertainty the merchant holds off the market and this starts a recession which accumulates in effect as it goes down the line until the full impact is met by the spinner at the end. This is hard on the spinner but we believe that it is partly due to the scheme itself. There is no inducement for weavers and merchants to hold stocks if it is known that there is excess capacity in the spinning industry available to fulfil an order as soon as it is given; and there is no inducement to place an order in advance of an anticipated revival if there is no fear of any sharp rise in prices.

We are not satisfied that the fluctuations in the industry are so severe as to call for exceptional measures to create and maintain reserve capacity. Every mill will have some reserve capacity of its own. Overtime working and double shift working may not be so easy to operate in the cotton industry as they are in some others; but we do not think that they are at present being used to anything like the extent which they might be. We agree that adequate reserve capacity is desirable; the question is whether concerted action is needed to obtain it. We do not think that it is and we think that what is necessary can be got without the scheme. We think likewise that without the scheme the public will be provided with all the cotton goods in the qualities and varieties which it is likely to demand. Lastly, it is contended that there is a special need for the preservation of capacity and in order to meet periods of national emergency. As we have said, 20 per cent. of the British public's demand for cotton goods is satisfied by imports from abroad, chiefly from India or Hong Kong. It is true that the outbreak of war or the action of foreign governments might cut off or curtail these sources of supply. But we cannot speculate about this or about the probable consequences of this type of interference. It has to be remembered that the spinning industry cannot function at all without imports of raw cotton; and no-one can say what the national policy would be with regard to these imports or with regard to the quantity of yarn that the country might need. During the last war the capacity of the spinning industry was not extended, but severely reduced. For these reasons, we are not satisfied that the removal of the restrictions would deny to the public any of the benefits alleged in paragraph 6 (a) of the case.

Under his second head, Sir Andrew has listed the benefits which are alleged in paragraph (6) (d) of the case, namely, that the operation of the restrictions enables and encourages the industry to spend money on modernisation and that this enables the public to obtain cheaper or better goods. We think that the existence of the "floor" which is created by the scheme, and the feeling of stability and confidence in the future which it gives, does make it likely that mills will spend money on modernisation and encourages them to do so. Whether there are good grounds for this feeling, we need not say; we are impressed with the volume of evidence which shows that it is in fact the attitude of the mills. Modernisation should lower costs and should therefore result in some ultimate benefit to the purchasing public. But it will not lower the price to the public until it is done to a sufficient extent to have an appreciable effect upon the operating cost margin; and that effect will inevitably be delayed until after the next costs investigation. Moreover, as we have already shown, a reduction in the price of yarn has either to be very substantial in itself or has to be combined with other reductions further down the line before it affects the public's purse. We have come to the conclusion that the advantage to the public in the form of

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cheaper and better goods to be derived from modernisation resulting from the scheme is not a substantial one and cannot therefore be brought within the Act.

The next benefit relied upon is that the scheme prevents what is called "price invasion." As we have said, the machinery in the mill is balanced so that it is most economically utilised when the mill is producing a yarn within a particular range of counts. A change of fashion may diminish the demand for the yarn within that particular range. The mill will then go outside it and seek to attract customers for yarns of a different quality which belong to some other mill's balanced count. The easiest way of attracting new customers is to offer a lower price; the scheme prevents a drop below the minimum and so discourages price invasion. No doubt the ideal arrangement would be if every mill were fully occupied with its own balanced count; but, since that is not possible, we cannot see why price invasion is a bad thing or something which ought to be prevented; it is only one form of normal trade competition.

The next contention is that the scheme enables and encourages spinners to spin for stock in bad times, with the result that when demand revives there will be stock immediately available to fulfil it. Bad times mean presumably those times when the demand is not great enough to absorb the spinners' capacity when yarn is offered at the minimum price. It may be said that any spinner who does not want to sell below cost can spin for stock during such times without the assistance of the scheme. But, here again, from the evidence we have heard we think that a spinner is more likely to spin for stock if all his competitors are doing likewise and none of them is trying to get for himself what demand there is at cut-throat prices. The benefit to the public which results from spinning for stock is, we think, only one particular aspect of price stabilisation. On the one hand, the agreement in times of recession prevents prices falling below the minimum; on the other hand, it encourages spinning for stock which helps to secure that when demand revives there will be no scarcity to send prices sky-high. We shall deal with this contention therefore under the general heading of price stabilisation, which comes later.

The next head to be considered is the one pleaded in paragraph 6 (*c*) of the case. It is that when price competition is forbidden, competition is channelled into the maintenance and improvement of quality and service. Competition in quality is no doubt a benefit, but the removal of the restriction would not prevent it. If there were no restriction, the spinner would have a choice between giving better quality at the same price or the same quality at a lower price. Under the scheme he is free to pursue only one of these courses. All that the removal of the restriction would do would be to give him back his freedom of choice. It may be that if one channel of competition is closed, the volume in the other will be increased. If this increase can be said to

confer a benefit at all on the purchasing public, we think that it is negligible.

The next head is that which is pleaded in paragraph 6 (*e*) of the case, that the scheme prevents the establishment of monopoly or near-monopoly conditions. We do not think that if the scheme goes there is any danger of this. Even if the industry were reduced to the five large combines, who now control about 40 per cent. of it—and it is not suggested that the reduction would go further than this—it would not necessarily diminish competition; but in fact we do not believe that there is any likelihood of so severe a reduction.

We turn now to consider the broad head of price stabilisation. The scheme obviously prevents prices from falling, and it is said that it also checks them from rising, by preserving capacity and accumulating stocks in readiness to meet revived demand. It is claimed that when a recession begins, prices are brought down more quickly than they might otherwise be because it is known in the market that they will be supported eventually by the "floor"; and that at the end of the recession they will rise less rapidly because no spinner will wish to put his price too high so long as he has got accumulated stocks to clear. We think that any scheme which imposes a minimum price is bound in this or in other similar respects to contribute towards price stability. Any form of price control will probably make prices more stable than they would be in a free market. If price stability could be obtained without the sacrifice of a free market, it would undoubtedly be a benefit; if it can be looked at in isolation, it is no doubt a benefit. But we do not think that the proper way of considering this point is to admit price stabilisation as a benefit to the purchasing public, and defer for subsequent consideration the question whether the loss of a free market is a detriment to the public generally. We have to look at both sides of the medal. A question, for example, as to whether a contract for the sale of goods is beneficial is not divisible into two parts; it could not be argued that the acquisition of goods was of itself always a benefit, and that the fact that they had been acquired at double the market price, while it might be a detrimental corollary, did not prevent the acquisition from being beneficial. What we have to consider is whether price stabilisation as an alternative to a free market is a benefit to the purchasing public in the circumstances of this particular case. We cannot think that as a general rule it is a benefit; if we were to hold that, we would be going contrary to the general presumption embodied in the Act that price restrictions are contrary to the public interest. There may be particular cases where price stabilisation confers a peculiar benefit sufficiently great to outweigh the loss of a free market, but this is not one of them. We cannot find that in the circumstances of this case stabilising the price of yarn confers any benefit on the purchasing public that is not outweighed by the

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loss of the chance of reductions in price that might be secured under free competition.

The respondent relies in the alternative upon benefits said to be conferred by the scheme upon a particular section of the public, namely, the trade purchasers of yarn, who are mainly the weavers and doublers. Sir Andrew has listed some of these benefits separately. He relies in particular upon what has been called "the one-way option" which the weavers have. The result of the excess capacity in the spinning industry is that the weavers can obtain yarn more or less when they want it. In bad times they need not buy stock so as to be prepared for any sudden revival in demand, since they can be sure that when they place an order it will be met without delay. They can place a large order at the minimum price, take delivery by instalments as they want them; and if better times come and prices rise, they keep the benefit of the increase for themselves. Another benefit claimed by Sir Andrew is that the minimum price relieves the weavers from the evils of competition among themselves; they know that they have got to pay a fixed price for the yarn and do not therefore cut each other's throats in an attempt to get yarn at a marked-down figure. In addition to these particular benefits, many of the advantages which we have considered above reach the weavers and the other trade purchasers before they reach the public. If, for example, during bad times the spinners spin for stock, it is a direct advantage to the weavers. A reduction in the price of yarn, which may have only a small effect on the cost of a garment to the public, is of much greater and more immediate importance to the trade purchaser; he is benefited by it because either the price of the end product will be reduced, so increasing his sales, or he will be able to retain it as additional profit for himself. Of course, in exchange for these benefits, he loses the advantage of obtaining yarn at the lowest possible price in a free market. But the perpetual buyers' market created by the excess capacity preserved under the scheme is a substantial advantage. It is the view of the Weavers' Association that on balance the scheme is advantageous to them, and we see no sufficient reason to dissent from this.

If this point fell to be decided solely upon the wording in subparagraph (*b*), we should have to consider two difficult questions; first, whether the advantage was specific and, secondly, whether it was enjoyed by the public. Prima facie, the trade purchasers of yarn, who form a very small and special section of the community, cannot be described as the public. Sir Andrew argues, however, that since they are the only members of the public who purchase yarn, they must constitute the public for the purposes of subparagraph (*b*). It is clear that they are not outside the definition simply because they are trade purchasers and not retail; that appears from section 21 (2). "Any goods" in subparagraph (*b*) does not mean, Sir Andrew contends, all the goods that the public purchases, consumes or uses; it means any goods

that the respondent association selects for the purpose of discharging the burden of proof that lies upon it. Sir Andrew selected, in the first instance, cotton goods in relation to which he had to consider the whole shopping public; and, alternatively, he selects yarn, in relation to which he has to consider only trade purchasers.

This argument means that, although the subparagraph refers to the public as a whole and makes no express provision for any sectional interest being considered, it can be construed so that in a case such as this the advantage to only a small fraction of the public is sufficient to bring the case within the subparagraph. We doubt whether this was the intent of the draftsman, but we recognise that the grammatical construction of the words may lead to this conclusion. In view of our final conclusion upon the facts, we do not find it necessary to decide either of these points of construction and we shall therefore assume for the purposes of this case that the benefits and advantages which we have outlined above are specific benefits enjoyed by the public as purchasers. On that assumption, we have to balance these benefits against the detriment to the public generally that arises from the scheme.

But before we perform this balancing operation, we must consider whether we are satisfied that the circumstances described in category (*e*) have been proved to exist, since if we are, they too must be put into the balance against the detriment to the public generally. The requirement in category (*e*) is that, having regard to the conditions actually obtaining or reasonably foreseen at the time of the application, the removal of the restriction would be likely to have a serious and persistent adverse effect on the general level of unemployment in an area, or in areas taken together, in which a substantial proportion of the trade or industry is situated. The Act does not say how for this purpose the size of the industry or of any part of it is to be assessed; but, as the category deals with employment, it is appropriate to do so by means of the numbers employed in any area, and this is what both parties have done. Spinners and doublers are ordinarily classified together, and it has not been possible to obtain separate figures. The total figure of those employed in spinning and doubling throughout the whole country is about 140,000; of these it is probable that about one-fifth are employed in doubling and the rest in spinning. We are satisfied that the conclusions we reach about spinners separately would apply also to spinners and doublers taken together; and it is therefore convenient to use the figure of 140,000 and deal with the probabilities in relation to that figure.

The requirement in category (*e*) refers to an area, or areas taken together, in which a substantial proportion of the industry is situated. Accordingly, it is open to the respondent to select any area or group of areas and endeavour in relation to the area or areas selected to discharge the burden of proving that the

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removal of the restriction would be likely to have a serious and persistent adverse effect on the level of employment in those areas. The respondent has selected in the first instance eleven areas in which about 100,000 employees or about 70 per cent. of the industry is situated; and alternatively, has selected four out of the eleven in which about 55,000 employees or about 38 per cent. of the industry is situated.

We have been using round figures and shall do so throughout. It is, indeed, quite impossible to make precise calculations. The only way of obtaining precise figures about the number of unemployed is to take the number of persons who are registered at the labour exchanges as seeking work. These figures are not, however, quite comprehensive. Married women whose husbands are insured are not obliged to register, and it is estimated that about two-thirds of them do not. If a mill is closed down, it does not follow that everyone who is thrown out of employment thereby will apply to the labour exchanges. This is particularly true of married women who, because of their domestic duties, may be unable or unwilling to work in any other mill. It may apply also to the elderly, who, while they would have preferred a job to no job, are not willing to go to another mill and so are retired before their time. We accept Sir Andrew's submission that while the Ministry of Labour figures afford us a necessary basis and the only one we have for making calculations about the level of employment, we ought not to disregard these other factors because they are unquantifiable but should make the best estimate we can of their effect.

There is yet another difficulty about the figures of unemployed. They are divided by the Ministry into wholly unemployed and temporarily stopped; the latter category covers persons suspended from work on the understanding that they are shortly to return to their former employment. Workers put on short time are considered to be within this description if they are not working on the day on which the count is taken, which is a Monday. There is at present a great deal of short-time working in the spinning industry; the percentage of the labour force on short time in May, 1958, is calculated at over 19 per cent., and probably now is substantially greater; in the case of many mills, short-time working is the only alternative to closing down. When there is short-time working in the spinning industry, it is likely that the mill will close for a long week-end and so the short-time workers will be counted on Monday as temporarily stopped. It may very well be that the Ministry's figures for those temporarily stopped in the industry are largely composed of short-time workers.

Subject to these general observations about the value of the figures, we take as our basis the Ministry's figures relating to the eleven areas in October, 1958. There were then in all industries 600,000 insured workers, of whom over 25,000 were unemployed, 11,000 wholly and 14,000 temporarily stopped. Thus, the general level of unemployment in these eleven areas

then stood at 4·3 per cent. In the spinning and doubling industry in these areas there were 100,000 insured workers, of whom nearly 12,000 were unemployed, under 2,000 being wholly unemployed and 10,000 temporarily stopped. These round figures (they are not all absolutely up to date; in some cases it has had to be assumed that 1957 figures are substantially unaltered) are good enough as a working basis, since the factors which we have to apply are even more incalculable than the figures. How many mills will close down if the scheme goes? How many would have closed down anyway? What proportion of those who lose their jobs altogether are short-time workers already classed as unemployed? How many will get work elsewhere and how long will it take? We can make no specific finding on any of these points, and can only state in general terms the sort of considerations relating to them which have influenced us in determining whether or not the words of the subparagraph apply.

The first question is how many mills are likely to close. This cannot be answered with any precision. The association's case was that the high-cost producers would struggle to remain in for as long as they could, thus initiating the period of cut-throat competition; the association was not willing to allow much for the possibility that, if the scheme went, a number of mills would realise that they had no future and would give up at once. It is impossible to say how it will happen, but we are satisfied that one way or the other, either at once or over a measurable period, a substantial number of mills would close down. The next question is how many mills would be likely to have closed down anyway even if the scheme continued. Notwithstanding the scheme, mills have been closing down; in the last five years about 60 have closed down, one or two during the hearing of these proceedings. We are satisfied that this process would have continued in any event. But we are also satisfied that the removal of the scheme would accelerate it considerably and also put out of business a number of mills which might have stayed on for very much longer.

It is likely that the mills which go out of business will be those in which there is at present a good deal of short-time working. It may be that the first effect of the ending of the scheme would be to transfer a large number of unemployed workers from the category of temporarily stopped to that of wholly unemployed. While we keep this in mind as a matter of statistics, we do not lose sight of the fact that it is a much more serious thing to be wholly unemployed than to be on short time.

What proportion of those thrown out of work are likely to get a job again within a reasonable time, either in the cotton industry or elsewhere? It has never been the association's case that the whole, or anything like the whole, of those thrown out of work would become permanently unemployed. Indeed, its case is the opposite; it is that when a mill closes down, it loses for ever so much of its labour that it would not be possible for

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it to reopen again. The skilled men and the young men, it is conceded, may be expected to get work elsewhere. But the labour force in the industry contains a large proportion of female and elderly labour. The chances of their re-employment in the industry are not good if the abrogation of the scheme means, as we anticipate it will, that the industry will become more compact. As regards employment in other industries, female labour is not usually so mobile as male; and elderly labour is not so attractive to other employers. The proportion of female labour registered (it is not possible to say how many are married) in the industry is two-thirds, which is a good deal higher than the average. The proportion of labour over 50 years of age is 44 per cent. for males and 28 per cent. for females (compared with 28 per cent. and 23 per cent. respectively in industry generally).

The registrar relies upon a comparison between the present position and that which existed in the depression of 1952. Certainly the figures now do not look on paper as bad as they did in June, 1952. Then the spinning and doubling labour force was higher—110,000—and it had 47,000 unemployed, of whom 44,000 were temporarily stopped. By August, 1953, this unemployment had substantially gone; those displaced were either back in the industry or absorbed in other industries. But Sir Andrew stresses that conditions are now different. In 1952 the general level of unemployment was lower than it is now; there will be much less room for taking back workers in the industry itself when demand revives, and there is not such a good chance as there was in 1952 of the surplus labour from the spinning industry being absorbed into other industries.

These are the considerations which we have to bear in mind, and we state the following assumptions in order to illustrate the sort of figures with which we have to deal. If we were to estimate that in the eleven areas the abrogation of the scheme would cause doublers to be thrown out of work in the same proportion as spinners; if we were to assume that 20 per cent. of the spinners and doublers employed in the eleven areas were to be thrown out of work and further to assume that only half of them obtained employment elsewhere; and if we were to allow the considerations relating to unregistered persons, such as married women, and to short-time workers to cancel each other out, that is, if the assocation's case is not to be strengthened by including in the unemployment figures those who fall outside the statistics, but also is not to be weakened by the consideration that some of the increase in the figures of wholly unemployed may mean only a transfer from the temporarily stopped: there would be left a figure of 10,000 which would raise the general level of unemployment in the eleven areas from 4·3 per cent. to 5·9 per cent. If similar assumptions were made in relation to the four areas, the general level of unemployment in them would be raised from 5·2 per cent. to 7·8 per cent.

We have stated these as illustrative assumptions and not as

findings because there is not sufficient certainty about any of these matters to enable us to compute the anticipated effect even in round figures. We are required to act without certainty and on the balance of probabilities, and to arrive at a general conclusion in the terms used in the Act. We find that the closing of mills consequent upon the abrogation of the scheme to be expected in the eleven areas as well as in the four will have a serious adverse effect on the general level of unemployment in those areas. We find, though with even greater doubt and hesitation, that that effect will be persistent.

We must now consider the detriments to the public relied on by the registrar as resulting from the scheme. They are pleaded in his answer under a number of heads. We think that all those that matter can be placed in three groups: first, the maintenance of a high price for yarn eventually reflected in the price of goods bought by the public; secondly, loss of or handicap to the export trade; thirdly, the waste of national resources caused by excess capacity. As to the first, we are satisfied that the price of yarn could be lower than it is. We agree that there will not be any appreciable lowering of the price of cotton goods unless the cost in the intermediate processes also comes down; but we think that a lowering of the price of yarn may well start reductions which could mount up in a way which would in the end be of appreciable—though not of great—benefit to the public. There is, therefore, a detriment here. As to the second head, we are satisfied that quite a considerable export business has been lost, not so much in yarn as in cloth, through the rigidity of the scheme and the inability of spinners (without special permission only reluctantly granted) to make even a small concession in price to help in securing export business. Exports of yarn and cloth do not form a large part of the country's export trade; but they are not insignificant, and we think that anything which appreciably hinders or diminishes the export trade must be regarded as a public detriment. As to the third head, Sir Andrew Clark has submitted that waste of national recources is too remote an effect of the scheme to be classed as a public detriment. We do not agree. Excess capacity in any industry means short-time working and idle plant. It is in the public interest that labour and capital should be employed as productively as possible, and we consider, therefore, that the excess capacity in the cotton industry is a public detriment.

Against these detriments we have found two sets of circumstances to be balanced. We give little weight to those that come under category (*b*); having regard to the detriments we have enumerated, we are quite clear that a restriction which secures benefits only to a small class of trade purchasers is unreasonable. The effect on the general level of unemployment is much graver. But whether it be in relation to the four or the eleven areas, the effect is localised; the price of its avoidance would have to be paid nationally. It would be paid not solely or primarily in the

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price of cotton goods or in the loss to export trade. Though both these are substantial, we have in mind chiefly the waste of national resources in the form of excess capacity. So long as the scheme lasts, concentration of the industry will be postponed; it will not be until the excess capacity has been got rid of that the industry can be made into a more compact entity, a reorganisation which we believe will ultimately be beneficial not merely to the nation and the consuming public, but to the industry itself and those employed in it. We have decided that on balance it would be unreasonable to continue the restrictions in the scheme in order to avoid the degree of local unemployment which we fear. We find that the association has not made out a case under section 21 as a whole.

The association admits that if the clauses enforcing the minimum price are bad, the whole agreement must fail; and accordingly our judgment means that the agreement is contrary to the public interest, and we so declare. We recognise that this declaration may come at an unfortunate time while, according to the evidence, the general level of unemployment has been rising, and we have therefore given especially careful and anxious consideration to this part of the case, realising, as we do, that any unemployment may cause great hardship to those who suffer from it. If in the past six years competition among the spinners had operated freely, or even if the minimum price had been set at a lower level, the excess capacity might have been got rid of gradually without serious disturbance of the labour market. The scheme has held back the outflow from the industry and it is inevitable that when the dam is breached, the flood should be greater than the normal flow. But we are clear that once we have reached a conclusion of fact, it is our duty to disregard the consequences of our verdict. Apart from our discretion in the matter of an injunction, the Act gives us no power to modify the consequences of our findings; and, indeed, we have not attempted to consider whether in the present situation any modification would be desirable.

We have, however, considered a suggestion made by Sir Andrew Clark on the last day of the hearing that the court should, before entering judgment against the association, offer them an opportunity of amending the scheme by inserting an overriding proviso that the minimum price was not in any event to exceed the average actual cost of production of the six lowest-cost producers, plus some specified element for interest and depreciation. Section 20 (5) of the Act says that where an agreement is varied after the commencement of the proceedings, the court may make a declaration, either in respect of the agreement as at the commencement of the proceedings or in respect of the agreement as varied, or both. This proviso would clearly be applicable to a variation set up in the pleadings; it would be much more difficult to apply it to a variation that is adumbrated in the course of argument. In any event, we could not give judgment

on the agreement as varied unless the effect of the variation had been fully considered and we heard all the relevant evidence and argument. We do not exclude the possibility that in a case where the proposed amendment is purely textual, or its effect obvious and admitted, we might be able to deal with it on the line suggested by Sir Andrew. We do not say that we would, for if any such case arose, we should have to consider carefully what was within our powers. But the amendment adumbrated in this case is far-reaching. We do not know what the effect would be of the alteration from the median of the lowest two-thirds to the average of the six lowest figures, and the alterations to the provisions for interest and depreciation remain to be specified. It is inevitable that there would have to be a further investigation of the figures and that we should have to hear further evidence and argument. We cannot deal with a variation of this magnitude until after it has been made and then only in accordance with the procedure laid down in the Act.

February 2. The court indicated that, on the registrar making a formal application under section 20 (3) for an injunction and on the association giving an undertaking for itself and on behalf of all its members to give to the registrar notice as specified in the undertaking of any intention to bring either the scheme or any other similar scheme into force in the future, no order would be made upon that application; and directed that a draft form of order, declaring that the restrictions set out in an agreed list were contrary to the public interest, and setting out the application for an injunction and the undertaking, be submitted to the clerk of the court.

Declaration accordingly.

Solicitors: *John Taylor & Co., Manchester; Treasury Solicitor.*

J. F. L.

[COURT OF APPEAL.]

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Dec. 12.
Hodson and Ormerod L.JJ.

* PRINCE AND ANOTHER *v.* GREGORY AND ANOTHER.

[1958 P. No. 1442.]

Negligence—Duty of care to whom?—Child, injury by—Pile of mortar left in gutter of road by householder—Whether dangerous allurement to children.

Practice — Pleading — Striking out — Negligence — Whether plaintiff "neighbour" of defendant—Question of degree—Inherent jurisdiction of court—R.S.C., Ord. 25, *r.* 4.

The plaintiff, a boy of 10, claimed damages against the first defendant, another boy, aged 15 years, and also against a second

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defendant, for injuries sustained while the plaintiff was playing in the street. By his statement of claim the plaintiff alleged that the second defendant was the owner of a pile of lime mortar situated in the gutter outside his home; that while the plaintiff was playing in the street the first defendant unlawfully picked up a quantity of the mortar and threw it at the plaintiff striking him in the right eye with the result that he suffered injury. The plaintiff claimed, inter alia, that the accident was occasioned or contributed to by the negligence of the second defendant, in that he placed the mortar in the gutter when he ought to have known that children habitually played in the road; that he failed to take any reasonable steps to cover the mortar or to prevent children from playing with it; that he caused the existence of a danger which he ought to have known to be an allurement to children and that he failed to take reasonable care to avoid acts which he could reasonably have foreseen to be likely to injure children:—

Held, that the statement of claim disclosed no cause of action against the second defendant, on the facts stated therein, as he had acted reasonably in placing or leaving the lime mortar in the gutter; it was not a dangerous thing or something which would be an allurement to children, and the second defendant had no reason to apprehend that some mischievous boy would use it to injure another boy; accordingly, the plaintiff was not a neighbour of the second defendant within the principle of *Donoghue* v. *Stevenson* [1932] A.C. 562; 48 T.L.R. 494; there was no question to be left to a jury and the court was entitled to exercise its inherent jurisdiction and order the claim against the second defendant to be struck out.

Jackson v. *London County Council and Chappell* (1912) 28 T.L.R. 359 distinguished.

Decision of Thesiger J. reversed.

Appeal from Thesiger J. (in chambers).

By his statement of claim, the plaintiff, Trevor Prince, an infant aged 10, suing by his mother and next friend, alleged that the first defendant, Malcolm Gregory, was an infant aged about 15 years and that the second defendant, A. Fairclough, was the owner of a pile of lime mortar which at all material times was situated uncovered in the gutter outside the home of the second defendant at 21, Downing Road, Bootle; that at about 5.30 p.m. on August 6, 1957, the infant plaintiff was playing in Downing Road when the first defendant unlawfully picked up a quantity of lime mortar and threw it at the infant plaintiff with the result that he was struck thereby in the right eye and suffered injury. It was claimed that, in the premises, the first defendant was guilty of assault and battery and of trespass to the person and further or in the alternative the accident was occasioned or contributed to by the negligence of the second defendant.

Particulars of the alleged negligence were that the second defendant placed the mortar and permitted it to remain in the road when he knew or ought to have known that children habitually played in the road; that he failed to cover the mortar or to take any reasonable steps to prevent children from playing with it; that he caused or permitted the existence of a danger in

the road which he knew or ought to have known to be an allurement to the children; and failed to take reasonable care to avoid all acts or omissions which he could reasonably have foreseen to be likely to injure the children. Alternatively, it was claimed that, in the circumstances, the mortar constituted a nuisance in the highway.

The Liverpool District Registrar struck out the action against the second defendant on the ground that the statement of claim showed no cause of action, but on appeal to him in chambers, Thesiger J. reversed the order of the registrar. The second defendant appealed, relying on R.S.C., Ord. 25, r. 4, and the inherent jurisdiction of the court.

C. M. Clothier for the second defendant.
W. G. O. Morgan for the plaintiff.

Cases cited in argument are referred to in the judgment.

HODSON L.J. I will ask Ormerod L.J. to deliver the first judgment.

ORMEROD L.J. This is an appeal from a decision of Thesiger J. in chambers, when he allowed an appeal by the plaintiff from an order of Mr. District Registrar Kewish, dated October 16, 1958, dismissing the action against the second-named defendant in the statement of claim. The ground of the dismissal was that the statement of claim showed no cause of action against the second defendant, and was vexatious and oppressive.

[His Lordship summarised the allegations in the statement of claim, and continued:] The allegation that the lime mortar in the circumstances constituted a nuisance on the highway has been abandoned, for the purposes of this appeal at any rate, and it is unnecessary to deal with it.

Put shortly, the submission of Mr. Clothier, for the second defendant, is that the householder was doing a reasonable thing in leaving this lime mortar in the gutter outside his house for the purpose for which he required it, presumably in connexion with some repairs, and that it was not reasonably within his contemplation that a boy of the age of 14 would come along and pick up a piece of this lime mortar and throw it at the plaintiff or any other passer-by. The submission is that a pile of lime mortar of this kind is no more likely to be thrown by children in these circumstances than is anything else which may from time to time be left outside the door of a house, and that, if in circumstances of this kind it were to be regarded as a potential danger, for which the householder might be liable, it would place an intolerable burden upon the householder, because it would have the effect of making the householder liable if he left anything at all outside the door of his house. Mr. Clothier, in the course of his argument, cited the case of a milk bottle, frequently left on

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people's doorsteps, which in the hands of a mischievous child might be a weapon capable of causing considerable harm.

It was argued that there is no reason to suppose that a pile of lime mortar left in these conditions is any more likely to be something with which one child will injure another than any other things which are normally, reasonably and properly left outside the door of a house, and there was no reason why this householder should anticipate that any danger would arise from leaving the pile of lime mortar in this way. Mr. Clothier says, having regard to the inherent jurisdiction of this court, that, if this court is satisfied that the action against the second defendant must fail, in such circumstances, the statement of claim should be struck out so far as the second defendant is concerned.

The way the case is put by Mr. Morgan on behalf of the plaintiff, as I understand it, is this: Here was something which, in fact, has caused damage to the plaintiff, and that, if there were a jury in the case, it would be proper to submit to the jury the question whether or not this lime mortar left in this position was in fact a danger against which the householder should have provided, and that, if there was a question of fact of that kind to be left to the jury or to be decided by the judge trying the case, then the statement of claim should not be struck out as there was clearly a matter to be decided at the trial. He cited in support of his argument *Buckland* v. *Guildford Gas, Light and Coke Co.*,[1] and *Davis* v. *St. Mary's Demolition and Excavation Co. Ltd.*[2] They were both cases which were decided, not by this court, but in the Queen's Bench Division. *Buckland's* case was that of a girl who had been with a party of other girls and was moved to climb a tree when she was legitimately crossing a field, although she had no right to climb the tree. In climbing the tree she came into contact with overhead cables which were heavily charged with electricity and caused her death. It was decided by Morris J. that the owners of the cable were liable because, although the girl was a trespasser so far as the tree was concerned, she came within the class of neighbour as defined by Lord Atkin in *Donoghue* v. *Stevenson*.[3] In *Davis* v. *St. Mary's Demolition and Excavation Co. Ltd.*[4] a boy was injured when trespassing on land where some buildings were being demolished, a place where it was known that children regularly trespassed, and complaints had been made consistently because the children were in the habit of going on the land and playing in the buildings which were in a dangerous state. There, again, it was held that the children came within the definition of neighbour and therefore the defendants were liable.

Those are cases on quite a different basis from the present case. Here there is something which is left outside in the gutter,

[1] [1949] 1 K.B. 410; [1948] 2 All E.R. 108.
[2] [1954] 1 W.L.R. 592; [1954] 1 All E.R. 578.
[3] [1932] A.C. 562; 48 T.L.R. 494.
[4] [1954] 1 W.L.R. 592.

not for children to play with or for any other purpose than for the purpose of doing whatever necessary repairs had to be done to the house. It seems to me quite impossible to say that, in the case of children playing in the street where one picks up a piece of mortar and throws it so as to injure another child, that child can be said to be a neighbour of the householder within the terms of Lord Atkin's definition.

Perhaps the strongest case which was cited by Mr. Morgan in support of his submission was *Jackson* v. *London County Council.*[5] That was a case tried by judge and jury where a load of material, of much the same kind as in the present case, had been taken to a school for the purpose of some repairs being done to the school, and on the instructions of the caretaker had been put in a corner of the playground. At that time, the school was not in session, but two days later, when the school reassembled, the headmaster realized this might be a danger and gave instructions to the builder to have it moved to a safer place. The builder appears to have given instructions to a second man to do this but the man failed to do it, and, the stuff being in the playground, the boys threw it at one another with the result that one of them was injured, and it was held that the builder was liable and the school also was liable. In his judgment Vaughan Williams L.J., after setting out certain questions which had been put to the jury, and their answers, said: "I take it upon that the "jury must have meant to find that this was a dangerous thing "to leave in the position in which it was left."

Mr. Morgan's argument was that in circumstances very similar to this, there was a question properly left to the jury which the jury answered in the affirmative, an answer which this court found no reason to disturb. He argued that there was no reason why the same question should not be put in the present case, that is, whether this lime mortar, being left as it was in this position, was a dangerous thing. That argument could be used in every case, I suppose, where something is left and an accident happens. It appears to me to be a question of degree. In *Jackson's* case the place in question was a place where boys were intended to play, and were no doubt sent to play at certain intervals of the day. It is not unreasonable to say in those circumstances that anything left in the playground was something with which they would be likely to play. That seems to me to be a very different thing from something left in the street for a useful and necessary purpose. Mischievous children may from time to time throw at other children things they pick up in the street, but to anticipate that anything properly left in the street would be so used would be to put a very heavy burden upon householders.

In these circumstances, as I see it, it is reasonable to take the view that there is not a question here to be left to a jury. If the court is of the opinion that this lime mortar, left as it was,

[5] (1912) 76 J.P. 217, 218.

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was something from which danger could not reasonably be apprehended, then it appears to me that it is the duty of this court to say that the statement of claim should be struck out. This seems to be a plain and obvious case. It was a reasonable thing for this defendant to leave this lime mortar as he did. There was no reason why he should anticipate that some mischievous boy would pick it up and throw it at another boy who happened to be passing by, or playing in the street. In my opinion, therefore, the statement of claim, so far as it affects the second defendant, should be struck out, and I would allow this appeal.

HODSON L.J. I agree, and for the same reasons.

Appeal allowed.

Solicitors: *Lightbounds, Jones & Co. for Hoskinson, Montgomery & Co., Liverpool; Jaques & Co. for Thomas R. Jones, Liverpool.*

A. W. G.

[QUEEN'S BENCH DIVISION.]

1959
Jan. 20, 28.
Lord Parker C.J., Donovan and Ashworth JJ.

* WINTER *v.* HINCKLEY AND DISTRICT INDUSTRIAL CO-OPERATIVE SOCIETY LTD.

Weights and Measures—Coal—Exposure for sale—Deficiency in sacks of labelled weights—Larceny by sellers' servant—Whether coal exposed by servant for sale exposed for sale by master—Whether mens rea necessary—Weights and Measures Act, 1889 (52 *&* 53 *Vict. c.* 21), *s.* 29 (2).

Sacks of coal exposed for sale in the street were of less weight than was represented on the labels on the sacks, some coal from each sack having been stolen by the servant of the sellers who was in charge of the coal. On a prosecution of the sellers under section 29 (2) of the Weights and Measures Act, 1889 [1]:—

Held, that, since the sellers were "exposing the coal for sale" within section 29 (2), when the sacks were full, the fact that the contents of the sacks were reduced by the dishonest acts of their servant did not affect the reduced contents which were still being exposed for sale by the sellers; and as the offence was absolute and mens rea was not a necessary ingredient, the sellers were guilty of an offence.

[1] Weights and Measures Act, 1889, s. 29: "(1) Any inspector of "weights and measures . . . may "stop any vehicle carrying coal for "sale . . . and may weigh any load, "sack, or other less quantity of coal, "found in any such . . . vehicle. . . . "(2) If it appears to a court of summary jurisdiction that any load, "sack, or less quantity so weighed is "of less weight than that represented by the seller, the person . . . "exposing the coal for sale, or the "person in charge of the vehicle, as "the case may be, shall be liable to "a fine not exceeding five pounds."

Brentnall and Cleland Ltd. v. *London County Council* [1945] K.B. 115; 61 T.L.R. 97; [1944] 2 All E.R. 552 applied.

Twentyman v. *John Hulbert Ltd.* (1944) 170 L.T. 340; 108 J.P. 168 disapproved.

CASE STATED by Market Bosworth justices sitting at Hinckley.

On May 15, 1958, nine informations were preferred against the defendants by the prosecutor acting on behalf of the Leicester County Council, each information charging that a sack of coal found in a vehicle carrying coal for sale and weighed by an inspector of weights and measures was of less weight than that represented by the defendants, the persons exposing the coal for sale, contrary to section 29 (2) of the Weights and Measures Act, 1889.[1] In relation to each of the informations the defendants served notice in accordance with the provisions of section 12 (5) of the Sale of Food (Weights and Measures) Act, 1926,[2] and preferred informations against Albert Edward Cooper, charging him that in relation to each of the informations laid against the defendants the latter had used due diligence to enforce the execution of the Act, and that Cooper had committed the offence in question without the defendants' consent, connivance, or wilful default, and that he was the actual offender.

The justices heard the informations together and found the following facts proved: On May 1, 1958, at Stoney Stanton in the county of Leicester, the prosecutor, a district inspector of weights and measures, stopped a coal lorry belonging to the defendants which was driven by Cooper. There were 39 sacks of coal on the lorry and the sacks, each of which was labelled "112 lb. coal," were not for delivery to order, but were exposed for sale. When weighed 33 of the sacks were less than the represented weight, and the coal in nine of the sacks which were the subject of the informations weighed respectively 99½ lb., 90½ lb., 99 lb., 100½ lb., 98½ lb., 101 lb., 101½ lb., 97 lb., and 96½ lb. At the time of leaving the premises of the defendants earlier in the day all the sacks on the lorry were of the represented weight and thereafter Cooper stole from the defendants the quantity of coal by which each of the nine sacks was respectively found deficient in weight. During the previous 45 years the defendants had never been convicted of an offence similar to that charged nor had Cooper any convictions recorded against him.

[1] For footnote 1 see p. 182.

[2] Sale of Food (Weights and Measures) Act, 1926, s. 12: "(5) "Where an employer or principal is "charged with an offence against "this Act, he shall be entitled on "information duly laid by him, and "on giving not less than three days' "notice of his intention to the prose-"cution, to have any other person "whom he charges as the actual "offender brought before the court at "the time appointed for hearing the "charge, and, if after the commission "of the offence has been proved, the "employer or principal proves to the "satisfaction of the court that he had "used due diligence to enforce the "execution of this Act, and that the "said other person had committed the "offence in question without his con-"sent, connivance or wilful default, "the said other person shall be sum-"marily convicted of the offence and "the employer or principal shall be "exempt from any penalty: . . ."

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On a submission that there was no case to answer, the defendants referred to *Twentyman* v. *John Hulbert Ltd.*,[3] and contended that (*a*) there was no evidence to prove that the defendants knew that the representations as to weight were false or could reasonably have found out that the coals were short weight; (*b*) since the defendant in *Twentyman* v. *John Hulbert Ltd.*[3] was not criminally liable for "tampering" by his servant, a fortiori, the defendants were not liable for the larceny by their servant in the present case; and (*c*) since the act of stealing by Cooper was outside the course and scope of his employment and done in fraud of the defendants, the act of exposing for sale was an independent act by Cooper outside the course and scope of his employment for which the defendants were not criminally liable.

It was contended on behalf of the prosecutor that the offences charged were absolute, and that proof of mens rea was not necessary, and that the act of Cooper in exposing for sale sacks that were deficient in weight was sufficient to render the defendants guilty of the offences with which they were charged.

The justices were of the opinion that, in relation to each of the informations preferred against the defendants, the contentions put forward on their behalf were correct and, accordingly, the justices dismissed each of the informations preferred against the defendants by the prosecutor, and each of the informations preferred against Cooper by the defendants.

The prosecutor appealed.

J. G. Jones for the appellant prosecutor.

H. A. Skinner for the respondent defendants.

The following case was cited in argument in addition to those referred to in the judgment: *Elkington* v. *Kesley*.[4]

Cur. adv. vult.

January 28. DONOVAN J. read the following judgment of the court, in which he stated the facts and continued: In dismissing the informations the magistrates said that in their view the contentions put forward by counsel for the respondents were correct. Those contentions were: (*a*) that there was no evidence to prove that the respondents knew that the representation as to weight was false or could reasonably have found out that the coal was short weight. (*b*) Since the respondent in *Twentyman* v. *John Hulbert Ltd.*[1] was held not criminally liable for "tampering" by his servant, a fortiori the respondents were not liable for the larceny of their servant in the present case. (*c*) Since the act of stealing by Cooper was outside the scope of his employment and

[3] (1944) 170 L.T. 340; 108 J.P. 168.

[4] [1948] 2 K.B. 256; 64 T.L.R. 340; [1948] 1 All E.R. 786.

[1] (1944) 170 L.T. 340; 108 J.P. 168.

done in fraud of the respondents, the act of exposing for sale was an independent act by Cooper outside the course and scope of his employment for which the respondents were not criminally liable. In answer to these contentions the present appellant argued before the magistrates that the offences charged under section 29 (2) of the Weights and Measures Act, 1889, were absolute; that proof of mens rea was not necessary; and that the act of Cooper in exposing for sale sacks which were deficient in weight was sufficient to render the respondents guilty of the alleged offences.

In support of his contentions before the magistrates, the solicitor for the present appellant quoted *Brentnall & Cleland Ltd.* v. *London County Council.*[2] On this the magistrates say that the solicitor, not having a report of that decision with him they were not referred to any specific passages in the judgments. One can perhaps sympathise with the magistrates in this respect because the decision in *Brentnall & Cleland Ltd.* v. *London County Council*[2] clearly lays down that mens rea is not a necessary ingredient of this offence, and Humphreys J. (whose remarks in the *Twentyman* case[3] were relied on by counsel for the respondents) specifically disowned their accuracy and rather doubted whether he had been correctly reported.

Now that the case stated is before us counsel for the respondents admits that the offence created by section 29 (2) is absolute and that mens rea is not a necessary ingredient of the offence. He also admits that the representation constituted by the respondents' label on each of their sacks, viz.: "112 lb. of coal" was a representation by the respondents. But he says that in the circumstances the respondents did not "expose the coal for sale." This he still alleges is an independent act done by Cooper outside the scope of his employment and therefore that the respondents are not in breach of section 29 (2).

We have some difficulty in understanding this argument. Before Cooper committed the theft of a few pounds of coal from some of the sacks, the 112 lb. of coal in each of those sacks was admittedly being exposed for sale by the respondents; and what is true of the whole contents of the sacks seems to us to be true of each part. When, therefore, the contents of the sacks are reduced to 90-odd lb., each of those sacks was still, as it seems to us, being exposed for sale by the respondents. The reduced contents were, in our view, unaffected in this respect by Cooper's pilfering. Different considerations would arise if Cooper had substituted different coal not belonging to the respondents, but such is not the case. It was the respondents' coal which was still being sold in their sacks by the man authorised to sell it; and in these circumstances we think the respondents were clearly exposing it for sale.

[2] [1945] K.B. 115; 61 T.L.R. 97; [1944] 2 All E.R. 552.

[3] (1944) 170 L.T. 340; 108 J.P. 168.

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That is enough to dispose of this case; but a word should perhaps be said about the authorities quoted to us. In *Roberts* v. *Woodward*[4] it was held that there must be a representation by the seller of the weight of coal sold. The facts of this case were that a greengrocer, who also sold coal, received orders for 5 cwt. of coal and the five sacks containing this coal when weighed by the inspector en route to the customer were found to be deficient in weight. But the seller had made no representation to anyone as to the weight of the coal. All that had happened was that when his servant was stopped en route by the inspector and was asked what weight the sacks contained, the servant told him one cwt., which was found to be wrong. On these facts the court held that the seller had made no special representations as to weight and was not criminally responsible for the representation made by his servant. It is to be noted that the case was decided in 1890, that is, one year after the Act was passed, but in any event the decision does not touch the present case where admittedly there *was* a representation by the respondents. And it may also be useful to recall that Pollock B. said among other things[5]: "In the present case there was no "verbal representation by the seller as to the weight of the coals "as there usually would be in cases where coals were sold in the "shop or were hawked round the streets for sale."

In *Twentyman* v. *John Hulbert Ltd.*[6] the report in the Law Times gives the ratio decidendi of the judgment to be that evidence must be forthcoming that the seller knew that the representation as to weight was false; in other words that there must be mens rea. No other ground for the decision is suggested in that report. As it stands, therefore, the decision cannot be treated as of continuing authority.

Brentnall & Cleland Ltd. v. *London County Council*[7] lays down specifically that mens rea is not a necessary ingredient for an offence under section 29 (2); and the following passage in the judgment of Viscount Caldecote C.J. seems to be in point here[8]: "I think that quarter sessions came to a correct decision when "they said that in their opinion mens rea was not a necessary "element in the offence. To constitute an offence under section "29 it is sufficient if there is a representation as to weight—which "is clearly proved in this case—and if the coal which was being "carried is deficient in weight. Whether or not the company "were aware of the deficiency in weight seems to me to be an "unnecessary matter for consideration."

What happened in the present case was that there was an exposing for sale by the respondents of coal which was represented as being 112 lb. in weight, but which was in fact less; that the respondents were saddled with such representation and deficiency

[4] (1890) 25 Q.B.D. 412.
[5] Ibid. 415.
[6] (1944) 170 L.T. 340; 108 J.P. 168.
[7] [1945] K.B. 115.
[8] Ibid. 119.

by the dishonest act of their employee Cooper. This gives the respondents no defence under section 29 (2) itself, but since Cooper, the real offender, was not made a party to the present appeal, no penalty can now be visited upon him. In the circumstances, the magistrates might think it right on this occasion to grant the respondents an absolute discharge, though this is a matter for them to decide.

The appeal must be allowed.

Appeal allowed.

Solicitors: *Kingsford, Dorman & Co., for John A. Chatterton, Leicester; Thomas Flavell & Sons, Hinckley.*

J. D. P.

[PROBATE, ETC., DIVISION.]

*SWISZCZOWSKI *v.* SWISZCZOWSKI AND JEWASINSKI.

1959
Jan. 27, 28, 29.

Karminski J.

PRACTICE NOTE.

Husband and Wife—Practice—Children—Commencement of Act of 1958 *—Answer—Amending to allege desertion by way of cross-petition—Three years not completed at date of original answer—Proceedings begun before January* 1, 1959; *cross-petition filed thereafter—Whether Matrimonial Proceedings (Children) Act,* 1958 (6 *&* 7 *Eliz.* 2, *c.* 40) *applicable.*

DEFENDED PETITION for divorce.

The husband by his petition alleged adultery, cruelty and desertion. The wife by her answer denied the allegations and prayed for a divorce in the exercise of the court's discretion on the ground of cruelty (prior to the date of the alleged adultery). At the date her answer was filed the parties had lived apart for a period of less than three years; but the wife, relying on the proviso to section 4 of the Matrimonial Causes Act, 1950, further alleged that the husband had deserted her prior to the alleged adultery. The three years were completed prior to the hearing.

Upon the husband, by his counsel, stating at the conclusion of the husband's evidence that he proposed to offer no further evidence upon the charges made in his petition, his Lordship indicated that the wife might be given leave to pray for a divorce on the ground of desertion by way of cross-petition. Reference was made to *Robertson* v. *Robertson,*[1] in which Barnard J., applying his decision in the nullity case of *Pickett* v. *Pickett* (*orse. Moss*),[2] had given leave in similar circumstances—save that in

[1] [1954] 1 W.L.R. 1537; [1954] 3 All E.R. 413n.

[2] [1951] P. 267; [1951] 1 T.L.R. 585; [1951] 1 All E.R. 614.

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that case the answer contained no cross-prayer for relief but consisted only of a bare denial—to amend the answer by adding the charge of desertion "by way of cross-petition."

O'Malley for the husband.

John B. Gardner, for the wife, asked for leave to amend the answer by adding the words "And by way of cross-petition [the "wife] saith" followed by the allegation of desertion.

KARMINSKI J. gave leave to amend the answer accordingly, and in the exercise of his discretion granted the wife a decree on the ground of desertion, and granted her the custody of the child of the parties.

His Lordship said that although the cross-petition had been filed after January 1, 1959, the date when the Matrimonial Proceedings (Children) Act, 1958, came into force, that Act would not be applicable in relation to the child, since the cross-petition was part of the original proceedings.

Solicitors: *Alban P. B. Gould; Lionel Leighton & Co.*

J. B. G.

[HOUSE OF LORDS.]

H. L. (E.)†

1958 *Dec.* 11, 15.

1959 *Jan.* 28.

* SHELL-MEX AND B.P. LTD. . . . APPELLANTS;

AND

HOLYOAK (VALUATION OFFICER) . . RESPONDENT.

Rating—Plant and machinery—Petrol station—Underground petrol storage tank—Whether "a building or structure"—Whether a "tank"—Rating and Valuation Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 90), *s.* 24—*Plant and Machinery (Valuation for Rating) Order,* 1927 (*S.R. & O.* 1927, *No.* 480), *Sch., Class* 4.

By the Plant and Machinery (Valuation for Rating) Order, 1927, the classes of plant and machinery deemed to be part of the hereditament included class 4 described as "the following parts "of a plant or a combination of plant and machinery whenever "and only to such extent as any part is, or is in the nature of, "a building or structure." The items following included "tanks."

In accordance with licences issued by the local authority pursuant to the Petroleum Consolidation Act, 1928, a company constructed an underground petrol container beneath the pumps of a petrol station. The container consisted of a concrete base with brick walls 9 inches thick, having a concrete rendering. On the base rested concrete cradles on which was placed a metal cylinder 13 feet 6 inches long by 7 feet in diameter, capable of containing 3,000 gallons of petrol. The space round the outside of the cylinder

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† *Present*: VISCOUNT SIMONDS, LORD MORTON OF HENRYTON, LORD REID, LORD KEITH OF AVONHOLM and LORD DENNING.

was packed with dry sand and the whole was covered with slabs of reinforced concrete except for a manhole through which the cylinder was filled:—

Held (Lord Keith of Avonholm and Lord Denning dissenting), that the metal cylinder did not fall to be rated as part of the hereditament. It was a "tank" housed in a structure and not part of a "tank" formed by the whole installation.

Cardiff Rating Authority v. *Guest Keen Baldwin's Iron and Steel Co. Ltd.* [1949] 1 K.B. 385; 65 T.L.R. 159; [1949] 1 All E.R. 24 considered.

Decision of the Court of Appeal [1958] 1 W.L.R. 331; [1958] 1 All E.R. 702 reversed.

APPEAL from the Court of Appeal (Lord Evershed M.R., Parker and Sellers L.JJ.).

This was an appeal from an order of the Court of Appeal dated February 21, 1958, whereby an appeal by the now respondent, H. B. Holyoak (valuation officer), on a case stated by the Lands Tribunal (Mr. Erskine Simes Q.C.), pursuant to section 3 (4) and (11) of the Lands Tribunal Act, 1949, and R.S.C. Ord. 58A, was allowed and a decision of the Warwickshire Local Valuation Court restored. The decision of the Lands Tribunal was in favour of the present appellants, Shell-Mex & B.P. Ltd.

The facts are stated in the opinion of Viscount Simonds.

J. P. Widgery Q.C. and *W. L. Roots* for the appellant company.

Maurice Lyell Q.C. and *Patrick Browne* for the respondent.

No cases besides those referred to by their Lordships were cited in argument.

Their Lordships took time for consideration.

January 28, 1959. VISCOUNT SIMONDS. My Lords, it is not surprising that in this case there should have been a difference of opinion between the Lands Tribunal, before whom it originally came, and the Court of Appeal, from whose decision an appeal has been brought to this House; nor that your Lordships should be unable to agree upon the matter. For in truth the arguments on either side are nicely balanced and I have not easily reached the conclusion that the appeal should be allowed and the decision of the tribunal restored.

The primary facts have been found by the tribunal and are not in dispute.

The appellants are the owners and occupiers of a hereditament known as the Oaklands Filling Station, Birmingham Road, Budbrooke, in the rural district of Warwick. It is a familiar type of wayside petrol filling station for motor vehicles, consisting of a single building for office, stores and showroom and a concrete forecourt with three petrol pump islands each accommodating two pumps. These pumps are connected by underground pipes to four

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tanks, each of 3,000 gallons capacity at the side of the building. These tanks, which are constructed of metal and were delivered at the site as complete units, are cylindrical in shape, 13 ft. 6 ins. in length and 7 ft. in diameter, and weigh when empty about two tons. Each of them was installed underground on the premises in accordance with plans approved by the local authority and a licence granted by them under the Petroleum Consolidation Act, 1928.

The method of installation was as follows: a pit was excavated, its floor was covered with a concrete slab, brick walls 9 ins. thick were then built round the sides of the pit and lined internally with cement. The internal dimensions were 8 ft. 6 ins. by approximately 9 ft. Concreted cradles 12 ins. in height were laid on the floor of the pit and the tanks laid on the cradles. The pit was then filled with sweet sand, to absorb any possible leakage and to reduce the risk of explosion, and the whole covered with concrete 6½ ins. thick, a manhole with cover supported on rolled steel joists giving access through the concrete to the top of the tank. This concrete covering forms an extension of the forecourt at the side of the building. Each tank is in a separate similar compartment and is connected by underground pipes to one or two of the pumps but not to the other tanks.

It was agreed between the parties at the hearing before the tribunal that each of the tanks formed part of the plant installed at the filling station and it was admitted by counsel for the respondent that, looked at by itself, it was neither a building nor structure nor in the nature of a building or structure. It was further agreed that each of the compartments was itself a building or structure or in the nature of a building or structure.

I have mentioned the licence granted by the local authority and this document with the plans annexed to it or exhibited with it assumed some importance. But I doubt whether it should have much weight in construing the Act and Order to which I now refer.

The Rating and Valuation Act, 1925 (which made a substantial alteration in the law in regard to the rating of plant and machinery) provided by section 24 (1) as follows: "For the "purpose of the making or revision of valuation lists . . . the "following provisions shall have effect with respect to the valua-"tion of any hereditament . . . (*a*) All such plant or machinery "in or on the hereditament as belongs to any of the classes "specified in Schedule III to this Act shall be deemed to be a "part of the hereditament: (*b*) Subject as aforesaid, no account "shall be taken of the value of any plant or machinery in or on "the hereditament."

Under and by virtue of an Order made under later subsections of the same section (The Plant and Machinery (Valuation for Rating) Order, 1927) the classes of machinery and plant deemed to be part of the hereditament under the said Schedule III to the Act included class 4 described as: "The following parts of a plant

"or a combination of plant and machinery whenever and only to "such extent as any such part is, or is in the nature of, a building "or structure." Then followed numerous items of which I give as specimens "Blast furnaces," "Bins and hoppers," "Con-"veyor gantries," "Flues," "Foundations, settings, gantries, "supports, platforms and stagings for plant and machinery" and "Tanks."

The question at issue can now be stated. It is whether the metal containers, which I have without prejudice referred to as tanks, fall to be rated as part of the hereditament known as the Oaklands Filling Station. This question can be answered in the affirmative only if (1) they are "tanks" within the meaning of the Order and (2) they are buildings or structures or in the nature of buildings or structures. The Local Valuation Court having held that these conditions were fulfilled and rated the hereditament accordingly, the present appellant appealed to the Lands Tribunal (Mr. Erskine Simes Q.C.).

That tribunal allowed the appeal, concluding that the only part of the installation which could properly be called a tank for the purpose of the Order was the metal cylinder and that the compartment in which it was housed did not form a functional entity with it any more than any other building in which a piece of plant or machinery is housed. "That compartment" said the tribunal "appears to me to form an integral part of the "hereditament like any other building thereon but the metal "tank which is admittedly not a building or structure or in the "nature of a building or structure looked at by itself should not "under section 24 and the Order be deemed to be a part of the "hereditament." The expression "functional entity" was taken from the judgment of Jenkins J. in *Cardiff Rating Authority* v. *Guest Keen Baldwin's Iron & Steel Co. Ltd.*[1] I must, with great respect, doubt whether so vague and elastic an expression is of any real assistance in determining whether a piece of plant or machinery is, or is in the nature of, a building or structure.

The present respondent (the valuation officer) appealed to the Court of Appeal upon case stated by the tribunal on the grounds that the tribunal misdirected itself and was wrong in law in holding that the only parts of the underground installation referred to in the case stated which could properly be described as "tanks" for the purposes of the Order were the metal cylinders therein referred to, and that, although the said metal cylinders were not, looked at by themselves, buildings or structures or in the nature of buildings or structures, each of them as installed on the hereditament in question was, or was in the nature of, a building or structure within the meaning of the said Order.

The appeal was allowed by the Court of Appeal. The learned Master of the Rolls observed that he had in the course of his judgment in a previous case made the point that, when the

[1] [1949] 1 K.B. 385, 404; 65 T.L.R. 159; [1949] 1 All E.R. 27.

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question arises as to some identifiable piece of apparatus, whether and to what extent it is in the nature of a structure, that question is prima facie a matter of degree and of fact. And he added [2]: "So also, prima facie, it will be . . . a matter of fact to say "what in any given case constitutes the thing you identify with "the item in the catalogue. If, therefore, the matter was simply "that the tribunal had said, after examining the material and "perhaps examining the site, 'I conclude that the tank here is "'no more than the cylinder,' that might well have been the "end of it. But the tribunal has not so confined himself." The Master of the Rolls then explained that in his view the tribunal had materially misdirected himself and summed it up thus [3]: "It "seems to me with all respect that the fallacy lies in this sentence "'But it seems to me that the compartment in which the tank "'is housed does not form a functional entity with the tank any "'more than any other building in which a piece of plant or "'machinery is housed.' I have been unable to escape from "the conclusion that the tribunal came in the end to the view "that what he called 'the compartment,' the installation other "than the cylinder, was no more relevant to the question of "the rating of the cylinder in this case than would be an ordinary "above-ground edifice in which there happened to be found, "resting on a cradle, a cylinder, a tank. In my judgment, quite "manifestly this is not so." The learned judge thought that the reasoning to which he had referred disabled the conclusion of the tribunal and allowed the appeal saying that the tank on the hereditament in question was the installation in its entirety, in which case there was no question but that the whole of it was of the nature of a structure.

Parker L.J., in my view rightly, pointed out that the question was what, not in relation to the licence but in relation to the hereditament, was properly described as the tank, and concluded that looking at the primary facts found by the tribunal the only reasonable conclusion was that the whole structure, walls and metal lining, themselves formed "the tank." He referred to the purpose of the installation, viz., the storage of petrol, and, though he did not use the expression "functional entity," he relied, I think, on the fact that, in his view, the brick and concrete structure without the lining performed no function at all, and, equally the lining without the walls and concrete performed no sensible function. It was, he thought, a case where the so-called chamber was a housing which formed part of the plant itself. Sellers L.J. agreed, thinking that the significant matter was that these tanks were for the storage of petrol and that the matter must be so viewed. It would not, he said, be sufficient to have the petrol simply in the cylinder: it had to be dealt with in some manner similar to that in which it was dealt with here for the purpose of safety and proper user: the manner of protecting or lagging or

[2] [1958] 1 W.L.R. 331, 335; [1958] 1 All E.R. 702.
[3] [1958] 1 W.L.R. 331, 336.

securing it had turned what was simply a cylinder into a structure or building: he could not think that in law or in fact it would be sensible or realistic to split the two things up: what had been called the structure or building and the cylinder formed one tank for the purpose of storage of petrol and it should be so regarded.

My Lords, I have referred to these judgments at some length because they express in the most cogent form the arguments which the appellants must meet. They meet them very simply. They ask whether the so-called metal cylinder is not properly called a tank. It clearly is: no one has suggested the contrary. I do not, as I have said, attach great importance to the language of the licence or to the legends on the plans, but it has some significance that in the ordinary user of words by persons accustomed to deal with these things the "tank" is the metal container. It is a thing which is to be "tilted to simplify extrac-"tion of sludge" and a thing of which it can be said that the sand in-filling is not to be laid until the air test of it has been completed. There are indeed other passages in which the whole installation appears to be referred to as a tank. But it is at least abundantly clear that the metal cylinder alone can be and is properly identified as a "tank." So far the appellants make good their case. Nor have they, I think, any difficulty in their next step. For it is clear, as was admitted, that the metal cylinder, looked at by itself, is not, and is not of the nature of, a structure or building. Now they face the final difficulty. It is said that, though the metal cylinder is by itself a tank and by itself is not of the nature of a structure or building, and though the compartment is not by itself a tank, yet when the metal container is put into the compartment, the whole installation becomes a tank for the purposes of the Order: "what was," in the words of Sellers L.J.,[4] "simply a cylinder" has been "turned into a structure or "building." To this the simple answer is made, that it is not a case of that which was a tank being turned into a structure but of that which was a tank remaining a tank and being housed in a structure made for that purpose. It appears to me, my Lords, that this is a question of great nicety, and I am by no means satisfied that it is not a question of fact upon which the finding of the tribunal should not be disturbed. So, as it appears to me, the Master of the Rolls would have held but for the passage in the judgment of the tribunal which I have already cited. If it is not a question of fact, I am not very clear what is the question of law that is involved. I would agree that the tribunal was in error in so far as it made functional entity the test, though, as I have pointed out, two at least of the judgments in the Court of Appeal were not altogether free from the same error. It is, in my view, an error because it entirely depends on what is the function which is in mind. It is equally true to say that it is the function of the whole installation to store petrol or to say

[4] [1958] 1 W.L.R. 331.

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that it is the function of the metal container to contain petrol and that of the compartment to protect the container and minimise any danger to it or to the public if it did not function properly. This leaves the question unanswered to which an answer must be given. Then the test was suggested of *physical* entity, but I fear that this is a case of obscurum per obscurius. For, if the whole installation can be described as a physical entity, as probably it can, so also was the metal container a physical entity when it was placed in the compartment, so it is while it remains there and so it will be if and when it is removed, as it easily can be. The question remains whether there is a "tank" formed by the whole installation or a "tank" which is housed within a structure. I have come to the conclusion that the latter view is correct. It is with diffidence that I do so in face of the unanimous opinion of the Court of Appeal. But I think that paramount weight should be given to the consideration that beyond doubt the metal container is a tank and is identifiable as a tank wherever it may be placed whether above ground or under ground and by whatever structure it may be protected. If it is a tank, it is not, for rating purposes, to be regarded as part of the hereditament unless it is, or is in the nature of, a building or structure. I do not think that any finding of fact would justify that conclusion. I would allow the appeal and restore the decision of the tribunal with costs here and below.

Lord Morton of Henryton. My Lords, the question for decision on this appeal arises under section 24 of the Rating and Valuation Act, 1925, and the Plant and Machinery (Valuation for Rating) Order, 1927, made thereunder. It is convenient to set out at once the relevant provisions of the section, and of Schedule III to the Act, as settled by the Order of 1927. They are as follows:

Section 24 (1): "For the purpose of the making or revision "of valuation lists . . . the following provisions shall have effect "with respect to the valuation of any hereditament . . . (*a*) All "such plant or machinery in or on the hereditament as belongs "to any of the classes specified in Schedule III to this Act shall "be deemed to be a part of the hereditament: (*b*) Subject as "aforesaid, no account shall be taken of the value of any plant "or machinery in or on the hereditaments."

"Third Schedule

"Classes of Machinery and Plant to be deemed to be part of the "Hereditament.

. . . . . .

"Class 4.

"The following parts of a plant or a combination of plant and "machinery whenever and only to such extent as any such part "is, or is in the nature of, a building or structure."

The Schedule then sets out a long list of items, including such

items as racks, refuse destructors and incinerators, retorts, silos, stills, superheaters, tanks, vats, weighbridges and windmills. The relevant item for the present purpose is "tanks."

This appeal relates to an installation used for the storage of petrol which is to be supplied to the public from petrol pumps upon a roadside petrol filling station of the usual type, owned and occupied by the appellants. The installation, and the method by which it was constructed, are described in the decision of the Lands Tribunal and illustrated by a plan and drawing exhibited to the case stated. A pit was dug and its floor was covered with a concrete slab; brick walls 9 inches thick were built round the sides of the pit and lined with cement, and the pit was divided into four compartments by similar walls built across it. Each of these compartments is 15 feet long, 8 feet 6 inches wide and 9 feet deep. On the floor of each compartment are installed three concrete cradles 12 inches in height, on which rests by its own weight a metal cylinder 13 feet 6 inches long and 7 feet in diameter. Each of the four metal cylinders (one in each compartment) weighs about 2 tons and has a capacity of 3,000 gallons. The space round the outside of the cylinder, and between it and the walls of the compartment, is filled with sweet, dry sand to absorb any possible leakage and to reduce the risk of explosion. The whole pit is covered with a concrete slab 6½ inches thick which forms an extension of the forecourt of the filling station. There is access to each cylinder by a manhole supported on rolled steel joists, but otherwise each compartment is completely enclosed, and the cylinders could only be removed by demolishing the concrete covering.

At the hearing of the appeal in this House, counsel for both parties were agreed (a) that each of the metal cylinders, when considered by itself, can properly be described as a "tank," and is neither a building or structure nor in the nature of a building or structure, within the meaning of class 4 already quoted; (b) that each of the four compartments, by itself and apart from the metal cylinder, is not a tank, and is a building or structure or in the nature of a building or structure, rateable as part of the hereditament; (c) that there are four "tanks" on the premises, within the meaning of that word as used in class 4.

The only question arising on this appeal is whether the four "tanks" are the four metal cylinders or the four complete installations, including the metal cylinders, which I have already described.

The appellants contend that the former view is correct, and, if they are right, the metal cylinders will not be rateable, although the four compartments containing them will be rateable. The respondent contends that the latter is the correct view, and that consequently the four complete installations are rateable.

My Lords, the Lands Tribunal accepted the contention of the present appellants, and I agree with him. I turn first to the Act of 1925 and Schedule III. Section 24 (1) of the Act, read

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in conjunction with class 4 in the Schedule, deems to be part of a hereditament and rateable accordingly, "the following *parts* "of a plant or combination of plant and machinery, whenever "and only to such extent as any such *part* is, or is in the nature "of a building or structure." I have emphasised the words *part* and *parts* because it seems to me vital to bear in mind that class 4 is dealing with parts, and nothing but parts, so that when "tanks" are mentioned in the list they are mentioned as part of a plant. It is rightly conceded by counsel for the respondent that each metal cylinder, if it were not enclosed at all, or if it were placed in a large room, would be a tank within class 4 and would not be included in the valuation of the premises for rating purposes, because it would not be, or be in the nature of, a building or structure. They contend, however, that each cylinder loses its identity as a tank when it is in the underground structure already described, and thereupon the whole of each underground installation becomes a tank within class 4 and is rateable as a whole because it is, or is in the nature of a building or structure.

My Lords, I cannot accept this contention. The position might well be different if the metal cylinder were so linked with the surrounding compartment as to become one physical entity with it—for instance, if the space now filled with sand were filled with concrete adhering to the cylinder. As it is, the cylinder is simply a tank which has been placed in an underground structure, and surrounded with sand, for safety reasons. It is not a physical entity with the compartment, but can be lifted out and replaced again at the will of the owner, still in exactly the same condition, although it would be necessary, as I have said, to demolish the concrete covering before removing the cylinder. If the respondent's contention were correct, the cylinder would again become a "tank" when it emerged from the pit, and would lose its identity as such if and when it was replaced in the pit. This seems to me a highly artificial conception.

It was suggested on behalf of the respondent that the whole of the underground installation formed a "functional entity" and that it was this functional entity which formed the "tank" within class 4. The phrase "functional entity" appears in the judgment of Jenkins J. in the case of *Cardiff Rating Authority* v. *Guest Keen Baldwin's Iron and Steel Co. Ltd.*[5] and that case was read to the House, but the facts differ so widely from the facts of the present case that I do not find the *Cardiff* case[5] of assistance to either party. My Lords, in my opinion this contention on behalf of the respondent also fails. I would accept the view advanced by counsel for the appellants that the placing of a tank within a building or structure, whether for convenience of operation or to protect the tank or to protect persons from nuisance or risk emanating from the tank, does not cause the building or structure to become a functional entity with the tank

[5] [1949] 1 K.B. 385.

which it contains or vice versa. The tank and its functions remain unaltered by the building which contains it, and similarly the nature and function of the building remains unaltered by the tank which it contains.

I find some confirmation of the views which I have formed, that the "tank" is the metal cylinder and not the structure which surrounds it, in the wording of the licence to keep petrol on the premises which the appellants had to obtain from the local authority, and in the wording which appears on the plan which is exhibit B to the case stated. It seems to me reasonably clear that the word "tank" when used in the "schedule of conditions" endorsed on the licence, refers to the metal cylinder, and clear beyond doubt that the same word, when it appears in exhibit B, has the same meaning. It would not, of course, be legitimate to construe the Act of 1925 and the Schedule by reference to such documents, but class 4 is a list of parts of business installations, and the licence and the plan deal with business matters. It is therefore interesting to observe that the word "tank" is used in such documents as applying to the metal cylinder and not to the complete installation.

It was suggested in the course of argument that the following sentence, in the decision of the Lands Tribunal, is a finding of fact from which there is no appeal—"I have come to the conclusion that the only part of the installation which can properly "be described as a 'tank' for the purposes of the Order is the "metal cylinder." The tribunal went on to give his reasons for this view and the Court of Appeal thought that he had misdirected himself. As I find no misdirection, and agree with the passage just quoted, I do not find it necessary to express an opinion as to whether the passage ought or ought not to be treated as a finding of fact.

I would allow the appeal.

LORD REID. My Lords, I need not restate the facts. The case turns on the proper construction of the item "tanks" in class 4 of the Schedule to the Plant and Machinery (Valuation for Rating) Order, 1923 (S.R. & O. 1927, No. 480), and that requires consideration of the structure and apparent purpose of this Order and of section 24 of the Rating and Valuation Act, 1925, under which the Order was made. This section derated all plant and machinery with certain exceptions. The original exception was that "with respect to the valuation of any hereditament . . . (*a*) "All such plant or machinery in or on the hereditament as belongs "to any of the classes specified in Schedule III to this Act shall "be deemed to be a part of the hereditament." And the relevant part of Schedule III was: "4. Such part of a plant or any combination of plant and machinery, including gas holders, blast "furnaces, coke ovens, tar distilling plant, cupolas, water towers "with tanks, as is, or is in the nature of, a building or structure."

Section 24 of the Act of 1925 gave power to make an order to

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be substituted for Schedule III and this Order was duly made for that purpose. The Schedule to the Order sets out the "classes of "machinery and plant deemed to be part of the hereditament." Under class 4 are included: "The following parts of a plant or a "combination of plant and machinery whenever and only to such "extent as any such part is, or is in the nature of, a building or "structure." Then there follows a long list of items including "tanks."

Class 4 deals with "parts of a plant" and, looking to the descriptions of a number of the items in it such as burners, crane gantries and stagings, it seems to me to be clear that they need not be, and in some cases cannot be, capable of working as separate self-sufficient units. So the Order requires one to pick out of the whole installation of plant and machinery those bits which correspond to any of the items mentioned in the list irrespective of whether or not they require to be associated with other things in order to produce any useful result. Then the next step is to consider whether each bit of plant so picked out is or is not, taken by itself, a building or structure or in the nature of a building or structure. If it is, then it is to be taken into account in valuing the hereditament; but, if it is not, then it is not to be taken into account.

In the present case metal cylinders which hold petrol are enclosed in underground chambers and the spaces between the walls of the chambers and the cylinders are packed with sand: a cylinder could not be taken out without breaking the roof of its chamber. I assume, although this is not very clearly stated, that for practical purposes the cylinder and its chamber are a unit: this arrangement is necessary for reasons of safety and without such an arrangement the cylinder would not be allowed to be used. But it seems clear that the purpose of the chamber and the sand is not to contain the petrol, it is to minimise danger if there should be a leakage of petrol from the cylinder.

What then is the "tank" within the meaning of the Order? Is it the whole unit, chamber, sand and cylinder, or is it simply the cylinder? It has not been argued that any technical meaning attaches to the word "tank" in the Order, and it must therefore be taken as an ordinary word of the English language to be construed in light of the context in which it is found. The question is crucial because a "tank" is not rateable unless it is in the nature of a building or structure. If the whole unit, chamber, sand and cylinder, is the tank, then admittedly it is of that nature and is rateable. But if the cylinder alone is the tank, then admittedly it is not, taken by itself, in the nature of a building or structure and it is not rateable: on that view only the chamber is rateable.

The Court of Appeal, as I read their judgments, have decided in favour of the respondent because the whole unit is a "func-"tional entity." The reasoning is stated succinctly by Sellers

L.J.[6]: "I think the significant matter is that these tanks are for "the storage of petrol, as my Lord has just indicated. The "matter has to be so viewed. The mere cylinder would be quite "insufficient for that purpose having regard to the liabilities of "the occupiers, who are the respondents. It would not be "sufficient to have the petrol simply in the cylinder. It has to be "dealt with in some manner similar to that in which it is dealt "with here for the purposes of safety and proper user. The "manner of protecting it or lagging it or securing it has turned "what was simply a cylinder into a structure or building. I "cannot think that in law or in fact it would be sensible or "realistic to split the two things up."

I agree that in fact, from a practical point of view, it would not be sensible or realistic to split the two things up. But, as I have said, it appears to me to be the purpose of this legislation to split up for rating purposes installations which are for practical purposes indivisible. I must therefore leave out of consideration the functional connection between the chambers and the cylinders. Then it appears to me to be clear that the tank is the cylinder and nothing else. There may well be cases where a tank consists of a structure with a metal lining, in such a case probably the lining would not be capable of use as a tank without the support of the structure. But these cylinders are not mere linings: they would properly have been described as tanks before they were enclosed in the chambers, and enclosure did not alter their character. Taking the ordinary meaning of the word "tank" I think that these cylinders were tanks originally and are still tanks. They have not acquired additional walls: the sand cannot be part of the tank wall, and I do not think that it would be in accordance with ordinary usage to say that the walls of the chambers became part of the tanks by reason of the tanks being enclosed in the chambers. In my opinion this appeal should be allowed.

LORD KEITH OF AVONHOLM. My Lords, were it not that there was a difference of opinion in this case I would have been content to express my entire concurrence with the judgments of the Court of Appeal. As it is I can express my views very briefly.

We are concerned here with four tanks for keeping petroleum spirit below ground in connection with what is described in the findings of the Lands Tribunals as "a wayside petrol filling station "of a usual type with a single building for offices, stores and "showroom and having a concrete forecourt with three petrol "pump islands each accommodating two pumps. These pumps "are connected by underground pipes to four 3,000-gallon tanks "at the side of the building. Each of these tanks, which are "constructed of metal and were delivered at the site as complete "units, is cylindrical in shape, 13 feet 6 inches in length, 7 feet "in diameter and weighs when empty about two tons." It is

[6] [1958] 1 W.L.R. 331, 337.

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stated by the Lands Tribunal that it was agreed between the parties that "each of these tanks forms part of the plant installed "at the filling station." I mention this fact because it satisfies the first requirement of class 4 of the Schedule to the Plant and Machinery (Valuation for Rating) Order, 1927, that the tanks must be part of a plant. In order, however, that the tanks may be rateable as part of the hereditament it is necessary that the second requirement of class 4 of the Schedule be satisfied, that the tanks "are or are in the nature of a building or structure."

The method of installation has already been described. It is clear that the pits with their brick and concrete walls, floors and covers were useless except for the purpose of holding metal containers, as I shall call them for the moment, and the metal containers were useless for their purpose unless placed in the pits or equivalent structures.

Now what is said, as I understand it, is that it appears from the licence that was granted under the Petroleum (Regulation) Acts by the local authority to store petrol on the premises and from the plans that were submitted to the local authority that what was meant by "tanks" was the metal containers only and not the containers with their housing. So far as the licence is concerned no such inference can, in my opinion, be made. The licence says the spirit "shall be kept only below ground in a "tank." The first condition of the schedule of conditions to the licence says: "The petroleum spirit tank(s) together with the "connections pipes and fittings shall be so constructed and main-"tained as to prevent any leakage of petroleum spirit." The sixth condition says: "No alterations shall be made to the "tank(s) pump(s) and vent(s) except with the approval of the "local authority." This language, in my opinion, leaves it entirely open as to what the local authority understood by a tank. But from the mere language of condition 6 I should have thought that the local authority would be entitled to object to any alteration of the pit, its structure, or its layout as shown in the plans submitted, without their approval. In the plans it is true that the appellants described the metal containers as "tank" or "tanks." But all that, in my opinion, is irrelevant. Call them tanks if you will. That is what the Plant and Machinery Order calls them. The question is what becomes of the tank when it is put into the ground. Unless "tank," as used in the order means only a tank that is constructed in the ground like a small reservoir, clearly there must be some point at which, in some cases at least, a tank ready-made and brought to the site of premises becomes a tank for rateable purposes within the meaning of the Schedule.

In my opinion, when the container here was brought to the site and fitted into a specially prepared pit, with a surround of compacted sand, which, after all, is only a special kind of soil, it became part of a larger unit which can all be described as the tank forming part of the admitted plant of the filling station.

The whole is then in the nature of a building or structure. The container is, as the Master of the Rolls and Parker L.J. described it, just the lining of a tank. It would be an excessive refinement to say that if a hole was dug in the ground, retained with brick or tiles and lined with metal or some other material and covered over, with a cushion of sand between the retaining wall and metal lining, that was a tank for the purposes of the Schedule, as I think it must be, but if the metal lining is brought to the prepared pits as a whole it is not such a tank. The container here was, in my opinion, just part and parcel of a structure for holding petrol which it was not permissible in the present case to store in any other way.

I agree with the views of the Court of Appeal. The Lands Tribunal, in my opinion, went wrong in thinking that the licence necessarily referred to the container as the tank. In any case, that was, I think, an irrelevant consideration. It also went wrong in thinking that the pit and its structure was just a building housing a piece of plant or machinery like any other building, by which I take the tribunal to include a factory or similar building, in which plant or machinery can be found. Cylinder and housing were, in my opinion, one integral whole.

I would dismiss the appeal.

LORD DENNING. My Lords, in the course of the argument, it was said that this was a matter of degree for the Lands Tribunal to decide. I am glad that your Lordships will not dispose of the case on this facile ground. The primary facts are all agreed. The only question is whether on those facts the four petrol tanks fall to be rated as part of the hereditament. That involves in this case a question of law, for the solution of it depends on the true interpretation of the Act of Parliament and the Order made thereunder—an Order which has not, I believe, come up to this House before. It is, moreover, a test case which will decide, once and for all, the rateability of all the wayside filling stations. If your Lordships were to say: "This is a question of degree for "the Lands Tribunal with which we cannot interfere, whatever "our own views," you would leave the matter open to be canvassed again before another tribunal. You would leave the position uncertain when it ought to be made certain. By deciding it here and now, your Lordships will give guidance where it is needed and asked.

My Lords, this metal cylinder was, beyond doubt, a "tank." If it had been put on to the chassis of a lorry, it would have been called by everyone a petrol tank: and the vehicle would be called a tanker. Or if it had been installed above ground, inside a shed for protection from the weather, it would still have been a tank. When it is put underground, it is still, I think, a tank.

But is it "in the nature of a structure"? Looked at by itself, it is admittedly not in the nature of a structure. Looked at, as installed on a lorry, or as housed in a shed above ground, it is

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still not in the nature of a structure. But when it is placed underground in a brick and concrete emplacement, and built into it tight and fast, is it not then "in the nature of a structure"?

This depends, of course, on what you mean by "in the nature "of a structure": or rather, on what Parliament meant when it used those words in Schedule III of the Rating Act, 1925, and what the Order meant when it repeated those words.

The Act itself gives some guidance in this respect; for it gives a few instances of what Parliament had in mind. To take illustration is, I find, often the most helpful way of understanding what an Act of Parliament means; see *Escoigne Properties Ltd.* v. *Inland Revenue Commissioners.*[7] Schedule III includes this specific illustration: "water towers with tanks." Everyone knows what a "water tower with tank" is. It is a concrete or steel structure built up from the ground with a water tank fitted into the top so that it forms part of one integral whole. If such a tank stood on the ground, it would probably not be rateable as part of the hereditament, because it would not be a structure or in the nature of a structure. But when it is built into a water tower so as to form an integral part of the whole, it becomes rateable as part of the hereditament, because it then becomes in the nature of a structure. The water tower itself is clearly a structure: and the tank, being part of it, partakes of the nature of a structure.

Another illustration can be found in a decided case, *B. P. Refinery (Kent) Ltd.* v. *Walker.*[8] There was a boiler unit on the premises. It was a very large structure but in its essentials it was merely an enlarged version of the common domestic boiler, with its constituent parts, furnace, flues, and so forth, built in together so as to form one integral whole. The boiler unit itself was held not to be rateable because class 4 does not include boilers. But some of the constituent parts, such as the "furnace," the "economiser" and the "flues" were held to be rateable, because they were mentioned in class 4. Now if you were to take one of those parts and set it on the ground, and look at it separately by itself, it would not be rateable because it would not be in the nature of a structure: but when it was built into the boiler unit so as to become part of the integral whole, it did become rateable because it was in the nature of a structure. It took its colour, so to speak, from the boiler unit of which it formed part. The boiler unit was a structure. So the various parts built into it were in the nature of a structure.

There are, of course, other ways in which parts of a plant may partake of the nature of a structure, as appears from the *Cardiff* case,[9] but the two illustrations which I have given point the way to the decision in this case. If this petrol tank stood on the

[7] [1958] A.C. 549, 565–6; [1958] 2 W.L.R. 336; [1958] 1 All E.R. 406.

[8] [1957] 2 Q.B. 305; [1957] 2 W.L.R. 907; [1957] 1 All E.R. 700.

[9] [1949] 1 K.B. 385.

ground, housed in a shed, it would not be rateable as part of the hereditament, because it would not be in the nature of a structure. But the position is altogether different when you find it built into an underground emplacement, embedded in sand, boxed in by girders, encased in a concrete cover—so that no one can get it out except by breaking up the emplacement. The tank is clearly an integral part of the whole, and, as such, partakes of the nature of the whole, just as a tank on a water tower, or a furnace in a boiler. This is a tank which is in the nature of a structure and is therefore rateable as part of the hereditament.

The chairman of the Lands Tribunal held otherwise. He asked himself: "Is the whole of the installation a 'functional "'entity'?" And finding it was not, he held the tank was not rateable. He took the phrase "functional entity" from the judgment of Jenkins J. in the *Cardiff* case,[10] but I am sure that the learned judge did not mean it to be a test of rateability. A part of plant can be in the nature of a structure without being a functional entity. Each of the various parts in the *Kent Refinery* case,[11] of which I have spoken, such as the furnace, the economiser, and the flues, was rateable although none of them was a "functional entity" in itself. I get no help from the phrase and think it should be discarded. By making it the test of rateability, the Lands Tribunal fell into error.

The Court of Appeal reversed the decision of the Lands Tribunal and held the tank was rateable. They emphasised, just as I would wish to do, the fact that the metal cylinder was built into the brick and concrete structure so as to form one integral whole: and on that account they held it to be rateable as part of the hereditament. I entirely agree with them in the result but I would use a somewhat different line of reasoning or, perhaps I should say, a somewhat different terminology. Lord Evershed M.R. and Parker L.J. seem to have regarded the whole installation as a "tank" which was in the nature of a structure: whereas I think the metal cylinder still remains a "tank," but, by being built into one whole structure, it partakes of the nature of a structure. Sellers L.J. used words more in line with my view when he said[12]: "The manner of protecting it or lagging it or "securing it has turned what was simply a cylinder into a struc-"ture or building. I cannot think that in law or in fact it would "be sensible or realistic to split the two things up." I entirely agree with that line of approach.

In the oral argument before your Lordships, Mr. Lyell put his case in the same way as the majority of the Court of Appeal. He said the whole thing was a "tank" just as they did: but in the printed case he put it also in the way I prefer, saying that, though each cylinder was a "tank," it was, as installed, in the nature of a structure: see Reason 3.

Is this House bound to determine the case according to the

[10] [1949] 1 K.B. 385, 404.
[11] [1957] 2 Q.B. 305.
[12] [1958] 1 W.L.R. 331, 337.

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particular way in which counsel puts his argument orally before your Lordships? I think not. Your Lordships are to "determine "what of right" ought to be done. To my mind, it is a mistake to fret about this way or that way of putting the case. The decision should not rest on such niceties. Suffice it to take hold of the cardinal fact that this metal cylinder was built into the structure so as to form one integral whole. It is that fact which makes it rateable as part of the hereditament. It is that fact which Mr. Lyell stressed. The rest is all words and not substance: and words are delusive things anyway. It is a matter of indifference whether you call the whole thing a "tank" or only the metal cylinder a "tank," so long as you are agreed that in either case it is in the nature of a structure.

The question, after all, is whether these four petrol tanks fall to be rated as part of the hereditament: and I feel a good deal of confidence in saying that they do, when I find that all three judges in the Court of Appeal think so, and so does my noble and learned friend, Lord Keith of Avonholm, and lastly, I myself do too.

I would therefore dismiss this appeal.

Appeal allowed.

Solicitors: *Sydney Morse & Co.; Solicitor of Inland Revenue.*

F. C.

[COURT OF APPEAL.]

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Nov. 20.
Lord Evershed M.R., Sellers L.J. and Roxburgh J.

* FRANKLAND and Another *v.* CAPSTICK.

[Plaint No. O. 508.]

Agriculture — Agricultural holding — Notice — Ambiguity — Notice of claim for dilapidations on surrender—Landlord's name incorrect—Ambiguity—Whether notice invalid—Agricultural Holdings Act, 1948 (11 *&* 12 *Geo.* 6, *c.* 63), *s.* 70.

After the landlord and the tenant had made an agreement for the surrender of a tenancy of an agricultural holding, the solicitors acting for the landlord served a notice on the tenant making a claim in respect of dilapidations. The notice was expressed to be given by the solicitors "as solicitors for your landlord R. F." In fact, R. F. was the name of the landlord's son who, to the knowledge of the tenant, had been acting as agent for the landlord in unsuccessful post-surrender negotiations:—

Held, that the notice was ambiguous but it was clearly given on behalf of the landlord and was valid. The tenant could not rely on the obvious blunder which had in no way affected her or her understanding of what the proceedings and her obligations were.

Mountford v. *Hodkinson* [1956] 1 W.L.R. 422; [1956] 2 All E.R. 17 applied.

APPEAL from Judge Forbes, sitting at Appleby County Court.

The late John Henry Capstick was the tenant of an agricultural holding known as Murthwaite, Fell End, Ravenstonedale in the county of Westmorland, and Dr. Edward Percy Frankland of Needlehouse, Ravenstonedale, was the landlord. John Henry Capstick died on April 27, 1957, and Clara Capstick, his widow and sole administratrix, succeeded to the tenancy. Clara Capstick (hereinafter called "the widow") approached the landlord with a request to surrender the tenancy and an agreement was drawn up and signed by both parties under which the tenancy terminated on May 14, 1957. Negotiations with regard to claims for dilapidations and other matters took place between the parties and various agents representing them, including Edward Raven Percy Frankland who acted on behalf of his father the landlord. No settlement was reached and on October 11, 1957, the landlord applied to the Minister of Agriculture, Fisheries and Food for the appointment of an arbitrator. On July 12, 1957, solicitors who had acted for the landlord at all material times, sent by registered post to the widow a notice under section 70 of the Agricultural Holdings Act, 1948,[1] of intention to make certain claims. The notice began: "As solicitors for your landlord Raven "Frankland of Bowberhead, Ravenstonedale in the county of "Westmorland, we hereby give you notice . . . of his intention "to make against you certain claims arising out of the termina- "tion of the tenancy of the . . . holding." A schedule of the alleged dilapidations was attached to the notice and it was signed and dated by the solicitors.

When the matter came before the arbitrator, the widow submitted that the notice was invalid and a special case was stated for the opinion of the court. The county court judge decided in favour of the widow, reading the notice not as containing an incorrect description of the landlord but as asserting that Raven Frankland was the landlord and giving notice on his behalf.

The landlord gave notice of appeal but he died on October 22, 1958, before the appeal was heard, having by his will appointed his son Raven and Helga Maud Toynbee Frankland to be his executors. Pending a grant of probate to them, they gave the usual undertakings and were appointed to represent the estate.

[1] Agricultural Holdings Act, 1948, s. 70: "(1) Without prejudice to any "other provision of this Act, any "claim of whatever nature by the "tenant or landlord of an agricul- "tural holding against his landlord "or tenant, being a claim which "arises . . . under this Act [that is, "a claim arising on the termination "of a tenancy] . . . shall . . . be "determined by arbitration. . . . (2) "No claim as aforesaid shall be "enforceable unless before the expira- "tion of two months from the ter- "mination of the tenancy the claim- "ant has served notice in writing on "his landlord or tenant, as the case "may be, of his intention to make the "claim. A notice under this sub- "section shall specify the nature of "the claim, and it shall be a suffi- "cient specification thereof if the "notice refers to the statutory provi- "sion, custom or term of an agree- "ment under which the claim is "made."

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J. G. Shorrock for the executors.
L. Morris Jones for the widow.

No cases other than those referred to in the judgments were mentioned in argument.

LORD EVERSHED M.R. I will ask Sellers L.J. to deliver the first judgment.

SELLERS L.J. stated the facts, read section 70 of the Agricultural Holdings Act, 1948, as set out above, referred to the decision of the county court judge, and continued: Mr. Shorrock, on behalf of the landlord's executors, has submitted that the county court judge's view is erroneous and that the approach to the matter is to be derived from a decision of this court in *Mountford* v. *Hodkinson.*[1] That was a decision under section 24 (1) of the Agricultural Holdings Act, and it was held that, "although a document "alleged to be a counter-notice under the Agricultural Holdings "Act, 1948, section 24 (1) was not to be construed with great "strictness, yet it must be so expressed, if effect were to be given "to it, as to indicate a clear intention to invoke the right which the "Act gave."

We were particularly referred to the observations of Romer L.J. where he said[2]: "It is quite clear that, although according "to the actual language of section 24 (1), a tenant who wants "to serve a counter-notice at all must serve a counter-notice in "writing requiring that the subsection shall apply to the notice "to quit, the tenant can plainly indicate his intention that he "desires to take advantage of the subsection without exactly "following that language. The question is how far he can "depart from it." A little later he said[3]: "It was objected on "behalf of the landlord in that case"—that is, *Ward* v. *Scott*[4]—"that the notice was not a valid counter-notice. Apparently, "according to the judgment which Danckwerts J. delivered, Mr. "Miles for the tenant had said: 'The court is indulgent in respect "'of notices of this kind and does not in effect care for merely "'technical points, and if the meaning is so plain that the land-"'lord cannot mistake what is meant, then effect should be "'given to the notice.' That proposition, I think, commended "itself to Danckwerts J., though he actually decided the case "on another point. For my part, I think that that is right, "though perhaps subject to this, as Mr. Megarry pointed out, "that one should add the word 'reasonably' so as to make it "read: 'and if the meaning is so plain that the landlord cannot "'reasonably mistake what is meant, then effect should be given "'to the notice.' It seems to me to be the proper test to apply "to notices of this sort. The reason why the tenant has to make

[1] [1956] 1 W.L.R. 422; [1956] 2 All E.R. 17.
[2] [1956] 1 W.L.R. 422, 426.
[3] Ibid. 427.
[4] [1950] W.N. 76; 66 T.L.R. (Pt. 1) 340.

"his intention reasonably clear is that the landlord has to take "action upon the counter-notice."

That is the position which arises under the section which is in question here, section 70. A tenant has not necessarily to take action on the notice, but one of the matters submitted to us was that he might take action on the notice and might indeed wait to see whether the landlord was going to act before the tenant acted at all.

Counsel for the executors also referred to *Armstrong* v. *Wilkinson*.[5] The headnote to that case is: "Notice, to a yearly tenant, "to quit 'that messuage, farm, etc., situated at D., in the county "'of York, which you now hold under me as tenant from year "'to year.' The premises were not situated at D. but at H. "D. and H. were adjoining parishes." It was held, "on motion "for nonsuit, after verdict in an action of ejectment, not a "material variance, the tenant not having shown that he held "more than one farm under the lessor of the plaintiff, or that he "was misled by the notice, and not having desired to have any "question on this last point submitted to the jury." That is the effect, I think, of the judgment of Lord Denman C.J. Approaching this matter in that way, counsel submits that the county court judge was wrong in his interpretation of this notice.

The authority relied on by Mr. Morris Jones on the other side was a passage from the judgment of Lord Greene M.R. in *Hankey* v. *Clavering*,[6] which was a case of a notice to quit. As Lord Evershed M.R. pointed out in the course of the argument, the requirement of certainty of a notice to quit has always had judicial support. The passages relied on in Lord Greene's judgment are, first[7] (referring to the notice, which had given a wrong date), "The whole thing is quite obviously a slip on his part and "there is a natural temptation to put a strained construction upon "language in aid of people who have been unfortunate enough "to make slips. That is a temptation which must be resisted "because documents are not to be strained and principles of con-"struction are not to be outraged in order to do what may appear "to be a particular fairness in an individual case." But a further passage was quoted to this effect[8]: "It is perfectly true "that in construing such a document, as in construing any other "document, the court in case of ambiguity will lean in favour "of reading the document in such a way as to give it validity as "a document; but I dissent entirely from the proposition that, "where a document is clear and specific on a particular matter, "such as that of date, it is possible to ignore the inaccurate "reference to a date and substitute a different date because it "appears that the date was put in by a slip."

This particular document is, I think, in the category of being one which is ambiguous. It clearly states that the notice is given

[5] (1840) 12 Ad. & E. 743.
[6] [1942] 2 All E.R. 311.
[7] Ibid. 313.
[8] Ibid. 314.

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on behalf of the landlord, and given by his solicitors; but it misstates the name of the landlord. Section 70 (2) itself, it has been conceded by counsel for the tenant, has to be modified in some way. It is not submitted that it is to be read so strictly that the claimant himself, either landlord or tenant, has personally to give the notice. It has been conceded—and I think rightly conceded beecause it clearly is so—that the notice can be given by an agent acting on behalf of either party respectively, and therefore there is already in that respect a departure from the strict wording of the section. The question, as it appears to me, that has to be decided is whether, approaching the question on the principles which I have read, this is an ambiguity which can be complained of by the tenant, constituting, as it is alleged, an invalid notice. I think, with respect, that the judge has arrived at his conclusion by transposing the order of the words. He has, in the passage I have read, which I think is the substance of his judgment, treated this as if the notice itself read "As solicitors "for Raven Frankland," of a certain address, "your landlord." I am not sure that that would have made any difference in my view as to the interpretation, but it would have been a little stronger in favour of the allegation of invalidity. But this case, I think, leaves it clear that the notice is one given on behalf of the landlord, and there is no indication in the case—in fact I do not think the arbitrator was asked to make any finding of fact about it—that the widow was in any way deceived by this, or was under any misapprehension as to who the landlord was. It would have been very curious if it were otherwise, because the surrender only a short time before had quite clearly been made between the landlord himself—the actual landlord, Edward P. Frankland, who had signed the surrender—and the widow, who had signed on her part. The intervening negotiations for the dilapidations arising out of the termination of the tenancy had taken place with the son, whom she knew to be the agent acting on behalf of his father, and the solicitors throughout were solicitors acting on behalf of the landlord. There cannot have been any mistake about it. It is a technical error: it is indeed a slip which I think in no way affected the widow, her rights, or her understanding of what the proceedings were and her obligations thereunder.

For these reasons I think that the county court judge has misconstrued this document and that, on the principles which have been established, it was quite an adequate, although unfortunately an ambiguous, notice. I would allow this appeal.

Roxburgh J. I agree; and I am going to travel so closely the ground which Sellers L.J. has just travelled that I must plead as my justification the fact that we are differing from the county court judge.

There are, as I see it, two clear pointers in favour of the executors. The first one (which Sellers L.J. has already pointed

out) is that, if the words of the section are read literally, the claimant landlord could not employ a solicitor to serve the notice: he must serve it himself. That conclusion would be so nonsensical that nobody has had the temerity to argue that that is the right construction of the words. That does show that absolutely literal compliance with the section could not possibly be called for. The second pointer is the decision of this court in *Mountford* v. *Hodkinson*,[9] to which Sellers L.J. has also referred; and he has also referred to the headnote, and I need not repeat that reference; but I would merely observe that, having regard to the similarity of the language in section 24 and the similarity of the subject-matter, it would be difficult to apply one view of how to construe the subsection in one case and to apply a different view in the other case.

With those two pointers, I look at the notice, and I see that it says "As solicitors for your landlord Raven Frankland." It is to be remembered that, as the special case states, the widow had approached the landlord with a request to surrender the tenancy, an agreement for which was drawn up and signed by both parties, the landlord signing himself as "Edward P. Frank-"land." Therefore, it is obvious on the face of it, and must have been obvious to the widow if she ever took any trouble to look at this point at all, that there was something wrong about the notice. In my view, having regard to the fact that she knew quite well from that document that her landlord was Edward P. Frankland, it is fair and reasonable to solve the ambiguity which arises by saying that the falsa demonstratio is in the words "Raven Frankland" and not in the phrase "As solicitors for "your landlord." There can be no dispute that apart from that obvious blunder the notice could not be clearer in what it is intended to achieve, and, therefore, there is no doubt that it falls within the test laid down in *Mountford* v. *Hodkinson*.[9]

For these reasons, I concur in the view that the appeal should be allowed.

LORD EVERSHED M.R. I agree so fully with the conclusions which my brethren have stated, and with their reasons for them, that I will not, I hope, be thought disrespectful to the county court judge or to Mr. Morris Jones's argument if I do not attempt any repetition of those reasons.

The appeal will be allowed.

Appeal allowed.

Solicitors: *Hewitt, Woollacott & Chown for Hague & Hague, Sedbergh, Yorks; Corbin, Greener & Cook for Willan & Willan, Hawes, Yorks.*

E. D.

[9] [1956] 1 W.L.R. 422.

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Feb. 3.

* PRACTICE DIRECTION (FORM OF DIVORCE DECREE).

Husband and Wife—Practice—Decree—Form of decree—Naming parties found guilty of adultery.

In accordance with a recent ruling of the Court of Appeal [1] the President has directed that in future the wording of a decree on the ground of adultery should in every case record the judge's finding in full by stating with whom adultery was found to have been committed.

1. The normal form, for use where adultery is found against a named person who has been served, will recite that the decree is by reason that the wife or husband, as the case may be, has committed adultery:

"... with the [Co-respondent] [Party cited] [Intervener] "[Second respondent] A.B."

or "... with A.B. upon whom the [Petition] [Answer] has "been served."

The latter wording will be used for a woman named or party cited in an answer not claiming relief, who has not intervened or been made a second respondent.

2. The wording to be used in other cases will be as follows:

(*a*) *Where the name of the adulterer is not known*

"... with a man [woman] unknown."

(*b*) *Where service has not been effected in the normal manner*

(i) when service has been wholly dispensed with

"... with a man [woman] service upon whom has "been dispensed with"

(ii) when any form of substituted service has been allowed

"... with a man [woman] upon whom substituted "service has been allowed."

(*c*) *Where adultery was found against the spouse but not against the alleged adulterer*

"... with a man [woman] as against whom the charge "was not proved."

B. LONG,
Senior Registrar.

February 3, 1959.

[1] *Schlesinger* v. *Schlesinger* [1959] 1 W.L.R. 92; [1959] 1 All E.R. 155.

[COURT OF APPEAL.]

* HOLIDAY FELLOWSHIP LTD. *v.* HEREFORD.

C. A.

1959
Jan. 28.

Lord Evershed M.R., Romer and Ormerod L.JJ.

[1958 H. No. 66.]

Landlord and Tenant—Repairs—Covenant—"Wall"—Covenant to repair "main walls"—Whether windows part of "walls."
Fact or Law—Landlord and tenant—Construction of lease—Whether wall includes window.

The lessee's covenants in a lease of a dwelling-house included a covenant to maintain the demised buildings and the fixtures and fittings therein "(except the roofs and main walls of the said "dwelling-house)" in good repair and condition. By a complementary covenant of the lease the landlord covenanted "to keep the "main walls roofs . . . in good repair and condition." The tenants sought a declaration that under those covenants the landlord was liable to paint and repair the windows:—

Held, that the question in each case was one of degree and, on the true construction of the lease, the windows of the demised premises were not part of the "main walls."

Boswell v. *Crucible Steel Co.* [1925] 1 K.B. 119 and *Taylor* v. *Webb* [1937] 2 K.B. 283; 53 T.L.R. 377 distinguished.

Decision of Harman J. affirmed.

APPEAL from Harman J.

By a lease dated December 31, 1946, the predecessor in title of the landlord, Viscount Hereford, demised to the tenants, the Holiday Fellowship Ltd., a large dwelling-house called "Tregoyd," in the county of Brecon, for a term of 21 years at a rent of £210 a year. By clause 2 of the lease the tenants covenanted "(3) To maintain and keep the demised "buildings and the said fixtures and fittings therein (except "the roofs and main walls of the said dwelling-house) . . . "in good repair and condition . . ." By clause 3 the landlord covenanted: "(1) to keep the main walls roofs . . . of the demised "premises in good repair and condition . . ." By this summons the tenants sought a declaration that on the true construction of the lease the landlord was liable to keep in good repair and condition (including all necessary painting) the main walls (including the windows and window panes) of the demised premises.

Harman J. held that the landlord was not liable to keep in good repair and condition the windows and window frames of the demised premises.

The tenants appealed.

O'Connell Stranders for the tenants.

John L. Arnold Q.C. for the landlord.

The cases cited in argument are referred to in the judgments.

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Lord Evershed M.R. By a lease dated December 31, 1946, the predecessor in title of the present landlord granted a lease to the tenants of certain premises at Tregoyd and Velindre in the county of Brecon, consisting of a messuage or dwelling-house and two cottages. The lease contains no covenant on either side as to painting. In clause 2 there are the tenants' obligations, which include, in subclause (3), the following: "To maintain and keep "the demised buildings and the said fixtures and fittings therein "(except the roofs and main walls of the said dwelling-house) . . . "in good repair and condition." Complementary to that is found in clause 3 (1) the landlord's covenant "To keep the main walls "roofs" etc. "in good repair and condition."

The premises are a large building containing, on two of its fronts, at any rate, what might be described as bays, or similar structures, jutting out from the walls, in which are contained windows, in the ordinary sense of that term. A question has arisen (and I take this from the note of Harman J.'s judgment), who is responsible for repair by way of painting of the wooden surrounds of the windows and the sashes.

It is conceded by the tenants that, except in so far as there is an obligation expressed to be upon the landlord, the tenant must undertake repairs. But the tenants have contended that, in the absence of any specific reference to painting, or indeed to windows, the obligation falls upon the landlord, on the ground that the windows are, and should be treated, for the purposes of this lease, as part of the main walls.

I wish to be a little careful in the meaning that I am attaching to the word "windows." I have described the bays or similar structures, which are, at any rate to judge from the photograph, made of the same material as the walls, in the ordinary sense of that term. We are not concerned with any question of repair to the brick or stone structures containing the actual windows. For the purposes of this case and of the question raised in the originating summons, I take "windows" to mean, and to be confined to, the glass panels and the wooden framework and apparatus in which the glass is placed; and the question is whether, for the purposes of this lease, "main walls" ought to be treated as including the windows as I have defined them.

I must confess that, if I looked at this matter without any guidance (or possibly the reverse) from authority, I should unhesitatingly say, in ordinary language, that the windows, as I have defined them, are distinct from the walls. No doubt they are *in* the walls. Walls may have eyes as well as ears. But I would say that they are, as physical things, distinct from the walls in which they are inserted; and that was the view, plainly, of Harman J. Various illustrations from ordinary conversational usage have been cited; and, to my mind, it is plain that, apart (again) from the effect of any authority, the windows in the walls would be treated as something distinct from the walls themselves.

But it has been argued, with force, by Mr. Stranders, that

certain authorities binding upon us, being authorities of this court, put a different light upon the matter. The first case, decided in 1925, is *Boswell* v. *Crucible Steel Co.*[1] The question in that case arose out of the obligation on the part of the tenant to repair "landlord's fixtures." It was said that by virtue of that obligation he was bound to repair the windows, which had been broken —I gather by mischievous persons throwing stones through them. The premises were shop premises; and (as was pointed out in the judgment of Bankes L.J.) far the greater part of what was called (and the phrase was taken from an earlier case that I will mention in a moment) the "skin" of the premises consisted of the shop windows. In the county court it had been held that these shop windows were in truth "landlord's fixtures" and, therefore, within the express language of the tenant's covenants; and the Divisional Court affirmed that view. Counsel for the appellant opened his argument thus: "These windows were not fixtures "at all. They were part of the walls of the house"; and in the course of the argument he invoked the assistance of another decision of the Court of Appeal, *Ball* v. *Plummer*[2] (only reported in "The Times" newspaper, I observe, of many years ago), a case of an action by the tenant of a public-house against his landlord for breach of covenant to do "outside repairs." This court had held that in that case the "outside repairs" included window repairs, "the windows being part of the skin of the house."

Mr. Stranders did not (as counsel in *Boswell* v. *Crucible Steel Co.*[3] did not), suggest that *Ball* v. *Plummer*[4] governed *Boswell* v. *Crucible Steel Co.*,[5] nor did he suggest that it covered this case. The argument was and is that in so far as windows were part of the skin of the house, then it was a step towards the point that they were part of the walls of the house, which were, so to speak, the "skin" in that sense. So this court held in *Boswell* v. *Crucible Steel Co.*,[5] on the facts of that case, that the windows could not be regarded as "landlord's fixtures" because, in truth, they were part of the structure of the building, and in that sense part of the skin of the house—of the walls of the house.

Scrutton L.J. said[6]: ". . . it seems to me clear that that "expression [landlord's fixtures] cannot include a thing which "forms part of the original structure of the building." Atkin L.J. said[7]: "As these windows were part of the original struc- "ture representing the walls of the house, so that without them "there would be nothing that could be described as a warehouse "at all, they cannot come under the head of landlord's fixtures." Although, therefore, it was a county court appeal, this court said that the judge had misdirected himself, that it was a question of law, there being no evidence (I take it) to support a contrary conclusion; and they allowed the appeal.

[1] [1925] 1 K.B. 119.
[2] The Times, June 17, 1879.
[3] [1925] 1 K.B. 119.
[4] The Times, June 17, 1879.
[5] [1925] 1 K.B. 119.
[6] Ibid. 122.
[7] Ibid. 123.

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Mr. Stranders has, not unnaturally, relied somewhat strongly upon that case; and, indeed, he is encouraged to do so by the use and citation of it in the last edition of Woodfall on Landlord and Tenant, 25th ed., p. 760, where there is the following sentence: "It would appear that windows in the outer walls of a "building are themselves to be regarded as part of the walls and "therefore of the external parts." That passage is based exclusively on *Boswell* v. *Crucible Steel Co.* With all respect to the editor, I think that is an over-statement or over-simplification of the matter. It would be correct to say: "It would appear that "windows in the outer walls of a building may, in certain con-"texts and for certain purposes, be regarded as part of the "walls"; but I do not think that *Boswell's* case justifies any more extensive proposition. Nor can I agree with Mr. Stranders that because, in *Boswell's* case, the conclusion is regarded as a matter of law, therefore it is impossible to say, as a matter of fact or degree in another case and in another context, that windows are not to be regarded as part of the main walls: the one thing by no means follows from the other.

So far, therefore, I am unable to hold (and I agree entirely with Harman J. that *Boswell's* case does not bind us to hold) that these windows are part of the main walls of this edifice for the purposes of this lease.

A further case was cited of *Taylor* v. *Webb*,[8] in which a somewhat similar problem arose. There was an obligation to keep "outside walls and roofs in good and tenantable repair"; and the question was: What of skylights: were they part of the roof? The building was a somewhat unusual one. It appears that there had been at some time an addition to the original structure: a passage had been built over the roof of the back ground floor premises leading to some upper storey behind. The passage and the upper storey behind were only lit from above; and the facts seem to show that the so-called "skylights" constituted a very substantial part of the roof—certainly of the passage. It was said by du Parcq J.[9]: "I have no doubt that the skylights are part "of the building, and I also think that they are part of the roofs, "and that that was the intention of the parties." But once again it is, to my mind, a fallacy to suggest that that case (and du Parcq J.'s view on this matter was affirmed) leads to the proposition that all skylights for all purposes are part of the roofs in which they appear.

I conclude, therefore (with Harman J.), that these cases do not have a binding and conclusive effect. In any case, I would add that there is in truth no evidence whether the windows, as I see them, were or were not part of the original structure of this house. But that is, perhaps, neither here nor there.

If I am right so far in thinking that the matter is not concluded by these authorities, then the question comes back to that

[8] [1937] 2 K.B. 283; 53 T.L.R. 377.

[9] [1937] 2 K.B. 283, 289.

of the construction of this lease and of asking and answering the question: Are these windows as limited by my definition, part of the main walls, within the meaning of clause 2 (3) and clause 3 (1)?

Applying, to the best of my ability, the ordinary standards of common sense and interpretation of language, I conclude, unhesitatingly, that they are not; and taking that view (which was the view of Harman J.) it follows that this appeal must fail.

I do not think I shall improve the matter by further elaboration; and my refraining from so doing will not, I am sure, be taken by Mr. Stranders as disrespectful to his argument. But it is a question of construing this document in the light of the facts and the usage of language; and so doing, I repeat that I reach the conclusion that the windows here which are the subject of the application are not part of the main walls and are, therefore, outside the scope of the landlord's obligation to repair.

ROMER L.J. I agree. The tenant's contention before the judge was described by the judge, in the note of the judgment which we have, as being that glass and wooden window frames are part of the main walls of a house; and that is the substance of Mr. Stranders' contention before us. That at first sight, at all events, would appear to be a surprising one. As my Lord has pointed out, it has apparently the support of the latest edition of Woodfall on Landlord and Tenant, 25th ed., p. 760, in a passage which is based on *Boswell* v. *Crucible Steel Co.*[10] In my opinion, *Boswell* v. *Crucible Steel Co.* did not decide anything of the kind. The decision in that case is accurately stated in the headnote, to this effect: "In a lease of a house the term 'fixture' "means something which is affixed to the premises after the "structure of the house is completed. It does not include things "which form part of the original structure itself." That was the decision; and at the beginning of Bankes L.J.'s judgment he said[11]: "The question"—that is, the question before the court—"depends upon what the original structure of the house was"; and he came to the result which is shown by the headnote.

I think Mr. Stranders would recognise that that was so; but he does rely on certain observations which were made, particularly by Bankes L.J. and Atkin L.J. as showing that windows form part of the walls. Those observations I think cannot be divorced from the facts of the case which was before the court, and the facts were that, the premises being business premises, "practic-"ally the whole of the sides fronting the street in question con-"sisted of plate glass windows. The windows were of the usual "kind, and were not made to open." Those being the facts—and Bankes L.J. condescended to detail in the matter of measurements—it is not surprising to find that all the members of the court regarded it in that case as being not an abuse of language

[10] [1925] 1 K.B. 119. [11] Ibid. 121.

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to say that that plate glass window could be regarded as (in Atkin L.J.'s language) "representing the walls of the house." I think that shows what indeed is obvious—that questions of this kind are questions of degree and not, as Mr. Stranders would have us hold, pure questions of law.

I ventured to suggest in the course of the argument that it would not be a misuse of language to describe, for example, the walls and roof of the old Crystal Palace as being made of glass, and if they were regarded as a series of windows the latter would form the walls, because the whole structure was glass. On the other hand, if you have a small house with ordinary windows, it does not appear to me to be possible to say that the windows form part of the walls of the house, still less that they form part of the "main walls" of the house, "which" (as the judge said) "support the structure of the building or have directly to do with "its stability."

Consequently, as I say, I think that in so far as there are observations to be found in *Boswell* v. *Crucible Steel Co.*[11] supporting Mr. Stranders' contention, they are to be read in the light of the particular facts which were before the court and were not intended to be of general application. I accordingly agree with my Lord in the opinion which he has expressed as to the modification which should be introduced into the passage from Woodfall at p. 760. As for *Taylor* v. *Webb*,[12] I have nothing to add to what my Lord has said.

I agree that this appeal must be dismissed.

ORMEROD L.J. I agree; and I have nothing to add to what has been said about *Boswell* v. *Crucible Steel Co.*[13] and *Taylor* v. *Webb*.[14] Those are cases which were decided on their own special facts and are of little avail to the tenants in the particular facts of this case. The issue is whether the windows in the walls of this house can be regarded as part of the "main walls" of the building. Harman J. in his judgment defined the "main "walls" as "those which support the structure of the building "or have directly to do with its stability"; and I suppose that in addition they go further than that in that they are a necessary part of the building, as they enclose, or help to enclose, the area on which the building or structure, or whatever it is, is erected. But they may well perform another function. In most buildings it is necessary to have means of ingress and egress, and, of course, some means of admitting light: therefore the walls form the setting for the necessary doors and windows which certainly a dwelling-house and a very large number of other buildings must have. But to say that those doors and windows, inserted in those settings, are part of the main walls of the building seems to me to be going very much further than the ordinary use of language would require or allow.

[11] [1925] 1 K.B. 121.
[12] [1937] 2 K.B. 283.
[13] [1925] 1 K.B. 119.
[14] [1937] 2 K.B. 283.

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It is, as Romer L.J. has said, a matter of degree. There may be cases where the walls are built so much of glass that it would be impossible to say whether they are walls or windows. In the sense that they admit light they are windows, and in the sense that they enclose the premises they are walls. But in the case of a house of this kind, an ordinary house with walls and the normal amount of windows, that position of course cannot apply.

I am satisfied here that on the ordinary use of language it would not be a proper construction of the terms of the covenant to say that the windows form part of the main walls of the structure. I would therefore dismiss the appeal.

Appeal dismissed.

Solicitors: *Eric P. Hannay; Nicholl, Manisty & Co.*

B. A. B.

[CHANCERY DIVISION.]

1959
Jan. 29.
Harman J.

* *In re* SELINGER'S WILL TRUSTS. MIDLAND BANK EXECUTOR AND TRUSTEE CO. LTD. AND OTHERS *v.* LEVY AND OTHERS.

[1958 S. 706.]

Will — Construction — Charitable bequest — Wish of testator — Delay — Express revocation "if . . . trustees shall not within a year . . . "succeed in finding" charitable institution—Delay of more than one year by executors — Distribution of estate held up by other causes—Whether time condition of essence—Whether intention that administration of estate should not be held up during search for charitable institution—Whether gift defeated by lapse of time.

By her will dated April 2, 1948, a testatrix devised and bequeathed her residuary estate to her executors and trustees upon trust to pay, inter alia, a legacy of £1,500 to the Jewish Home of Rest to endow four beds in memory of certain specified persons. She further directed that if the home were unable or unwilling to give effect to the endowment "the legacy shall go to some other similar "charitable institution Jewish or non-Jewish" which the trustees should regard as suitable: "Provided that if my trustees shall not "within a year after obtaining probate of this my will succeed in "finding such other Jewish hospital or similar charitable institu- "tion regarded as suitable by my trustees as aforesaid and able and "willing to give effect to the last-mentioned endowment to the "satisfaction of my trustees then and in such case such legacy shall "stand revoked." The testatrix died on August 25, 1954, and the executors took out probate on October 27, 1954. Before probate the executors learnt that the Jewish Home of Rest, which had been

[Reported by MARGARET THOMAS, Barrister-at-Law.]

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substantially destroyed in the war, had not, after rebuilding, enough beds to carry the plaques of all the beds originally endowed, and they accordingly decided that the home was not a suitable recipient for the legacy. After probate a correspondence, lasting some two years, arose with the Estate Duty Office, during which it was not possible to complete the distribution of the estate, and the executors took no decisive steps to find another similar charitable institution. In February, 1957, the executors ascertained that another similar institution, the Home for Aged Jews, which they regarded as a suitable recipient of the legacy, was willing to endow four beds. On a summons to determine whether the £1,500 legacy might now properly be paid to that home:—

Held, that a charitable bequest ought not to fail by reason of the default of the trustees unless that was the intention of the testatrix, and that the wish of the testatrix to be gathered from the will was that the administration of her estate should not be delayed while the executors decided which institution was to benefit. Since the distribution of the estate had been delayed in any event, and payment of the legacy to the Home for Aged Jews would now produce the effect intended by the testatrix, the condition as to time should not be treated as of the essence; and, accordingly, the gift was not defeated by the trustees' delay but might properly be paid to the home.

Observations of Romer J. in *In re Goodwin* [1924] 2 Ch. 26, 30 applied.

ADJOURNED SUMMONS.

By her will, dated April 2, 1948, the testatrix, Annie Selinger, appointed the plaintiffs, the Midland Bank Executor and Trustee Co. Ltd., Henry Abbot and Michael Bucks her executors and trustees, and, after making certain specific bequests, devised and bequeathed the residue of her estate to her executors and trustees on trust to pay the income therefrom to her husband Oscar Selinger, during his life if he should survive her. By clause 6 of her will, subject to her husband's life interest, the testatrix bequeathed a number of legacies to be paid out of the residue of her estate. In fact the husband predeceased the testatrix so that the legacies became payable immediately upon her death. The twelfth legacy was in the following terms: "To the Jewish Home "of Rest to endow four beds in memory of (1) Hannah de Villiers, "(2) Gali Selinger, (3) Sara de Villiers and Sophia Green, and "(4) Annie Selinger (being myself) and Oscar Selinger (being my "husband) respectively £1,500 for the four beds. And I declare "that it is my wish that the said four beds shall be placed along-"side the bed already endowed in the said home to the memory "of the said Sir John de Villiers . . . And I direct that if the "said home is unable or unwilling to give effect to my wish as "expressed above to the satisfaction of my trustees such legacy "shall go to some other similar charitable institution Jewish or "non-Jewish determined by my trustees, regarded as suitable by "my trustees for the endowment of four beds alongside each other "in memory of" the above named persons. "Provided that if "my trustees shall not within a year after obtaining probate of "this my will succeed in finding such other Jewish hospital or

"similar charitable institution regarded as suitable by my "trustees as aforesaid and able and willing to give effect "to the last-mentioned endowment to the satisfaction of my "trustees then and in such case such legacy shall stand "revoked"; the trustees were empowered to increase the legacy to £2,000 in certain events. Clause 8 provided that if there were a balance of the residuary estate after giving effect to the foregoing legacies (as in the event there was) then certain charitable legacies were to be given; and that if there were still anything remaining the trustees were to divide it among the third to twelfth defendants to the summons.

The testatrix died on August 25, 1954, and the executors proved her will on October 27, 1954. Before probate the executors made inquiries about the Jewish Home of Rest and discovered that it had originally been a voluntary hospital with 72 beds, but that during the war it had been practically destroyed and after rebuilding had only 24 beds, an insufficient number to carry the plaques of all the beds which had been endowed in the original building. They also learnt that the home had been transferred to the Minister of Health under the provisions of the National Health Service Act, 1946, and now formed part of the Wandsworth Hospital Group. In those circumstances the executors decided that the Home was not a suitable recipient of the legacy. Shortly afterwards, in November, 1954, they informally approached an orphanage for Jewish children, but it was not willing to comply with the endowment conditions in the will, and as they doubted whether it was a "similar charitable "organisation" the executors did not pursue the matter. Later in November they requested their solicitors to communicate with the Home for Aged Jews but the matter proceeded no further. About this time the executors entered into a correspondence, with the Estate Duty Office with regard to the duty payable on the estate, which lasted for some two years during which time it was not possible to complete the distribution of the estate, and the question of the legacy was left in abeyance by the executors.

The executors took no further steps to find another institution similar to the Jewish Home of Rest suitable for the endowment of four beds in accordance with the provisions of clause 6 of the will, until after the expiration of one year from the date of probate. In or about February, 1957, however, they ascertained that the Home for Aged Jews, Wandsworth, was able and willing to name four beds, and considering that it was a suitable institution to receive the legacy of £1,500, the executors took out a summons to determine, inter alia, whether the legacy could properly be paid to the Home for Aged Jews or whether it fell into residue.

A. J. Balcombe for the executors.

J. A. Wolfe for the first and second defendants, the joint treasurers of the Home for Aged Jews.

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Gerald Godfrey for the third to twelfth defendants, the residuary legatees.

Denys Buckley for the Attorney-General.

The following cases, in addition to those referred to in the judgment, were cited in the course of argument: *Christ's Hospital* v. *Grainger* [1]; *Royal College of Surgeons of England* v. *National Provincial Bank Ltd.* [2]

HARMAN J. stated the facts and continued: The question has been raised whether, the time limit set by the testatrix having long passed, the revocation expressed in the will after a year from probate has taken effect so that the subject-matter of the gift has fallen into residue. There is no doubt that if you read the terms of the will literally, that is what has happened. The words are "shall not within a year . . . succeed in finding" another institution: and it is true that the trustees did not succeed in doing that. The will goes on "then and in such case such legacy "shall stand revoked." The question is whether that revocation must be treated with the strictness with which the testatrix set it down.

In the forefront of the argument for the charity and for the Attorney-General it is said that the charitable bequest cannot be defeated by reason of the default of the trustees. It is argued that the words "succeed in finding" postulate that the trustees have made all due efforts to find, and it is said they did not do anything of the kind; that having made a few ineffectual efforts about the time when probate was granted, they forgot the whole matter and neglected their duties and failed to find; and that that ought not to redound to the detriment of the proposed legatee. There was nothing that it could do and no persona designata existed who could make any protest over the matter. It is no doubt a well-known principle and one that does not need any authority that a charitable bequest ought not to fail by reason of the default of the trustees. But that must be subject to this qualification, that that would be the result unless it was the intention of the testatrix that it should fail if the trustees did not carry out the trust. Otherwise you would be defeating the testatrix's intention.

Secondly, it is said that time conditions of this sort are not to be treated with strictness; if they are substantially fulfilled that is enough. If the object of the testatrix was to procure the bringing about of a certain result and the court can see its way to bring about that result, it will not be slow to treat the condition as to time as not being of the essence of the matter but will treat a compliance with it as soon as possible as a compliance in substance with the request.

I have found the authorities sadly confused upon this matter. If one starts, as apparently one should, with a modern statement

[1] (1849) 1 Mac. & G. 460.

[2] [1952] A.C. 631; [1952] 1 T.L.R. 978; [1952] 1 All E.R. 984.

of the doctrine, one begins with *In re Goodwin.*[1] In that case the testator bequeathed an annuity of £500 to his wife; she was entitled under a deed inter vivos to an annuity of £70 and he made it a condition that she should within six months of his death release her right to the annuity of £70 or else the bequest of the annuity of £500 should become and be absolutely void and of no effect. In fact his estate took a very long time to wind up. The widow continued to take her £70 under the deed, she never received anything under the will and was never asked to release her £70, and indeed in the end she died without ever having done so. After her death, the executors suddenly found themselves in a position to distribute to the beneficiaries, and the question arose whether, the widow not having ever released, still less not within six months of the death of the testator, could become entitled to anything under the will. Romer J. held that she could. He said this,[2] which seems to me to be a general statement: "It is well settled by authority that where a gift in a "will is made subject to a condition, even a condition precedent, "to be performed within a specified time, but the condition is "not in fact performed within that time, then, at any rate in the "absence of an express gift over, it is always a question for the "court to determine whether the time so specified was of the "essence of the matter. In determining that question the court "must have regard to what was presumably the intention of the "testator in inserting the condition, what it was that he desired "to bring about or to guard against; and if the court finds that a "performance of the condition at a time subsequent to the expira-"tion of the period fixed by the testator in substance provides for "the very thing that the testator intended to provide for, so that "all parties can be put in substantially the same position as they "would have been in had the condition been performed within "the proper time, time is not regarded as of the essence, and "such performance is treated as a sufficient compliance with the "condition." That would seem exactly to fit this case but for the exception which the judge makes as to the absence of an express gift over.

When I look at Roper and White, the authoritative work on legacies (4th ed., 1847), I find in the chapter on legacies upon condition this passage at p. 769: "When the condition "is precedent, there is nothing to forfeit, since no interest "can vest previously to the literal or substantial performance "of the condition. The question in all those cases appears to "be, have the conditions been duly performed? In resolving "such questions, it is presumed that the following distinction "is material to be regarded. When there is no disposition "upon non-compliance with the terms of the condition, either "in time or collateral circumstances, a liberal construction is to "be put upon the performance, under authority of the testator's

[1] [1924] 2 Ch. 26.

[2] [1924] 2 Ch. 26, 30.

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"intention, inferred from the absence of any disposition over, "that he meant the legatee to receive the legacy, upon the con-"dition being performed cy-près, or in substance, as in the pre-"ceding cases. But when there is a limitation over of the legacy "on non-compliance with its specific terms, the construction is "less liberal, a strict and literal performance being required; as "it is presumed, from the disposition over of the legacy to another "person, that the testator meant, if the terms which he imposed "were not literally fulfilled, the second object of his bounty "should succeed to the bequest by way of conditional limitation."

Here there is no express gift over, but there is an express revocation of the gift. The question which has been much debated before me is whether such an express revocation is not tantamount to a gift over, because an express revocation of a legacy is in effect a gift of it to residuary legatees. In Jarman on Wills (8th ed., 1951), p. 1468, that view is expressed in these words: "Where conditions require an act to be done within a "particular time, a distinction is to be drawn, on the one hand "where there is an express gift over or (what amounts to the "same thing) an express direction that on breach of the con-"dition the legacy shall lapse and fall into residue, and on the "other hand where there is no such express gift over."

This is neither quite one thing nor the other and it is difficult to say on which side of the line to come down. Indeed Danckwerts J. said in a recent case, *In re Hanbey's Will Trusts*,[3] that he does not think that there is any indication to be found from the cases of the line you should pursue in a matter of this sort. In that case there was a bequest to one charitable legatee with a gift over to a second charitable legatee in the event of default by the trustees, and the question was whether the default of the trustees should be allowed to defeat the gift. It seems to me that if you come to the conclusion that that is exactly what the testator intended you are not to defeat his intention; on the other hand, if you come to the conclusion that his intention was merely not to hold up the administration of his estate, or something of that sort, you may take it that time was not of the essence. Danckwerts J. said[4]: "I find it a little difficult to see what is "the distinction as regards the cases where the default of the "trustees to apply property in accordance with the testator's "direction is none the less not allowed to defeat the gift, and "the cases in which the default of the trustees does have the "result of defeating the gift and results in the gift over taking "effect. It seems to me practically impossible to discover what "is the dividing line." It is not very encouraging to find that being said by a judge, especially one so well acquainted with the characteristics of the law of charities as Danckwerts J.

It seems to me that I am to look here at what I think to have been, as expressed in her will, the wish of this testatrix. Her

[3] [1956] 1 Ch. 264; [1956] 2 W.L.R. 23; [1955] 3 All E.R. 874.

[4] [1956] 1 Ch. 264, 274.

desire was, in my judgment, not to allow the administration of her estate to be held up while the executors hummed and hawed as to what charitable institution they should make the object of her bounty. So they are to choose and she says: "You must "choose within a year or the legacy is revoked." She does not expressly provide that it is to fall into residue, though that, of course, is the result of a forfeiture. But she is, in effect, saying: "You are not to hold up the distribution of the estate "by hesitations on this subject." In fact the distribution has not been held up at all; it has been impossible, as I am informed, to distribute this estate until quite recently because of the difficulties over the estate duty. If the legacy be paid now to the Home for Aged Jews, who satisfy the conditions exactly, the effect intended by the testatrix will be produced and everybody will be in the position in which they ought to be. Therefore, it seems to me that this is a case in which time ought not to be treated as being of the essence of the matter, and the delay by the trustees in performing their duties ought not to be allowed to defeat the gift.

Declaration accordingly.

Solicitors: *Arthur S. Joseph & Cates; Bartlett & Gluckstein; Treasury Solicitor.*

[QUEEN'S BENCH DIVISION.]

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Lord Parker C.J., Donovan and Ashworth JJ.

Shop — Early closing — Mixed shop — Number of different trades or businesses carried on—Local orders providing for Wednesday closing in respect of four of shop's businesses—Application of orders to mixed shop—Shops Act, 1950 (14 *Geo.* 6, *c.* 28), *s.* 1 (1), (2).

The appellants carried on the business of a mixed shop in Brighton, their main trades or businesses in the shop being that of grocer, greengrocer, fishmonger and butcher. In addition they carried on other businesses including those of domestic hardware merchant, stationer, confectioner, baker, tobacconist and seedsman. The appellants closed their shop on Thursday afternoons. By the Shops Act, 1950, s. 1 (1): "Every shop shall be closed for the "serving of customers not later than one o'clock in the afternoon "on one week day in every week." By subsection (2) the local authority were empowered to make orders fixing the day on which a shop was to be closed, and Brighton Corporation had made orders fixing the half-holidays for grocers, greengrocers, fishmongers and butchers as Wednesdays. The appellants were charged with failing to comply with those orders:—

Held, that orders fixing weekly half-holidays for specific trades or businesses did not apply to a mixed shop.

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Per curiam. "Shop" in section 1 of the Act of 1950 refers to the premises, and where there is a single hereditament consisting of self-contained premises laid out with counters, the whole of those premises constitutes the "shop," and it is impossible to say that any particular part of those premises or any particular counter constitutes the shop.

Patrick Thomson Ltd. v. *Somerville,* 1917 S.C.(J.) 3 and *MacDonald* v. *Groundland,* 1923 S.C.(J.) 28 followed.

CASE STATED by Brighton justices.

The appellants, Fine-Fare Ltd., were charged on an information preferred by William Ogilvie Dodd on behalf of the respondents, the Brighton Corporation, that they, being the occupiers of a shop situate at 166/168, Western Road, Brighton, wherein the retail trade or business of a grocer, tea dealer and provision merchant was carried on, unlawfully failed to close such shop for the serving of customers not later than one o'clock in the afternoon of Wednesday, March 12, 1958, contrary to section 1 of the Shops Act, 1950,[1] and the Brighton Weekly Half-Holiday (No. 2) Order, 1912. Three further informations were preferred in identical terms save only that the retail trades or businesses and orders referred to were in the case of the second information, fruiterer, greengrocer and florist and the Brighton Weekly Half-Holiday (No. 3) Order, 1918, in the case of the third information, fishmonger and poulterer and the Brighton Weekly Half-Holiday (No. 4) Order, 1921, and in the case of the fourth information, butcher and the Brighton Weekly Half-Holiday and Closing (Butchers, etc.) Order, 1922. Each of those orders provided for the weekly half-holiday to be on Wednesday in respect of the trades or businesses specified in the informations.

The justices found the following facts: On Wednesday, March 12, 1958, and at all other material times the appellants were the occupiers of premises situate at 166/168, Western Road, Brighton, which premises were assessed for rating purposes as a single hereditament. In those premises the appellant had at all material times carried on the retail trades or businesses of (i) a grocer, tea dealer and provision merchant; (ii) a fruiterer, greengrocer and florist; (iii) a fishmonger and poulterer; (iv) a butcher. In addition the appellants carried on (but to a much smaller extent) other retail trades or businesses, including those of a domestic hardware merchant, a stationer, a confectioner, a baker, a tobacconist and a seedsman.

The Brighton Corporation on November 1, 1912, December 19, 1918, March 17, 1921, and May 25, 1922, respectively made orders known as the Brighton Weekly Half-Holiday (No. 2)

[1] Shops Act, 1950, s. 1: "(1) Every shop shall be closed for "the serving of customers not later "than one o'clock in the afternoon "on one week day in every week. "(2) The local authority may, by "order, fix the day on which a "shop is to be so closed (in this "Act referred to as 'the weekly half-"'holiday'), and any such order may "either fix the same day for all shops, "or may fix—(*a*) different days for "different classes of shops; . . ."

Order, 1912, the Brighton Weekly Half-Holiday (No. 3) Order, 1918, the Brighton Weekly Half-Holiday (No. 4) Order, 1921, and the Brighton Weekly Half-Holiday and Closing (Butchers, etc.) Order, 1922, which were in force at all material times. The appellants' premises were situate in a part of Brighton County Borough to which all of those orders were applicable. No notice that the appellants substituted Saturday for Wednesday was affixed in the appellants' premises and the premises were opened for serving customers after one o'clock in the afternoon on Saturday, March 15, 1958. The Brighton Corporation on various dates had made other orders relating to (i) the days of the week on which shops wherein certain retail trades or businesses were carried on either generally or in certain areas should be closed at 1 p.m.; (ii) the periods of the year during which shops wherein certain retail trades or businesses were carried on either generally or in certain areas should be exempt from the obligation to close at 1 p.m. on one day in each week; (iii) the exemption of shops, wherein certain retail trades or businesses were carried on, from the provisions of section 1 of the Shops Act, 1950; (iv) the extension of the provisions of section 1 to certain trades or businesses exempted therefrom by the provisions of section 1 (6) of the Act of 1950; (v) Sunday closing.

The retail trades or businesses carried on by the appellants fell into the following groups: (1) Those specified in orders providing for closing of shops, wherein the same were carried on, on Wednesday at 1 p.m., that was to say, the orders specified in the informations. (2) Those specified in orders providing for closing of shops, wherein the same were carried on, on Thursday at 1 p.m. (3) Those not specified in any order providing for closing for a weekly half-holiday and not either of a class mentioned in the First Schedule to the Shops Act, 1950, or specified in any order exempting the same from the provisions of section 1 of the Act. (4) Those of a class mentioned in the First Schedule to the Act of 1950, or the subject of orders exempting shops so far as they were used for carrying on the same from the provisions of section 1. The plan annexed to the case stated showed the parts of the premises, where each of those groups was being carried on, coloured yellow, red, green and blue respectively.

On Wednesday, March 12, 1958, while so occupying the premises the appellants did not close the premises or any part thereof for the serving of customers at or before one o'clock in the afternoon. On Wednesday, March 12, after one o'clock in the afternoon all the retail trades or businesses habitually carried on in the same premises were being carried on. The appellants habitually closed the whole of the premises not later than one o'clock in the afternoon on Thursday throughout the year, as specified in a notice to that effect affixed to the premises. Brighton Corporation had made no order specifically relating to mixed shops.

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On the part of the appellants it was contended that the appellants were the occupiers of one set of premises wherein there was one shop; that the appellants were under an obligation pursuant to section 1 (1) of the Shops Act, 1950, to close the shop at or before one o'clock in the afternoon on one week day throughout the year; that the appellants fulfilled that obligation by closing the whole shop at or before one o'clock in the afternoon on Thursday throughout the year; that the appellants were under no obligation to close one part of the shop at or before one o'clock in the afternoon on one day throughout the year and other parts of the shop at or before one o'clock in the afternoon on another or other days; that if the appellants closed part of the shop on one day and other parts on another or other days the appellants would not thereby fulfil the obligation imposed by section 1 (1) of the Act; that if the appellants were obliged to close the whole shop on one day to fulfil the requirements of section 1 (1) of the Act, and in addition to close part of the shop on another or other days so as not to infringe any order of the Brighton Corporation made under the Act, an obligation was imposed on them which was greater than that which was imposed on shopkeepers by the Shops Act, 1950; that if, on the proper construction of the orders, a part of the shop had to be closed at or before one o'clock in the afternoon on one day and other parts had to be closed on another or other days, or alternatively if, on a proper construction of the orders, the whole shop was required to be closed on one day and a part or parts on another or other days, the orders were ultra vires the Shops Act, 1950; that in the absence of an order relating to mixed shops the appellants were at liberty to choose on which week day throughout the year the shop would close at or before one o'clock in the afternoon by affixing a notice specifying the closing day in the shop; that none of the orders specified in the informations applied to the appellants' shop; that the appellants' premises were not a grocer, tea dealer and provision merchant's shop or a fruiterer, greengrocer and florist's shop, or a fishmonger and poulterer's shop or a butcher's shop within the meaning of the respective Brighton Half-Holiday Orders specified.

On the part of the respondents it was contended that in the appellants' premises there was more than one shop within the meaning of the Shops Act, 1950; that those parts of such premises wherein the appellants respectively carried on the retail trades or businesses of (i) a grocer, tea dealer and provision merchant; (ii) a fruiterer, greengrocer and florist; (iii) a fishmonger and poulterer; (iv) a butcher, comprised four separate shops; that the appellants were accordingly obliged to close for the serving of customers those parts of the premises wherein such trades or businesses were carried on on Wednesday at one o'clock in the afternoon; that the appellants having failed to do so were guilty of each of the offences charged; that in the alternative, if in the appellants' premises there was one shop, then with

the exception of such parts as were coloured red on the plan (stockings, towels, tablecloths, shirts, ties and sheets), green (hardware and domestic hardware), and blue (delicatessen, bread, popcorn, cakes, toothpaste, etc., and toilet requisites, sweets, cigarettes and ice cream, stationery, milk), the retail trades or businesses carried on therein were such that the appellants were obliged to close on Wednesday under one or other of the orders specified; that with respect to the parts coloured blue (see above), the retail trades or businesses carried on were exempt from the obligation to close on one day each week at one o'clock in the afternoon; that with respect to the parts thereof coloured respectively red and green (see above), the retail trades or businesses carried on were not sufficiently extensive to consist in the carrying on of separate retail trades or businesses but were merely incidental to one or other of the retail trades or businesses carried on on the parts of the premises coloured yellow (sausages, fresh meat, poultry, etc., butter, margarine, fats, cheese, tinned, bottled or packeted goods, biscuits, teas, jam, cereals, etc., soaps, polishes, soap powders, tinned goods, cake mixes, frozen goods, fresh fruit, greengrocery, tinned and packeted groceries, bacon, frozen foods and fish, eggs, frozen fruit and vegetables); that, accordingly, the appellants were obliged to close the whole of the premises save only the parts thereof coloured blue for the serving of customers at 1 p.m. on Wednesdays, and having failed so to do were guilty of all or one of the offences charged; that in the further alternative, if in the appellants' premises there was only one shop, and if in the parts coloured respectively red and green separate retail trades or businesses were carried on then the appellants were obliged pursuant to the said orders to close for the serving of customers those parts thereof, wherein the retail trades or businesses the subject of the said orders were carried on, on Wednesdays at 1 p.m.; that the said orders and each of them were intra vires the Shops Act, 1950.

Patrick Thomson Ltd. v. *Somerville*,[2] *MacDonald* v. *Groundland*[3] and *Margerison* v. *Wilson*[4] were cited to the justices.

The justices were of the opinion that the appellants were guilty of the offences charged and accordingly convicted them of each of such offences and fined them 10s. for each offence.

The question for the opinion of the court was whether the justices came to a correct determination and decision in point of law, and if not, what ought to be done in the premises.

L. G. Scarman Q.C. and *Owen Stable* for the appellants.
R. J. Parker for the Brighton Corporation.

The following cases, in addition to those referred to in the judgment, were cited in argument: *Margerison* v. *Wilson*[5];

[2] 1917 S.C.(J.) 3.
[3] 1923 S.C.(J.) 28.
[4] (1914) 112 L.T. 76.
[5] 112 L.T. 76.

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Schuck v. *Banks*[6]; *George Hotel (Colchester)* v. *Ball*[7]; *Gordon Hotels Ltd.* v. *London County Council*[8]; *West Derby Union* v. *Metropolitan Life Assurance Society*[9]; *Eldorado Ice Cream Co. Ltd.* v. *Keating*.[10]

LORD PARKER C.J. This is an appeal by way of case stated by the justices for the County Borough of Brighton before whom the appellants, Fine-Fare Ltd., were charged and convicted of certain offences against the Shops Act, 1950.

The appellants occupy premises in Western Road, Brighton, Nos. 166/168. It is quite clear from the plan which has been put in, that the premises were self-contained, and it is found that for rating purposes it was a single hereditament. In those premises they carry on what in ordinary terms would be called a mixed shop. It shows that they have a number of counters dealing largely with foodstuffs but also with some others, and the finding is that their main business is fourfold, (1) what is called that of a grocer, tea dealer and provision merchant, (2) a fruiterer, greengrocer and florist, (3) a fishmonger and poulterer, and (4) a butcher. In addition, though on a smaller scale, they carry on other trades or businesses including a domestic hardware merchant, stationer, confectioner, baker, tobacconist and seedsman.

Under the Shops Act, 1950, which is an amending and consolidating Act, it is provided by subsection (1) of section 1: "Every shop shall be closed for the serving of customers not "later than one o'clock in the afternoon on one week day in "every week." The appellants have obeyed that injunction in that they have closed the whole of these premises on Thursday afternoon of every week. But the Act goes on by subsection (2) to provide: "The local authority may, by order, fix the day "on which a shop is to be so closed (in this Act referred to as "'the weekly half-holiday'), and any such order may either fix "the same day for all shops, or may fix (*a*) different days for "different classes of shops." The local authority, the Brighton Corporation, have made a number of orders which have been in existence now for a considerable time, for example there were orders made in 1912, 1918, 1921 and 1922. They were made under the Shops Act, 1912, but by section 76 of the current Act of 1950 those orders remain in force as if made under the present Act. They provide that in regard to shops wherein the retail trade or business of a grocer, tea dealer and provision merchant is carried on the shop shall be closed on Wednesday, not Thursday, and the order for a fruiterer, greengrocer and florist also provides for a Wednesday closing; so does that in respect of shops wherein the trade or business of fishmonger and poulterer is carried on, and also

[6] [1914] 2 K.B. 491; 30 T.L.R. 378.
[7] [1938] 3 All E.R. 790.
[8] [1936] 2 K.B. 27; 32 T.L.R. 423.
[9] [1897] A.C. 647.
[10] [1938] 1 K.B. 715; 54 T.L.R. 356; [1938] 1 All E.R. 330.

the trade of butcher. In regard to yet another order dealing with towels, tablecloths, sheets and the like, there was a provision for Thursday closing. Accordingly, the informations in this case, four of them, charged the appellants with failing to comply with the four orders that I have referred to which provided for a Wednesday closing.

I have very great sympathy with the justices who were called upon to decide this case. I also have very great sympathy with any shopkeeper who has occasion to consider this Act, and, indeed, perhaps the only people who benefit out of it are the members of the legal profession.

One thing that is perfectly clear is that section 1 is extraordinarily difficult to construe. I will not go into it in detail, but clearly the first question is: What is a shop? One gets no assistance from the definition, which merely provides that it includes any premises wherein retail trade or business is carried on. Does "shop" there mean the physical self-contained premises? Can it be construed as applying to a department within those self-contained premises or, indeed, to a counter in a department? It seems to me that reading the Act as a whole and the regulations the term "shop" here is referring to the premises, and although there is no specific finding in this case I think it is clear that where you get a single hereditament consisting of self-contained premises laid out with counters as shown on the plan the whole of those premises constitute the shop, and that it is impossible to say that any particular part of those premises or any particular counter constitutes a shop. Accordingly, prima facie, each one of these orders which applied to shops wherein the specified trade or business was carried on, applies to the premises, and the Act goes on to provide that every shop for which a day has been fixed shall be so closed, that is, closed for the serving of customers.

The argument for the appellants who have been convicted in this case, quite shortly, is that on those plain words it becomes their duty if these orders apply to them to close the whole of the shop on every day for which an order was made. As I have said, in this case the four orders applied to a Wednesday and another order to a Thursday, and that would mean they would be obliged to close the whole of their shop every Wednesday and the whole of their shop every Thursday and, as Mr. Scarman pointed out, you might have a local authority who might make orders which would cover almost every day of the week. Accordingly, he says that that construction reduces the whole matter to an absurdity. I should add that a shopkeeper always has the option, whatever the local authority orders, to close on the Saturday instead of on the specified day. Therefore, it is perfectly right to say that these appellants instead of closing on Wednesday and Thursday could exercise the option to close on Saturday, but that does not lessen, as it were, the absurdity because it no longer becomes a

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free option. It means, in practice, they would have to close on Saturday.

On the other side, Mr. Parker has urged and, if I may say so, very plausibly, that if you read the Act as a whole—and I am not dealing with the details of his argument—it becomes clear that you are really only fixing a day for the closing of a shop in relation to a particular trade being carried on. He points to a number of other parts of the Act which clearly contemplate that the whole of the shop will not be closed but only certain counters or departments within the shop. From that he urges that the true construction of section 1, and the only one which will really make sense, is to say that if, for instance, an order provides for the Wednesday closing of a shop wherein a butcher's trade is carried on, it only means in the case of these appellants that they would have to close that part of their counters where they ordinarily sell butcher's meat.

I confess that I have very grave doubts and, as I have said, I sympathise with anybody called upon to construe this Act. I bear in mind that of course they are penal provisions. I also bear in mind that unless Mr. Parker's argument is right there may be unfairness and competition between traders, which is clearly a matter to be taken into consideration under this Act. But I confess that at the end of the day, if I may put it that way, I am still left in very considerable doubt. Thus I think the argument comes down to this, that there is no irresistible inference towards the local authority's construction. It is merely this, that the construction is the one which ought to be given in order to produce a logical scheme. I think that there is a difference between saying what would be a logical scheme and saying what the scheme is which Parliament have intended and which must be applied. But I find it unnecessary to come to any conclusion in the matter, and for this reason, that as long ago as 1917 this point came before the Scottish courts. It arose under the Shops Act, 1912, but for all material purposes the wording is the same. In *Patrick Thomson Ltd.* v. *Somerville* [1] a large firm of retail drapers and general warehousemen carried on in single premises their business as such together with a hairdressing business. The local authority made an order that hairdressing shops were to be closed on a particular day—again it was a Wednesday—and that was challenged by the shopkeeper. The court held unanimously that the order applying to a shop wherein the business of hairdressing was carried out did not apply at all to the case of a mixed business where other businesses were carried on as well as hairdressing; in other words it only applied to premises where the sole business was hairdressing. The Lord Justice-General (Lord Strathclyde) said [2]: "I think, from the "description of the business which they carry on, that the appel-"lants fall within the description given in section 10, subsection

[1] 1917 S.C.(J.) 3. [2] Ibid. 7.

"(1), of the statute, viz., persons who are carrying on in the same "shop several trades or businesses"; I interpose to say that in the current Act it is section 13. He goes on: "and under section "4, subsection (2)"—which corresponds with subsection (2) of section 1—"the local authority might have provided for the half-"holiday being observed on a particular day in shops where a "number of different trades or businesses are carried on. The "local authority has not, however, thought fit to do so. The "order in question is applied, apparently, to all barbers' and "hairdressers' shops, and that may be quite legitimate; but it "appears to me that it does not apply to a case like the present "where the shop is in the occupancy of one person who carries "on therein a variety of different trades or businesses. In such "a state of matters the statute expressly authorises the occupant "of the shop to go on with any one of his businesses, which chances "to be one of the exempted businesses, but quoad all the rest the "weekly half-holiday prescribed by the local authority must be "observed." Then he goes on to deal with the provisions of the particular order, and he ends in this way[3]: "On the ground, "therefore, that the appellants occupy only one shop in which "a variety of trades and businesses is carried on, I hold that "the order in question does not apply to the present case, and "accordingly that we ought to answer the question put to us "in the negative." The Lord Justice-Clerk (Lord Scott Dickson) and Lord Skerrington gave judgment to the same effect. That was in 1917. It is true that in that case there was a finding that the hairdressing business was merely ancillary to the other business, but in 1923 another case came before the courts in Scotland, *MacDonald* v. *Groundland*.[4] There the business carried on was that of a jewellery and tobacconist's business in the front of the shop but at the back there was a hairdresser's business, and it is clear in that case that the hairdresser's business was a substantial part of the whole and not merely subsidiary, and again there was an order fixing in that case Thursday as the weekly half-holiday for hairdressers' shops. The argument was that in that case by reason of the substantial character of the hairdresser's business it could be distinguished from *Patrick Thomson Ltd.* v. *Somerville*,[5] but the Lord Justice-Clerk (Lord Alness) said this[6]: "Having given careful attention "both to the argument and to the decision in *Patrick Thomson's* "case,[7] I am quite unable to see that any radical distinction, "either in fact or in law, can be drawn between it and the case "with which we are now concerned. The only distinction in fact "which has been suggested is that, whereas we are here dealing "with a business which forms a substantial part of small "premises, the Court was there concerned with a business which

[3] 1917 S.C.(J.) 3, 8.
[4] 1923 S.C.(J.) 28.
[5] 1917 S.C.(J.) 3.
[6] 1923 S.C.(J.) 28, 31.
[7] 1917 S.C.(J.) 3.

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"formed a small part of large premises. That is a perfectly "accurate distinction in fact; but I am unable to see that it "affected the judgment which was pronounced in *Patrick* "*Thomson's* case."[7]

There are two cases, therefore, in the Scottish courts, one in 1917 and one in 1923, saying that in cases such as this the order just does not apply, and although those decisions are in no way binding upon this court, as Lord Goddard C.J. said quite recently in *Trickers (Confectioners) Ltd.* v. *Barnes*[8]: "But, in any case, "if there is a decision of the High Court of Justiciary concerning "these matters on the other side of the border, we always try in "this court to decide in the same way." I think what he there said applies with force in the present case. Here are decisions in 1917 and 1923 to that effect and since then Parliament has considered the whole matter and has enacted the present Act of 1950. Unless this court could come to a clear conclusion that the decisions in Scotland were wrong I think that in those circumstances they should be followed. On that ground, and on that short ground, I would allow this appeal.

DONOVAN J. Speaking solely for myself, I would have come to a conclusion in the appellants' favour even in the absence of the Scottish decisions, but in the circumstances there is no point in my giving detailed reasons. Broadly they are those put forward on behalf of the appellants. But the decision of this court in this case is presumably final, and I do not want to run the risk of creating fresh difficulties on this dark subject by observations of my own. I content myself, therefore, by agreeing that this appeal should be allowed for the reasons, among others, stated by the Lord Chief Justice.

ASHWORTH J. I agree with the judgment of the Lord Chief Justice.

Appeal allowed.

Solicitors: *Royds, Rawstorne & Co.; Sharpe, Pritchard & Co. for the Town Clerk, Brighton.*

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[7] 1917 S.C.(J.) 3.

[8] [1955] 1 W.L.R. 372, 379; [1955] 1 All E.R. 803.

[COURT OF APPEAL.]

*GUINNESS TRUST (LONDON FUND) FOUNDED 1890 REGISTERED 1902 *v.* WEST HAM BOROUGH COUNCIL.

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Jenkins, Sellers and Pearce L.JJ.

Rates and Rating—Profit—Housing trust—Trust to provide decent housing for the poorer classes—Trustees required to obtain return on capital of trust fund and increase fund—Whether trust established or conducted for profit—Rating and Valuation (Miscellaneous Provisions) Act, 1955 (4 *&* 5 *Eliz.* 2, *c.* 9), *s.* 8 (1) (*a*).

The operative part of a trust deed constituting a housing trust provided: "1 (A) The objects to which the fund shall be applicable "are declared to be: The amelioration of the condition of the poorer "classes of the working population of London and of their modes "and manner of living, by the provision of improved dwellings; by "giving them facilities, should the trustees think it desirable . . . "for obtaining means of subsistence and the necessaries and "decencies of life; and by such other means as the trustees may "in their uncontrolled discretion think fit. (B) Without restrict-"ing the interpretation in the widest sense of the objects as before "defined, it is the intention of the founder that the original capital "of the fund should, by expenditure on objects of a permanent "character returning a fair low rate of interest, as far as possible, "be kept intact and go on increasing, so that, whilst payments of "money in the nature of gifts . . . are not precluded, the purpose to "be kept in view may be assistance to individuals to improve their "condition, without placing them in the position of being the "recipients of a bounty." There followed further provisions giving the trustees a very wide discretion in the administration of the trust.

The trust claimed the benefit of section 8 (1) (*a*) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955,[1] in respect of a working persons' hostel. This claim was upheld by quarter sessions, but rejected on appeal by the Divisional Court. On an appeal by the trustees, in which it was conceded that their main objects were charitable, and the sole question at issue was whether they were "an organisation . . . not established or conducted for "profit":—

Held, allowing the appeal, that the main objects of the trust were as set out in clause 1 (A), and that clause 1 (B), which provided for the increase by retentions from the rents received, was discretionary and ancillary. "Not established or conducted for "profit" meant not established or conducted for the purpose of making a profit; the trust was a charitable organisation which carried out its purposes in part by means of the surpluses derived from the letting at moderate rents of accommodation to people of moderate means, the accumulation of such surpluses not being an object or purpose of the trust.

National Deposit Friendly Society Trustees v. *Skegness Urban District Council* [1958] 3 W.L.R. 172; [1958] 2 All E.R. 601 applied.

[1] Rating and Valuation (Miscellaneous Provisions) Act, 1955, s. 8: "(1) This section applies to the "following hereditaments, that is to "say—(*a*) any hereditament occupied "for the purposes of an organisa-"tion . . . which is not established or "conducted for profit and whose "main objects are charitable . . ."

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Decision of the Divisional Court [1958] 1 W.L.R. 541; [1958] 2 All E.R. 237 reversed.

Appeal from the Divisional Court.

The statement of facts is taken substantially from the judgment of Jenkins L.J.

A charitable body known as the Guinness Trust (London Fund) Founded 1890 Registered 1902 claimed with respect to premises occupied by them and known as the Working Persons Hostel and Premises in John Street, West Ham, the benefit of the provisions in regard to rating contained in section 8 of the Rating and Valuation (Miscellaneous Provisions) Act, 1955. The respondents, the County Borough of West Ham, as rating authority, rejected that claim, and the appellants appealed to quarter sessions. The case was heard by the recorder, who allowed the appeal. At the instance of the respondent corporation the recorder stated a case for the opinion of the Queen's Bench Division, who allowed the appeal, and held that the appellants were not entitled to the benefit of section 8. From that judgment the trustees appealed.

The trust deed whereby the Guinness Trust was constituted was dated February 4, 1890, and it constituted the Guinness Trust as an ordinary unincorporated trust, but the Charity Commissioners incorporated the trustees as a charitable body by an order dated February 28, 1902, and from that time they had been a corporate body with the title now appearing on the record, Guinness Trust (London Fund) Founded 1890 Registered 1902. The trust deed of February 4, 1890, was made between Sir Edward Cecil Guinness, thereinafter sometimes called the founder, of the one part, and the trustees therein named, of the other part, and it contained these recitals: "Whereas the said Sir Edward "Cecil Guinness, having long felt the gravity of the evils which "result from the insanitary and insufficient accommodation sup-"plied to large numbers of the poorer of the working classes, in "the dwellings now inhabited by them, on November 18 last "addressed a communication to the trustees requesting them to "undertake the administration of a fund amounting to £200,000, "which he proposed to establish with the object of endeavouring "in those and other respects to ameliorate the condition of the "labouring poor of London. And whereas, whilst defining the "general lines on which the fund should be applied, it is the "intention of the founder that very wide discretion should be "left to the trustees as to the mode of application and manage-"ment, in the expectation that by economical and wise adminis-"tration the benefits of the fund may be brought within the reach "of many who are unable to avail themselves of the advantages "offered by existing organisations, and with the hope that, should "his expectation in this respect be fulfilled, the success of the "experiment may lead to other efforts in the like direction."

In the operative part, clause 1 (A), to which there was a side-note, "Objects of the trust," was in these terms: "1 (A) The "objects to which the fund shall be applicable are declared to be: "The amelioration of the condition of the poorer classes of the "working population of London and of their modes and manner "of living, by the provision of improved dwellings; by giving them "facilities, should the trustees think it desirable in any or all "cases to do so, for obtaining means of subsistence and the neces-"saries and decencies of life; and by such other means as the "trustees may in their uncontrolled discretion think fit." Sub-clause (B) (round which the main controversy in the case centred) was in these terms: "Without restricting the interpreta-"tion in the widest sense of the objects as before defined, it is "the intention of the founder that the original capital of the "fund should, by expenditure on objects of a permanent character "returning a fair low rate of interest, as far as possible, be kept "intact and go on increasing, so that, whilst payments of money "in the nature of gifts or not returnable by the recipients are "not precluded, the purpose to be kept in view may be assistance "to individuals to improve their condition, without placing them "in the position of being the recipients of a bounty." By clause 2: "The administration of the fund will be vested in the trustees, "and shall be carried out by them so as to give the fullest effect "to the objects hereinbefore declared. The mode of application "shall be from time to time determined by the trustees in their "uncontrolled discretion. 3. The following modes of application "are declared to be within the meaning of the trust, but they "are mentioned by way of example and illustration only, and "not so as to fetter or restrict the trustees' discretion, or render "it incumbent on them to adopt them or any of them, unless they "shall think fit so to do. (A) The acquisition of land, with or "without buildings thereon, in London, and the provision, erec-"tion, adaptation, or improvement, of buildings for the purposes "of (1) dwellings to be let out in tenements to the poorer classes "of the labouring population, in crowded neighbourhoods, or in "places of easy access to the centres of labour, with power in "the latter case, if deemed expedient, to make arrangements "with railway and other companies or otherwise for cheap means "of transit. It is the desire of the founder that the rents of "such tenements may, if practicable, be fixed on such basis as "to make them accessible to those of the poorer of the working "classes, whom it is his desire to attract from the crowded and "insanitary tenements which they now inhabit. Any part of "such premises may be used for shops, or for any other purposes "which the trustees may determine. (2) Common and other "lodging houses. (3) All or any matters, things, and con-"veniences for any and every purpose, tending, in the opinion of "the trustees, to the convenience, health, comfort, moral welfare "and improvement of their tenants and their families, and others "whether tenants or not. . . . (D) The contribution towards,

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"support of, or provision or subscription of capital for any company, institution, or private or public undertaking or trust formed, or to be formed, either for purposes of profit, or without profit, having objects analogous to any of the objects of the present trust, with or without reserving any control over the application or administration of the funds contributed." The provisions of clause 4 give the trustees wide powers of administration and management.

Such being the objects of the Guinness Trust (London Fund), it was common ground that the appellants fell within the second requirement of section 8 (1) (*a*) of the Act of 1955 in that the main objects of the trust were charitable. The matter in dispute was whether the trust also qualified under the first requirement, that the organisation concerned was not established or conducted for profit.

In the case the recorder stated that having heard the appeal he gave judgment and found the following facts proved or admitted: "(a) The appellants were an organisation whose main objects were charitable. (b) The appellants were established in 1890 by a deed of trust and were incorporated by order of the Charity Commissioners in 1902." The case continued: "Their activities consisted in the main of providing houses for 'people who are not well-to-do.' . . . Out of the rents received substantially from these houses they enjoyed an annual gross income in the sum of £150,000. Their policy had been, after allowing for all outgoings, to realise a net income of 3 per cent. on their capital which was applied in acquiring additional properties and expanding the work of the trust. This policy, however, the operation of the Rent Acts had long prevented them from attaining and in 1949 and 1954 they actually sustained a loss of over £2,000 in each year. However, during the years 1946–1955 their average profit was some £9,150 and they were now once again on a sound financial footing. (c) Their original capital fund amounted to £200,000 which had been increased by the end of 1955 to something of the order of £1,500,000. . . . (e) The trustees had never made any contribution to another organisation pursuant to clause 3 (D) of the said deed of trust. . . . The sole issue before me was whether or not the appellants were 'established or conducted for profit' within the meaning of subsection (1) of section 8 of the Act." Then he set out the contentions of the appellants and respondents respectively and stated his opinion thus: "I was of the opinion that (1) if it is shown that the appellant organisation was not established for profit, the question whether or not it is conducted for profit does not arise. (2) 'Established for profit' means established for the purpose of profit. (3) The crucial question which I therefore had to determine was: What was the real purpose for which the appellants were established and was that purpose the making of profit or something else. (4) For the purpose of determining that question regard must

"be had to the objects for which the appellants were established "as laid down in the said deed of trust. (5) Profit, while con- "templated by the said deed, was entirely incidental to the "objects of the trust. (6) The appellant organisation is not "established or conducted for profit," and, accordingly, he held that the appeal must succeed.

John Pennycuick Q.C. and *J. P. Widgery Q.C.* for the trustees.

Harold Williams Q.C. and *Geoffrey Rippon* for the council.

The case cited in argument is referred to in the judgments.

JENKINS L.J., after stating the facts: Before passing to the judgment of the Divisional Court I may perhaps conveniently refer to the reports of the case of the *National Deposit Friendly Society Trustees* v. *Skegness Urban District Council* in the Court of Appeal [1] and in the House of Lords.[2] The Court of Appeal decision was delivered on July 30, 1957, and it was available to the Divisional Court. The case had not been heard in the House of Lords at the time of the Divisional Court hearing. The case concerned an organisation of a very different kind from the one with which we are here concerned, but expressions of view were given in the Court of Appeal and in the House of Lords which appear to me to afford substantial support to the contention of the appellants in this case. So far as the report in the Court of Appeal is concerned, I would refer to the observations of Parker L.J. in delivering the judgment of the court. He said [3]: "We will deal first with the question whether the appellant "organisation is established or conducted for profit. It conducts "mutual insurance among its members and in carrying on that "activity it has accumulated very considerable reserves in the "form of investments in securities and in land. Indeed, we "think that if that activity is properly conducted the accumula- "tion of such reserves is not only inevitable but a necessity. "From time to time, when those investments are sold, profits "are made and the income and rents obtained are also in the "nature of profits. The organisation accordingly does earn profits "from which the members benefit, but that, as it seems to us, "is a very different thing from being established or conducted for "profit. In our judgment the earning of profits is purely inciden- "tal, and it cannot be said that the organisation is established "or conducted for profit. It carries on no 'business' for the "purpose of earning profits: cf. *Reg.* v. *Whitmarsh.*[4] The "appellants, accordingly, comply with the first condition." They

[1] [1957] 2 Q.B. 573; [1957] 3 W.L.R. 550; [1957] 3 All E.R. 199.
[2] [1958] 3 W.L.R. 172; [1958] 2 All E.R. 601.
[3] [1957] 2 Q.B. 573, 580.
[4] (1850) 15 Q.B. 600.

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were, however, held not to comply with the second condition, and, accordingly, could not qualify for the exemption.

The decision of the Court of Appeal was upheld in the House of Lords and I should read some passages from the speeches. Lord Keith said this [5]: "The society may, I think, quite properly "be described as a mutual insurance organisation set up to pro- "vide benefits for its members in the various mischances of "illness, disability and old age that may befall them during "membership, and to afford them an opportunity of taking out "whole life assurances, endowment assurances and old age "annuities for themselves, and certain other defined types of "insurance. A man might, in a sense, provide similar benefits "for himself without joining any society by setting aside and "investing a lump sum, or annual amounts, to accumulate with "interest and to provide a nest egg against some emergency, or "contemplated event although such a scheme would be "inadequate against unexpected early illness or death. The "interest earned would necessarily be subject to tax but it could "not, in my opinion, be said that he was engaged in earning a "profit, or in setting up a profit-earning scheme. The accumu- "lated sum is capital belonging to the person concerned. There "are obvious advantages in joining with some 700,000 others to "provide against such contingencies on a mutual basis and the "mutual organisation does not take on the character of a profit- "making organisation by the mere addition of numbers. This "was, in my opinion, the ratio of the decision of this House in "*New York Life Insurance Co.* v. *Styles*,[6] which is, I think, "conclusive on this point." So far Lord Keith was, as I understand his observations, dealing with the question of mutuality and holding that the case was concluded from that point of view by the case of *New York Life Insurance Co.* v. *Styles*.[7] Then he continued with these further observations: "The Court of Appeal "thought that profits, or something in the nature of profits, were "earned by the society for its members, but that this was purely "incidental to the purpose for which the society was formed, and "that it could not be said that it was established or conducted "for profit. It may well be that on change of its investments "the society on some occasions realised a capital appreciation "just as on other occasions it may have suffered a capital loss. "But it was not trading in its investments and the position in "the case of this mutual society does not seem to me to be "different in any way from what it would be in the case of a "single individual. The society holds very large investments "which earn large sums of interest and rents. These are, no "doubt, profits and gains for the purpose of the Income Tax "Acts but, in my opinion, the existence of these investments

[5] [1958] 3 W.L.R. 172, 178.

[6] (1889) 14 App.Cas. 381; 5 T.L.R. 621.

[7] Ibid.

"does not make the society an organisation 'established or con-
"'ducted for profit' within section 8 of the Act of 1955. If it
"were otherwise many charitable organisations holding invest-
"ments would be cut out of the benefit of the section."

Then Lord MacDermott said this [8]: "Of these requirements "the first is clearly satisfied. The second has been a matter of "controversy throughout the litigation, but quarter sessions found "and the Court of Appeal held that the society was not estab-"lished or conducted for profit. As at present advised, I am not "disposed to differ from that view, but I do not need to express "a final opinion upon it and I shall therefore refrain from doing "so and proceed on the assumption that this condition, too, is "fulfilled," and then he goes on to consider the other branch of the section. It will be seen that while not expressing any concluded opinion, he said as at present advised he was not disposed to differ from the view of the Court of Appeal on the question whether the society was established or conducted for profit.

Lord Somervell concurred in the opinion which had been delivered by Lord Keith, and Lord Denning said [9]: "I have no "doubt that this society was not 'established' for profit. Like "other friendly societies it was, no doubt, established to "encourage thrift among people of small means. Rule 2 (1) "shows that its object was to enable its members, by the pooling "of their contributions, to establish a common fund or funds, out "of which they would receive relief during sickness. . . ." Then Lord Denning continued [10]: "Looking at the way in which the "society has conducted its affairs, I am of opinion that it has "made profits. It has not distributed those profits like a com-"mercial company. Nor has it returned them to members. It "has used them to build up large and accumulating reserve "funds. But the fact that the society has made profits does not "mean that it is 'conducted for profit,' which I take to mean "'conducted for the purpose of making profit.' Many charitable "bodies, such as colleges and religious foundations, have large "funds which they invest at interest in stocks and shares, or "purchase land which they let at a profit. Yet they are not "established or conducted for profit. The reason is because their "objects are to advance education or religion, as the case may "be. The investing of funds is not one of their objects properly "so called, but only a means of achieving those objects."

I think those are all the passages to which I can usefully refer, and notwithstanding the difference between the two cases, they fortify me in the view that "established or conducted for profit" in section 8 (1) of the Act means established for the purpose of making profit or conducted for the purpose of making profit, and does not extend to every organisation which in any circumstances or at any stage in its activities receives something which might be considered in itself to constitute a profit.

[8] [1958] 3 W.L.R. 172, 182.
[9] Ibid. 186.
[10] Ibid. 187.

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The Divisional Court took a different view, and I should next read some part of their judgments. The leading judgment was delivered by Lord Goddard, then Lord Chief Justice, and he said: "It is clear enough, is it not, that what Sir Edward "Guinness desired was that this sum of £200,000 should be "administered by the trustees in erecting buildings and letting "them to tenants not as a matter of charity—it was, of course, "a charity, because it was aimed at the betterment of the poor—"and not at no rent at all but at such a low rent as would enable "the trust to maintain the buildings and to accumulate funds "because the settlor hoped and desired that more buildings of "this nature would be put up either by his trustees or other like "minded charitable people so that the dwellings of the poor of "London would be very largely increased. That was the object "of the trust, and that is the direction to the trustees which I "have just read. The trustees are therefore to invest their "money, that is, in buildings charging rents which will yield a "low rate of interest. That is a profit, and the profit will be "accumulated and used not for the personal profit of any member "of the trust, still less of the settlor, but for the purpose of "acquiring for the benefit of the trust other buildings or erecting "other buildings." Then he said [11]: "Let it be assumed, as I "think it may properly be assumed, that the Guinness Trust is "not established for profit, in the sense that that is not the object "of the trust, but is to be conducted for profit and exists in order "that there may become an accumulation of funds which will "enable the trustees to invest in other buildings and thus increase "the benevolent objects the settlor had in mind. So far as the "rating authority is concerned, the rating authority is not, it "seems to me, concerned with more than whether the conduct "of the business is for profit; and it is for profit. It is for other "objects, no doubt, but it is conducted for profit because clause 1 "(B), which, to my mind, distinguishes this case, if distinction "is needed, from *National Deposit Friendly Society* v. *Skegness "Urban District Council*,[12] to which we have been referred, shows "that if there is profit being made the rating authority is not "concerned with what is done with that profit. The rating "authority does not have to consider whether the profit is used "for charitable purposes or whether it is used for any other "purpose." A little further on he continues: "Although I will "assume it is not the case that the organisation is established "for profit, in my opinion it is conducted for profit because it is "making profits, and its object is making profits for the purposes "I have indicated; and, in my opinion, although its main objects "are charitable it is not entitled to the benefit of the section, "and the appeals must be allowed." [His Lordship read the judgments of Hilbery and Donovan JJ.,[13] and continued:]

[11] [1958] 1 W.L.R. 541, 543.
[12] [1957] 2 Q.B. 573.
[13] [1958] 1 W.L.R. 541, 544, 545.

I find it impossible to accept the views expressed by the Divisional Court. Returning to the deed of trust itself, it appears to me abundantly plain that the objects of the fund are set out in paragraph 1 (A), and that subparagraph (B) is an ancillary provision which does not restrict what has gone before or, to use the exact words, "without restricting the interpretation in the widest "sense of the objects as before defined." It states the intention of the founder without narrowing the foregoing objects; nor, as I see it, obliging the trustees to adopt the policy the founder recommended. In my view, as I have said before, the words "not "established or conducted for profit" mean not established or conducted for the purpose of making profit or with the object of making a profit. If that is right, then clearly it appears to me that the appellants are entitled to succeed in this case. If one does not introduce some word indicative of object or purpose into this requirement, it appears to me that, as Lord Keith observed in the *National Deposit Friendly Society* case,[14] many charitable organisations holding investments would be cut out of the benefit of the section. In my view, it is really quite plain, when one considers the trust deed under which the appellants were constituted and when one considers the history of their trust, that the appellants are not in any ordinary sense of that expression an organisation established for profit or an organisation conducted for profit. The trust was established for the amelioration of the condition of the poorer classes of the working population of London, and so forth, inter alia, by the provision of improved dwellings. These were the objects of the trust. It was at no time the object or the purpose of the trust to make profits, and I venture to think that the founder would have been much, and justifiably, surprised if, after he had executed this document, he had been told that this trust was a trust established for profit. I think it is an abuse of language so to describe it. The objects, as I have said, are those enumerated in subclause (A) of clause 1, and clause 1 (B) indicates the method which the founder recommends of carrying out the objects. It is perfectly true that in conducting their affairs on the lines indicated in subparagraph (B) of clause 1 the trustees did make a profit in the sense that they charged rents which, though moderate, were at such rates as to show some surplus over the outgoings incurred in respect of the various properties. It does not follow that the trust was established for the purpose of making or realising this surplus or, one may say, these profits; it was established for the purpose of ameliorating the condition of the poorer classes, inter alia, by the provision of improved dwellings. Lettings were adjusted so as to show a surplus with the sole object of supporting and furthering these charitable purposes. Not a penny of the so-called profits could ever find its way into the hands of anybody as a profit to which he was beneficially entitled. The only persons who could benefit by this surplus were the objects of the charity.

[14] [1958] 3 W.L.R. 172, 179.

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In the circumstances of this case I agree with the recorder that if it is shown that the appellant organisation was not established for profit (i.e., for the purpose of profit), the question whether it is conducted for profit does not arise, by which I take him to mean that there can then be no ground for holding that it is conducted for the purpose of profit. The point is not one which is capable of great elaboration, and all I can add is that when one considers the whole matter it is reasonably plain that, according to all ordinary notions, the appellants were not established for profit or conducted for profit. They were a charitable organisation which carried out its charitable purposes in part by means of the surpluses they could derive from the letting at moderate rents of accommodation to people of limited means. Such were the purposes of the organisation, and it does not appear to me that any question of profit enters into their case at all if one construes the language of section 8 (1) in the way I have endeavoured to construe it.

There is one point on the construction of subparagraph (*a*) of section 8 (1) to which I should advert, and it is this. If I may read the subsection again, it says: "any hereditament occupied," and so on, "which is not established or conducted for profit and "whose main objects are charitable or are otherwise concerned "with the advancement of religion, education or social welfare." That language, it is said, suggests that the legislature had in contemplation the possibility that an object which could qualify as charitable might be established or conducted for profit within the meaning of the earlier words of the section. That argument at first sight is not without force, but in my view the language "not established or conducted for profit" is capable of being explained by the circumstance that it refers to an enumeration of particular objects, not all of which are charitable or wholly charitable. It is an enumeration which includes what one might describe as charities and near charities, and it might have been thought necessary ex abundanti cautela to apply this qualification to the entire range without discrimination between the different objects stated. As I have said, the matter does not admit of any great elaboration. Giving it the best consideration I can, and with all respect to the views of the members of the Divisional Court, from whom I differ with diffidence, I am of opinion this appeal should be allowed.

Sellers L.J. For the greater part of the argument I was inclined to resist the persuasive submissions of Mr. Pennycuick and to think the decision of the Divisional Court was right. One of the difficulties I felt about accepting the argument on behalf of the appellants is the matter to which my Lord has just referred, the effect of it on the words in section 8 (1) (*a*) "not established "or conducted for profit." It seemed to me the argument would go a long way to make those words unnecessary and of no effect. My Lord has indicated a manner in which they might be accepted.

I still feel doubt as to whether there is any satisfactory way of explaining them. If one has an organisation whose main objects are charitable, it is a little difficult to see, on the argument which has been advanced, that it could be at the same time established or conducted for profit. Both requirements have to be present, that the organisation is not established or conducted for profit and its main objects are charitable, in order to come within the section.

On the whole I have come to the conclusion that one should approach the matter in this way. The Divisional Court had before them the decision of this court in the *National Deposit Friendly Society* case,[15] and, in particular, the passage in the judgment delivered by Parker L.J. relating to this matter, which my Lord has read more fully. The material passage is: "The organisation "accordingly does earn profits from which the members benefit, "but that, as it seems to us, is a very different thing from being "established or conducted for profit. In our judgment the earn-"ing of profits is purely incidental, and it cannot be said that "the organisation is established or conducted for profit." In the House of Lords I do not understand that that view was enlarged. It was accepted. The reasoning in support of it was developed in the speech of Lord Denning, on which great reliance has been placed before this court, and, in particular, on the passage where he says[16]: "Many charitable bodies, such as "colleges and religious foundations, have large funds which they "invest at interest in stocks and shares, or purchase land which "they let at a profit. Yet they are not established or conducted "for profit. The reason is because their objects are to advance "education or religion, as the case may be. The investing of "funds is not one of their objects properly so called, but only a "means of achieving those objects. So here it seems to me that "if the making of profit is not one of the main objects of an "organisation, but is only a subsidiary object—that is to say, "if it is only a means whereby its main objects can be furthered "or achieved—then it is not established or conducted for profit."

The recorder finds in the case stated: "Profit, while con-"templated by the said deed, was entirely incidental to the "objects of the trust." I have come to the conclusion, on the grounds which my Lord has advanced more fully, that that is the right view to take and that it concludes this case. I have come to it with some hesitation and after considerable persuasion but I agree that this appeal should be allowed.

PEARCE L.J. I agree with the reasons which have been given by Jenkins L.J. The making of profit by the appellant trust was part of the machinery by which it achieved charitable purposes. The making of that profit, which could never be distributed, was not the object or purpose of the trust. It was the

[15] [1957] 2 Q.B. 573, 580. [16] [1958] 3 W.L.R. 172, 187.

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means for the expansion of the sphere of the charity; it was not an end in itself. Though deliberate, it was incidental and subsidiary to the purpose of the trust. In my opinion the trust was not established or conducted for profit, and the appeal should be allowed.

Appeal allowed.
Leave to appeal.

Solicitors: *Travers Smith, Braithwaite & Co.; G. E. Smith, Town Clerk, West Ham.*

F. R. D.

[COURT OF CRIMINAL APPEAL.]

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Feb. 2.
Lord Parker C.J., Donovan and Ashworth. JJ.

* REGINA *v.* CLUCAS.
REGINA *v.* O'ROURKE.

Gaming—Fraud—Betting—Winning money by fraud in wagering—Gaming Act, 1845 (8 *&* 9 *Vict. c.* 109), *s.* 17.

The appellants were convicted, inter alia, of several offences of obtaining money by fraud in wagering, contrary to section 17 of the Gaming Act, 1845.[1] Giving false names, and pretending to act on behalf of a number of persons, they had placed substantial bets with bookmakers. The bookmakers were induced to accept these bets without further inquiry by the falsehoods told by the appellants, who never intended to meet their losses if these were substantial:—

Held, dismissing their appeals against conviction, that to establish the offence under section 17 it was not necessary to prove fraud in the actual game or sport: fraud in the wagering was sufficient.

Rex v. *Leon* [1945] K.B. 136; 61 T.L.R. 100; [1945] 1 All E.R. 14; 30 Cr.App.R. 130 applied.

View expressed in Russell on Crime, 11th ed. (1958), pp. 1373 to 1376 disapproved.

APPEALS against conviction.

The appellants, Baden Godfrey Clucas and George Peter O'Rourke, were convicted at Hampshire Quarter Sessions (chairman of the court: Mr. Eustace Roskill Q.C.) on several counts of an indictment charging them, inter alia, with obtaining money by fraud in wagering on the events of horse races, contrary to section 17 of the Gaming Act, 1845. Clucas was sentenced to seven years' preventive detention and O'Rourke to two years'

[1] Gaming Act, 1845, s. 17: "... "Every person who shall, by any "fraud or unlawful device or ill "practice ... in bearing a part in "the stakes, wagers or adventures, "or in betting on the sides or hands "of them that do play, or in wagering on the event of any game, sport, "pastime or exercise, win from any "other person to himself, or any other "or others, any sum of money ... "shall be deemed guilty of obtaining "such money ... from such other "person by a false pretence. ..."

imprisonment. Both appealed against conviction, and Clucas appealed against sentence.

The facts are stated in the judgment.

I. Starforth Hill for the appellant Clucas.
N. R. Blaker for the appellant O'Rourke.
Michael Lee for the Crown.

The following cases, which were not referred to in the judgment, were cited in argument: *Reg.* v. *Bailey* [2]; *Rex* v. *Clucas.* [3]

LORD PARKER C.J. The appellants were tried at Hampshire Quarter Sessions on seven substantive offences of fraud in wagering contrary to section 17 of the Gaming Act, 1845, and also on two charges of conspiracy to defraud bookmakers. There were two alleged conspiracies because one course of conduct concerned Hampshire and another course of conduct concerned Dorset. As regards the seven substantive offences both appellants were charged jointly on six of them and Clucas on the seventh.

What happened was that Clucas and O'Rourke set about defrauding bookmakers, and there is no doubt that Clucas at any rate is a complete menace, as his convictions show and as indeed the Law Reports show. Their scheme was that they would go to some place—they started at Aldershot—and one or other of them would ring up the local bookmaker, giving a false name and pretending that he was a foreman or engaged on some works contract and that the men on the site wanted to place bets; and asking the bookmaker to accept him under the assumed name as his client for the purpose of placing bets on behalf of workmen. It is clear that these two men never intended to pay losses if those losses were of any substantial amount. I say that because O'Rourke did pay two small losses. Generally, however, when they won they collected their bets and when they lost they moved on to the next place. Having exhausted Hampshire they went and did the same thing in Dorset. As soon as a bookmaker asked for the payment of losses or asked for a deposit or made further inquiries, they moved on, and it was not until fairly late in the day that the police were brought in and these men were finally caught.

The main point in this appeal taken by both the appellants is that whatever anybody may think of their conduct, and whether it is criminal or not, it does not come within the words of section 17 of the Gaming Act, 1845. [His Lordship referred to section 17 and continued:]

It is said that it is necessary in any charge under this section to show that money has been won by fraud as opposed to obtained by fraud. The winning, it is said, must have been

[2] (1850) 4 Cox C.C. 390.

[3] [1949] 2 K.B. 226; 65 T.L.R. 346; [1949] 2 All E.R. 40; 33 Cr.App.R. 136.

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through some fraud in the play, the gamble or the sport, whatever it may be. For example, it is said that fraud in inducing bookmakers to accept bets, as here, by pretending to act for other people, acting in a false name, and with no intention of paying losses, is not a fraud in wagering; but that there must be some fraud in the race itself. That is a view which has been taken by certain of the textbooks, in particular Russell on Crime, 11th ed. (1958), pp. 1373 to 1376. At page 1376 the author quotes the vital words as these: "Every person who shall, by any fraud, "or unlawful device or ill practice . . . win from any other person "to himself . . . any sum of money." I venture to think that those are not all the vital words because what is omitted is the fraud which is laid down in the section, namely, either a fraud in playing at the game in question or "in bearing a part in the "stakes, wagers or adventures, or in betting on the sides or "hands of them that do play, or in wagering on the event of "any game, sport, pastime or exercise." Of course it is perfectly true that the money is won by the horse winning, but it has been held by this court in *Rex* v. *Leon*[1] that it is enough if there was fraud in the actual wagering. In *Leon's* case the facts were very much the same. The fraud there consisted in a representation to the bookmakers that the accused had means enough to pay losses of £500 a week. That was a representation which was made dishonestly in order to persuade the bookmaker to accept his bets. Oliver J., a judge of very great experience in criminal matters, summed up to the jury in these words[2]: "Do "you regard that as money that he had won by cheating in the "circumstances of this case, and before you came to that con-"clusion, it seems to me you would have to come to the conclu-"sion that you are satisfied upon the evidence, and upon the "facts, that when he entered into those three sets of transactions "he never intended to pay if he lost; that he intended to put the "money in his pocket if he won, but he never intended to pay if "he lost?" There was an appeal to this court, and the decision of the court was given by Singleton J., who, having referred to the relevant words of section 17, said[3]: "It is to be observed "that something more than what is commonly known as obtain-"ing money by false pretences is contemplated by the legisla-"ture." Then, having referred to certain facts, he continued[4]: ". . . the difficulty is to see what 'in wagering' means. For the "purposes of this appeal it must be taken that the jury, who had "this case before them for some time, were satisfied that the "appellant was fraudulent throughout. Mr. Lincoln cited to us "authorities under this section, which dealt with games of cards. "They were *Rex* v. *Governor of Brixton Prison*[5] and *Rex* v. "*Moore*.[6] In those cases it was said that in a game of cards or

[1] [1945] K.B. 136; 61 T.L.R. 100; [1945] 1 All E.R. 14; 30 Cr.App.R. 130.
[2] [1945] K.B. 136, 143.
[3] Ibid. 142.
[4] Ibid. 143.
[5] [1912] 3 K.B. 568.
[6] (1914) 10 Cr.App.R. 54.

"a game such as the three-card trick, it was not sufficient to "show that there was a fraud before the game started. There "must be shown fraud in the course of the game itself. Of "course, a game of cards is not the same thing as wagering. The "act of making a wager is done by a word or a few words—an "offer and an acceptance. Mr. Slade, on behalf of the Crown, "submitted that, unless, in the circumstances of this case, the "offence of fraud in wagering was committed, it was difficult to "see when it could be, and, as he remarked, wagering is instan-"taneous. He submitted that the circumstances of this case "showed that there was evidence on which it was open to the "jury to find fraud in wagering." Singleton J. then referred to the words of the summing-up, and continued[7]: "The real "question put to the jury was: 'Was the appellant fraudulent "'throughout?' and they said: 'Yes, he was.' That seems to "us necessarily to mean that at the time when the appellant "made each of these bets with the bookmaker he intended to "cheat and defraud him."

That is a decision of this court, and if any members of the court felt that there was any doubt with regard to the conclusion arrived at, and the law laid down in that case, the court would adjourn and have a court of five to consider the matter, but this court will only depart from one of its own decisions if it is clear there has been some wrong principle laid down. The court, however, has no reason to think that *Leon's* case was wrongly decided.

In the present case it is abundantly clear, if one looks at the moment when these bets were placed, that the appellants were fraudulently representing, and continuing the representation, that they were acting for a number of men, thus inducing the bookmakers to accept their bets without further inquiry; and also that at the time when they placed their bets they had no intention of paying losses. That being so, there was clearly a fraud in wagering within the principle laid down in *Leon's* case, and the appeal on that ground must fail.

Mr. Blaker, on behalf of O'Rourke, took a number of other points. In particular he maintained that his client had been prejudiced by a ruling admittedly given, but at a very late stage, in regard to a statement by Clucas. Clucas had made a statement to the police in which he said that he and O'Rourke were acting together in this matter. In fact no ruling was obtained as to the admissibility of that evidence against O'Rourke until after the evidence had been given. No doubt that was because the deputy-chairman was not asked to rule on it. When he was asked to do so he did rule in the presence of the jury that the statement of Clucas was not in any sense of the word evidence against O'Rourke. There followed the speeches of counsel, and in the summing-up the deputy-chairman said: "You have heard

[7] [1945] K.B. 144.

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"a great deal of discussion in the course of this case about the "statement that Clucas made, which has been proved by the "police officer. You heard me rule this morning that that state-"ment is no evidence of conspiracy against O'Rourke; it is only "evidence against Clucas. On the other hand, you have also "heard me rule that in my judgment there is ample evidence for "you to consider quite apart from that statement—which you will "put out of your minds when you consider the case against "O'Rourke—on the conspiracy, and it will be for you to weigh "that evidence, the whole of it, and consider Aye or No, does it "point irresistibly to one conclusion only." There was thus a clear ruling and a direction to the jury that the statement of Clucas had to be put out of their minds completely when they were considering the case of conspiracy against O'Rourke. They were however left, in the opinion of this court, with abundant evidence on which they could hold O'Rourke a party to this conspiracy. Mr. Blaker has pointed out that the pattern of operation of these two men was slightly different, but here were two men living and working together, each apparently found with lists of the other's bets, and broadly speaking the pattern was the same. In the opinion of this court there was ample evidence on which the jury could convict O'Rourke of conspiracy. For these reasons the court feels that there is nothing in this case and as regards conviction the appeals fail.

The first appellant, Clucas, also appeals against sentence. He was sentenced to seven years' preventive detention concurrently on each count. He is a man of 48. In 1949 he was sentenced to 12 months' for conspiracy; in 1950 to two years for attempted false pretences and conspiracy; in 1953 to three years for attempted false pretences and in 1957 in Scotland to six months' for attempted fraud. This man is a menace to bookmakers and the court can see no reason to interfere with the sentence. Accordingly, the appeal against sentence is also dismissed.

Appeals dismissed.

Solicitors: *Registrar, Court of Criminal Appeal; W. Bradly Trimmer & Son, Alton, Hants.*

J. D. P.

[HOUSE OF LORDS.]

* PRACTICE DIRECTION (APPEALS TO HOUSE OF LORDS).

H. L. (E.)

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House of Lords — Practice — Appeal — Time for appeal — Documents — Judgment of court below.
Law Report—House of Lords—Appeal—Use of report of judgment in court below.
Barrister—Fees—House of Lords—Party and party costs—Refresher fees.

Notice is given of the following alterations in the Standing Orders of the House of Lords and in its Directions as to procedure:

1. *Time limit for appeals.*

A petition of appeal from an order or final interlocutor made or pronounced on or after April 1, 1959, must be lodged in the Parliament Office within three months from the date of the last order or interlocutor appealed from. The present time limit of six months will still apply to appeals from orders or interlocutors made or pronounced before that date.

2. *Reproduction of cases and documents.*

In regard to any appeal presented to the House after April 1, 1959, parties may print or duplicate any or all of their cases or documents as may be agreed between them, in such form and style as may be approved by the Clerk of the Parliaments. In default of agreement, cases and all documents must be duplicated.

3. *Judgments of the courts below.*

If the cause has been reported in a report which is ordinarily received in court, copies of the report may be lodged in lieu of the reproduction in the appendix of the judgments of the courts below in extenso.

4. *Poor person's limit of means.*

As from April 1, 1959, the limit of means to be proved by a petitioner in support of a petition for leave to prosecute an appeal in formâ pauperis will be raised from £5 to £100.

5. *Party and party costs (refresher fees to counsel).*

In regard to any appeal set down for hearing after April 1, 1959, the taxing officer may in his discretion allow refresher fees to counsel in excess of 10 guineas to a leader and 7 guineas to a junior.

VICTOR M. R. GOODMAN,
Clerk of the Parliaments.

February 19, 1959.

[COURT OF APPEAL.]

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1959
Feb. 5, 6.

Lord Evershed M.R., Romer and Ormerod L.JJ.

* ESPRESSO COFFEE MACHINE CO. LTD. *v.* GUARDIAN ASSURANCE CO. LTD.

[1958 E. No. 85.]

Landlord and Tenant—Business premises (security of tenure)—Landlords' intention to occupy for own purposes—Intention—How shown—Landlord and Tenant Act, 1954 (2 *&* 3 *Eliz.* 2, *c.* 56), *s.* 30 (1) (*g*).

The application by tenants of business premises for the grant of a new lease as from March 25, 1958, was opposed by the landlords on the ground that on the termination of the current tenancy they intended to occupy the premises for the purposes of a business to be carried on by them therein within the meaning of section 30 (1) (*g*) of the Landlord and Tenant Act, 1954 [1]; the tenancy of the premises now occupied by the landlords expiring in June, 1960. The evidence was that the landlords had bought the premises with a view to a possible occupation by them, but had since become interested in obtaining a tenancy of other premises nearby which were in the course of construction. The tenants contended that at the material time for the purposes of section 30 (1) (*g*), that is the date of the hearing of their application, the landlords had not established that if they got possession of the premises, they had a fixed and definite intention to occupy them within the meaning of paragraph (*g*) of section 30 (1).

The board of the landlord company had, in March, 1958, passed a resolution stating that they intended to occupy the premises; and at the hearing of the application and of the appeal their counsel gave an undertaking that, on obtaining possession of the premises, they would occupy them. On appeal from a refusal by the judge to grant a new tenancy:—

Held, that the judge's conclusion that the landlords had established at the date of the hearing a sufficiently fixed intention to occupy the premises on obtaining possession was justified, having regard to the evidence and to the undertaking given by counsel. Such an undertaking when given by a responsible body and accepted by the court was decisive of the fixity of intention.

[1] Landlord and Tenant Act, 1954, s. 24: "(1) . . . the tenant under "such a tenancy [i.e. to which this "part of this Act applies] may apply "to the court for a new tenancy . . . "(*b*) if the tenant has made a request "for a new tenancy in accordance "with section 26 of this Act. . . ."

S. 26: "(1) A tenant's request for "a new tenancy may be made where "the tenancy under which he holds "for the time being . . . is a tenancy "granted for a term of years certain "exceeding one year . . . (6) "Within two months of the making "of a tenant's request for a new "tenancy the landlord may give "notice to the tenant that he will "oppose an application to the court "for the grant of a new tenancy, "and any such notice shall state on "which of the grounds mentioned "in section 30 of this Act the land-"lord will oppose the application."

S. 30: "(1) The grounds on which "a landlord may oppose an applica-"tion under section 24 (1) of this Act "are such of the following grounds "as may be stated in the landlord's "notice . . . under section 26 (6) "thereof, that is to say . . . (*g*) . . . "that on the termination of the "current tenancy the landlord intends "to occupy the holding for the pur-"poses, or partly for the purposes, of "a business to be carried on by him "therein. . . ."

Decision of Harman J. [1958] 1 W.L.R. 900; [1958] 2 All E.R. 692 affirmed.

APPEAL from Harman J.

The Espresso Coffee Machine Co. Ltd. asked that their landlords, Guardian Assurance Co. Ltd., should grant them a new lease of business premises consisting of the ground floor and basement of 227–228 Strand, London, W.C., where they had showrooms and a coffee bar. The premises 227–228 Strand consisted of a basement and six superjacent floors. The tenants asked that the new lease should be for a term of 14 years from March 25, 1958 (the termination of the current tenancy), at a considerably enhanced rent of £3,500 per annum exclusive of rates, and otherwise on terms similar to those contained in the present lease; alternatively for a period and at a rent and on terms to be determined by the court.

The present tenancy was a term of 5¼ years from December 25, 1952, under a lease granted by the landlords to the British Bamboo Cane Co. Ltd. which had been assigned to the tenants with the leave of the landlords in October, 1955, and was due to expire on March 25, 1958. The tenants went into occupation at the beginning of 1956 and during most of the period since then had been trying to obtain a longer term.

By a notice dated September 24, 1957, the tenants served on the landlords a request under section 26 of the Landlord and Tenant Act, 1954. By a counter notice under section 26 (6), dated October 17, 1957, the landlords gave notice to the tenants that they intended to oppose an application to the court for a new tenancy on the ground stated in section 30 (1) (*g*)—namely that on the termination of the current tenancy they intended to occupy the premises themselves for the purpose of a business to be carried on there by them.

The evidence was that the landlords had bought the freehold of 227–228 Strand, in 1951 with a view to its possible occupation by them as their "Law Courts" branch on the termination on June 24, 1960, of the lease of the premises in Fleet Street which they were occupying, and had occupied for the previous 75 years, as that branch. The existing premises had now become too small for their needs.

It was not disputed that until about January, 1958, when the originating summons was issued, the landlords intended to occupy the demised premises 227–228 Strand if and when they got possession. About that date, however, according to the evidence at the hearing, they became interested in other possibly more suitable premises, known as 199 Strand, which belonged to the Huddersfield Building Society. These premises had sustained serious war damage but were being reconstructed. Negotiations were begun between the landlords and the Huddersfield Building Society but by the date of the hearing they were incomplete and no draft lease or contract had been put before the landlords.

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At the hearing of the application evidence was given on behalf of the landlords by their deputy general manager and secretary. In an affidavit sworn on March 11, 1958, he had stated that the "landlord for the reasons hereinafter stated has now made a "definite decision to occupy the demised premises for the pur-"poses of its said business on the termination of the term created "by the lease" and that "the landlord has decided that, even "taking into consideration the disadvantages . . . the demised "premises are greatly more suitable for the carrying on of its "business than the Fleet Street premises. At a meeting of the "general court of directors of the landlord held on February 19, "1958 (at which meeting I . . . was present) the following reso-"lutions were duly passed; '1. That in the event of the company "'obtaining possession of those parts of the premises . . . now "'occupied by the . . . tenants the company will as soon as "'practicable perform all necessary works'" (etc.) "'and when "'these works are completed will forthwith take up occupation "'of these parts for the said purpose; 2. That counsel appearing "'for the company in the application by Espresso Coffee Machine "'Co. Ltd. now proceeding in the Chancery Division be autho-"'rised to give an undertaking either to the court or to'" (the tenants) "'that in the event of possession being obtained as "'aforesaid the company will as soon as practicable perform the "'works aforesaid and when they are completed will forthwith "'take up occupation of the said parts of the premises. . . .'"

At the hearing on June 27, during the cross-examination of the landlord's witness, he was asked by the judge "Supposing "you did decide to sign a contract for 199, would you then "abandon the proposed move into 227?" and he answered "No, "we would not abandon it. We have every intention to move "from our present address to 227 Strand. We cannot get posses-"sion, I think, even on the most optimistic estimate, of the 199 "premises until well into next year at the very earliest." There were other similarly unqualified expressions of the present intention of the landlords. At the end of the cross-examination, after counsel for the tenants had made the point that, assuming the tenants took full advantage of every protection afforded to them by the Act and stayed on for the full period of protection after the final determination of their application, it would be clear that the landlords could not get possession of 227 Strand until about February, 1959, the tenant was asked what would then be the position. He was asked "If the situation arises that you cannot "get possession of 227 until some date between November and "February" [1959] ". . . would you agree with me that ob-"viously your board would then have to readdress its mind to "this question, and decide whether it wished to go ahead with "moving into 227 first, and then out and into 199?" He replied "Yes, I would agree with you that they would have to reassess "the position, but of course we have not yet signed the contract

"for the lease of 199, so we do not really know the exact terms "of that."

The tenants submitted on that and other similar answers that all that the directors had done was to say that, assuming that they got possession of 227–228 Strand about June, 1958, or soon afterwards, they had made up their minds to move in, but they were keeping on with the negotiations and if the truth was that they would not, on any view, get possession until February, 1959, then they were not sure what the position would be.

At the hearing before Harman J. counsel for the landlords gave an undertaking to the court in the terms of the board's resolution.

Harman J. refused to grant a new tenancy, holding that the landlords had established a present intention to occupy the premises which was sufficiently fixed to satisfy section 30 (1) (*g*) of the Act. The tenants appealed.

J. P. Widgery Q.C. and *Lionel A. Blundell* for the tenants.
R. E. Megarry Q.C. and *Christopher French* for the landlords.

Cases cited in argument not referred to in the judgment: *Fisher* v. *Taylors Furnishing Stores Ltd.*[2]; *Atkinson* v. *Bettison.*[3]

LORD EVERSHED M.R. As Harman J. said at the beginning of his judgment, this is a very peculiar case; and its peculiarity arises from what I might call an oblique effect of the legislation in question, which (as will appear) put the landlords in something of a difficulty—I might almost say an artificial difficulty. None the less, I confess that I have come to a clear conclusion, in accordance with that which Harman J. reached. [His Lordship stated the facts and continued:] Were it not for one circumstance (and it is from this that the peculiarity in the case arises) it would, I think, be quite plain that, whatever may have been in the minds of the landlords before January, 1958, when the originating summons was issued, they did at all relevant dates "intend" to move their insurance offices and business to 227–228 Strand, as soon as they could get possession. And there was good reason for doing so, since (as Mr. Widgery conceded from the evidence) the premises at which this company has carried on what is called the "Law Courts Branch" of its business for some 75 years has become manifestly too confined. But, just about the time of the issue of the summons, it appears that a new star was seen in the firmament. Further premises, known as 199 Strand, had been much damaged by enemy action. They belonged—either the freehold or a long leasehold—to the Huddersfield Building Society; and that society proceeded, about this time, to undertake work of reconstruction. The reason why this

[2] [1956] 2 Q.B. 78; [1956] 2 W.L.R. 985; [1956] 2 All E.R. 78.

[3] [1955] 1 W.L.R. 1127; [1955] 3 All E.R. 340.

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star fascinated the landlords—not unnaturally—was that here would be quite a new building, which might be even better than that provided by the ground floor and basement of 227–228; and negotiation, in some sort, then began between the landlords and the Huddersfield Building Society.

The relevant date for determining whether there was an "intention" such as would satisfy paragraph (*g*) of the subsection is now held to be at the hearing; and it is not in doubt that when that date arrived the negotiation, such as it was, with the Huddersfield Building Society was very far from complete. The building itself was still in course of reconstruction; and there had been nothing in the shape of draft leases or contracts put before the landlords.

Before I look at the evidence (for, as will appear, this case really turns on a short point), I observe that it is in this respect that the Act may be said to have created, for someone in the position of the landlords, a peculiar and artificial difficulty. No one doubts, in this case, the complete bona fides of the landlords. Nobody suggests that they have ever pretended, for the purpose merely of getting rid of the tenants. But, since Parliament has said that at the relevant date a landlord, in order to prevent the grant of a new tenancy, must prove "intention"—as that word is understood when such epithets as "firm," "fixed," "real," are applied to it—it will be seen at once that a difficulty is created if there is presented a possible better alternative in the future. A landlord in that position obviously has to say to himself: "Of course if I pin my hopes on this new building of the "Huddersfield Building Society I shall for certain lose any "chance of recovering possession of 227, and then, in the end of all, "I may not get 199 either." As Mr. Megarry rightly pointed out, motive is something quite different from intention; and a landlord (as I conceive) placed in that position has, as a matter of business, to say to himself: "For better or worse I shall have to make up "my mind: am I going to pin all my hopes on 199, or must I "decide here and now to move to 227, even though I shall after-"wards say 'What a pity: I would have done better to have "'relied exclusively on 199'; or even though I may make another "move thereafter?" One or the other of the alternatives I have stated he must, in common business sense, choose. As will appear, it is the burden of Mr. Widgery's argument and of Mr. Blundell's argument that, yielding to natural human temptations, the landlords tried to have their bun and their penny, and hesitated between the two and, therefore, did not decide definitely one way or the other. It was the view of Harman J. that that submission was incorrect—that the landlords did reach a firm decision, come what might thereafter; and (as I have earlier indicated) I think that that was the right conclusion, as I read the evidence.

[His Lordship referred to the evidence as summarised above, and continued:] If that were a right assessment of the view of

the landlords, it might be said—as Mr. Widgery contended—that, when one had examined it and when one had analysed the extent of what they had said they would do, it did not amount to a fixed intention of the necessary quality to satisfy the subsection.

In fairness to the witness, he, after all, was not a director but the deputy general manager and secretary: he no doubt could fairly state what the views of the board were because he would, in his capacities as deputy general manager and secretary, know them; but it must always be a little difficult for someone in his position to be assertive at every point; and it is not surprising that in the course of a skilful cross-examination he agreed with Mr. Blundell that, given certain facts, the board would no doubt "re-assess the position." But, notwithstanding those answers, the judge (who saw the witness) clearly came to the conclusion that, notwithstanding the delay, and the possibilities, it was not correct to say that the landlords had still kept an open mind. The truth was (he found) that they had made up their minds to go into possession, come what might—even though the consequence might be that, as a matter of business, 199 would have to be abandoned or, alternatively, that a double move would have to take place.

I cannot agree, for my part, with Mr. Widgery's submission that it was an essential characteristic of a decision to occupy 227 come what might that the landlords would have to abandon the negotiations for 199. I cannot see that that follows. It might be (as I have indicated) that, as a practical business matter, even though the negotiations might be fruitful, they would cease to be worth while. But I am unable to accept the view that an intention to occupy 227 is inconsistent with still pursuing negotiations as regards 199—bearing particularly in mind, of course, the date to which we must direct our attention, June, 1958; and the view I have formed is plainly (as I think) very much reinforced by the circumstance that, in addition to the resolution of February, the witness's statement in his affidavit in March, and his further statements in the witness-box, counsel for the landlords did give in court to the judge the undertaking in accordance with the language of his board's resolution: and that undertaking is quite unqualified and given by counsel on behalf of a responsible company.

In the light of those circumstances, the judge expressed his conclusion as follows. After observing that the word in the section is "intention" (more strictly, if I may be forgiven for the slight correction, it is "intends"; but that does not matter), without any qualifying epithet, he said that an "intention," to satisfy the section, must be "honest," "present," and "real." I do not think he left out any characteristic which he should have borne in mind. He then said [1]: "As I understand it, at

[1] [1958] 1 W.L.R. 900, 904; [1958] 2 All E.R. 692.

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"the time of the resolution"—that is, February—"the possibility of obtaining a lease of No. 199 had already been mooted. "Nevertheless, the board expressed the intention to occupy No. "227, not contingently, in the event of nothing better turning "up, but absolutely, and they were willing to offer an undertaking to the court, and authorised that to be done." Then, after referring to *Betty's Cafés Ltd* v. *Phillips Furnishing Stores Ltd.*[2] and *Lennox* v. *Bell*[3] in which undertakings had been offered, the judge proceeded: "But if the Guardian Assurance "Co. gives an undertaking, there is no question of its power "to honour it, and I think there is no doubt that it will honour "it. It is not the sort of company whose undertakings in a "suitable case the court would hesitate to accept. It is not "suggested that it could not carry out the undertaking if it wished. "Therefore, as counsel at the Bar today is still authorised to "make this offer to me and to the applicants, I must take the "offer at its face value. If that be the case, I do not see how "I can any longer doubt that the intention today exists. Whether "by the end of the year it will exist any longer, I do not know. "The tenants may so harass the landlord that the landlord will "change its mind."

The end of the year has passed, and we know that, as Mr. Megarry has told us, he is still instructed, if necessary, to repeat the undertaking: the same intention continues to exist. But that is not the point that has to be decided. The question is: Was the judge entitled to find as a fact (as he did) that at the date of the hearing before him—June 27, 1958—the landlords did intend to occupy these premises and get into possession for their own business? and I think, for reasons which I have stated, that the judge was amply justified in so concluding.

Mr. Widgery, in presenting the case, did not contend that a lease in his favour for the full term of 14 years, for which his notice had asked, should be granted. He said that a fair and just, and, therefore, the right, result would have been for the judge to have granted a short term—12 months; 18 months; something of that kind—which would have covered the period until the 199 negotiations could or would have been concluded, and then the matter could have been reconsidered. That might have been a sensible thing to do—either by order or by agreement. It might have paid the landlords, because if that had happened presumably the tenants would have paid more than the rent that they had in fact paid since March, 1958. But that course, for one reason or another, was not really debated—it may have been too late in June: at any rate it was not debated—and nothing of that kind happened.

Therefore, we (as I think) have got to decide the single question: On the date when the matter was before Harman J., was he justified in finding, as he did, that the requisite intention

[2] [1958] 2 W.L.R. 513; [1958] 1 All E.R. 607.

[3] Lord Goddard C.J., May 31 1957, unreported.

was then established? I repeat that in my judgment he was; and I, therefore, think that this appeal must be dismissed.

ROMER L.J. I entirely agree; and there is very little that I can add to what the Master of the Rolls has said. If a landlord desires to rely on section 30 (1) (*g*) of the Act, he has to show that on the termination of the current tenancy he "intends" to occupy the holding for business purposes; and it has been well established now, on the authorities, first that such an intention must exist at the hearing of the tenant's application, and secondly, that the intention must be a real intention, fixed and settled. Having regard to the affidavit of the deputy general manager and to his evidence in the witness-box—to which my Lord has referred—one would have thought prima facie that even on that alone the two requirements to which I have referred were satisfied. Nothing could be clearer than the evidence which he gave, and he repeated more than once, in categorical terms, in the evidence that he gave on behalf of his company, that his company did intend, if they got possession of 227, to go into occupation. When one adds to that the fact that counsel was authorised to offer, and did offer, to the court the undertaking in the form which my Lord has read, the matter really seems to be put beyond any doubt. Some undertakings, of course, are unacceptable. There was a case—one of the cases to which Harman J. referred [*Lennox* v. *Bell*[4]]—where the court was offered an undertaking which it knew perfectly well the person who offered it was incapable of carrying out. When one gets a responsible body like one has here, no such criticism can be levelled. It was an undertaking which the judge was prepared to accept, and which he did accept; and in regard to such an undertaking I would only quote a passage from a judgment of Danckwerts J. to which Mr. Megarry referred us, in the second *Betty's Cafés* case,[5] in which he said[6]: "The undertaking seems "to me to compel fixity of intention." I know of no better way of describing it than that description that Danckwerts J. gave; and it appears to me that, that undertaking having been given and accepted, it is perfectly decisive of the fixity of intention which I agree is a requisite element.

For those reasons, and the reasons that my Lord has stated, I entirely agree with Harman J. in thinking that the landlords had established their case.

ORMEROD L.J. I agree; and I have nothing to add.

[The order stated, in accordance with section 37 (4) of the Landlord and Tenant Act, 1954, that the grant of a new tenancy

[4] Lord Goddard C.J., May 31, 1957, unreported.

[5] [1957] 1 W.L.R. 799; [1957] 2 All E.R. 223n.

[6] [1957] 1 W.L.R. 799, 802.

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was refused on the ground that the landlord had established a valid objection under section 30 (1) (*g*).]

Appeal dismissed.
Leave to appeal to House of Lords refused.

Solicitors: *Charles Caplin & Co.; Trower, Still & Keeling.*

E. D.

[QUEEN'S BENCH DIVISION.]

1959
Feb. 12.

Lord Parker C.J.

* PRACTICE DIRECTION (ESTIMATED LENGTH OF TRIAL).

Practice and Procedure—Trial—Estimated length—Duty of counsel, clerks and solicitors to inform Clerk of the Lists of developments affecting probable length of case—R.S.C., Ord. 36, *r.* 9 (2).

LORD PARKER C.J. The Fixed List is for the convenience of parties, solicitors and counsel. It is quite impossible to work it unless the Clerk of the Lists is given full and accurate information from day to day as to the course of a case—whether there are negotiations for settlement, whether an issue has been withdrawn, whether medical reports have been agreed, and what is the probable length of the case. That is why R.S.C., Ord. 36, r. 9 (2), provides: "It shall be the duty of all parties to an "action entered in any list to furnish without delay to the officer "who keeps the list, all available information as to the action "being or being likely to be settled, or affecting the estimated "length of the trial, and, if the action is settled or withdrawn, "to notify that officer of the fact without delay and take such "steps as may be necessary to withdraw the record."

That is never done now, and I am concerned about it. It can be done. Anybody who has been on circuit knows that with co-operation between whoever is making up the day's list, counsel, counsel's clerks and solicitors, a very accurate estimate of the length of a trial can be made. No attempt is made to do that in London.

The only course, if we are going to work these lists, is that it should be the joint responsibility of counsel and their clerks and solicitors to tell the Clerk of the Lists, as from the moment the case comes into the Warned List on Thursday of each week, exactly what the latest estimate of the length of trial is. Of course, if there is any alteration in the position between the date when the case comes into the Warned List and the fixing of the Daily Cause List, that duty continues up to the last moment. Only in that way can these lists be worked. It is for counsel to see that their clerks know the position.

E. M. W.

[HOUSE OF LORDS.]

* HUNT . . . . . PETITIONER; H. L. (E.)†

AND

ALLIED BAKERIES LTD. . . . . RESPONDENT.

1959
Feb. 18.

PETITION for leave to appeal to the House of Lords from the decision of the Court of Appeal in *Hunt* v. *Allied Bakeries Ltd.* (*No.* 2).[1]

The Appeal Committee dismissed the petition.

† *Present*: VISCOUNT KILMUIR L.C., LORD RADCLIFFE and LORD EVERSHED.

[1] [1959] 1 W.L.R. 50; [1959] 1 All E.R. 37.

[COURT OF APPEAL.]

* INDEPENDENT TELEVISION AUTHORITY AND ASSOCIATED-REDIFFUSION LTD. *v.* INLAND REVENUE COMMISSIONERS.

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1959
Jan. 14, 15;
Feb. 9.

Jenkins, Romer and Pearce L.JJ.

Revenue—Stamp duty—Security—Agreement to provide broadcasting programmes—Fluctuating payments—Specified sums payable variable on a contingency—Whether liable to ad valorem duty—Stamp Act, 1891 (54 *&* 55 *Vict. c.* 39), *First Schedule.*

By an agreement under seal dated May 23, 1955, made between Independent Television Authority ("I.T.A.") and Associated-Rediffusion Ltd. ("A.R."), A.R. agreed to provide programmes for broadcasting by I.T.A. pursuant to section 2 of the Television Act, 1954. The agreement was to come into operation between August 15, 1955, and November 15, 1955, and to continue in force until July 29, 1964. A.R. was to pay I.T.A. a fee at the rate of £495,600 a year for 2½ years and at a rate of £536,900 thereafter. The agreement further provided for an increase or decrease of such payments in the event of an increase or decrease of 5 per cent. or more in the half-yearly index figure (therein defined), compared with the basic index figure (defined as meaning the average of the index figures for all items in the Interim Index of Retail Prices published by the Board of Trade).

The Inland Revenue Commissioners held that the agreement was liable to ad valorem stamp duty under the head of charge "Bond, "Covenant, or Instrument of any kind whatsoever (1) being the "only or principal or primary security for . . . any sum or sums of "money at stated periods" within the meaning of the First Schedule to the Stamp Act, 1891, and so assessed the duty on the sums payable annually of £495,600 and £536,900 respectively.

Wynn-Parry J. affirmed their decision:—

Held, (1) that the head of charge in the Stamp Act, 1891, "Bond, Covenant, or Instrument" included contracts providing

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for periodical payments in consideration of services to be rendered as well as payments for other forms of executory consideration.

Jones v. *Inland Revenue Commissioners* [1895] 1 Q.B. 484; 11 T.L.R. 78; *National Telephone Co. Ltd.* v. *Inland Revenue Commissioners* [1899] 1 Q.B. 250; 15 T.L.R. 98; and *British-Italian Corporation Ltd.* v. *Inland Revenue Commissioners* [1921] W.N. 220 applied.

(2) That the head of charge "Bond, Covenant, or Instrument" included sums contingently payable, and that the words "security "for a definite and certain period, so that the total amount to be "ultimately payable can be ascertained" should be construed as meaning "for a definite and certain period, so that the total "amount which will or may ultimately become payable can be "ascertained," and that the sums payable under the agreement of 1955 were ascertained sums, subject to the possibility of their being increased or decreased, and that the agreement had been rightly assessed to ad valorem duty.

Underground Electric Railways Company of London Ltd. v. *Inland Revenue Commissioners* [1905] 1 K.B. 174; 21 T.L.R. 109; affirmed [1906] A.C. 21; 22 T.L.R. 160; *Underground Electric Railways Company of London Ltd. and Glyn, Mills, Currie & Co.* v. *Inland Revenue Commissioners* [1914] 3 K.B. 210; affirmed [1916] 1 K.B. 306; and *County of Durham Electrical Power Distribution Co.* v. *Inland Revenue Commissioners* [1909] 1 K.B. 737; 25 T.L.R. 348 applied.

Decision of Wynn-Parry J. [1958] 1 W.L.R. 943; [1958] 3 All E.R. 126 affirmed.

Appeal from Wynn-Parry J.[1]

This was an appeal by the Independent Television Authority (hereinafter called "the authority") and Associated-Rediffusion Ltd. (hereinafter called "the contractor") from a judgment of Wynn-Parry J. dated July 15, 1958, dismissing their appeal on a case stated by the Inland Revenue Commissioners under section 13 of the Stamp Act, 1891, concerning the stamp duty payable on an instrument in the shape of an agreement under seal dated May 23, 1955, and made between the authority of the one part and the contractor of the other part, whereby the authority appointed the contractor to be a programme contractor to the authority for the purposes of the Television Act, 1954.

The case stated so far as relevant provided: The decision of the court was desired on the amount of stamp duty chargeable on an instrument which had been presented to the Inland Revenue Commissioners by the authority and the contractor under section 12 of the Stamp Act, 1891, for the opinion of the commissioners as to the stamp duty with which the instrument was chargeable.

The instrument was an agreement under seal dated May 23, 1955, and made between the authority of the one part and the contractor of the other part.

The authority was established under the Television Act, 1954, to provide in accordance with the Act for the period of 10 years from July 30, 1954, television broadcasting services additional to those of the British Broadcasting Corporation.

[1] [1958] 1 W.L.R. 943; [1958] 3 All E.R. 126.

Section 2 of the Act provided that the programmes broadcast by the authority should, so far as might be consistent with the observance of the requirements of the Act, be provided, not by the authority, but by persons who under contracts with the authority had in consideration of payments to the authority and subject to the provisions of the Act the right and the duty to provide programmes or parts of programmes to be broadcast by the authority, which might include advertisements. The agreement was such a contract.

Clause 4 (1) of the agreement provided that in consideration of the payments to the authority to be made by the contractor thereunder and upon the terms and subject to the conditions thereinafter contained and subject to the provisions of the Act the contractor should for the term mentioned in clause 10 of the agreement be a programme contractor and should have the right and be subject to the duty to provide programmes to be broadcast by the authority and that accordingly the contractor should provide and without prejudice to the exercise by the authority (subject as therein mentioned) of its powers under section 2 (2) (*a*) of the Act (being powers conferred on the authority to arrange for the provision of parts of programmes so as to include items of particular classes to secure a proper balance and which could not, or could not as suitably, be provided by programme contractors) the authority should broadcast programmes provided by the contractor from the station or stations and on the days and within the hours and otherwise in accordance with the terms and conditions set out in the first schedule to the agreement (which set out particulars, inter alia, of the stations from which programmes were to be broadcast and the hours and times of broadcasting and laid down the period within which broadcasting was to commence as the period between August 15, 1955, and November 15, 1955) as from a date or dates (being a date or dates within the periods for commencement of broadcasting) to be determined by the authority by not less than 28 days' prior notice to the contractor. The sub-clause contained a proviso for variation of programmes and substitution of stations and a proviso for discontinuance of broadcasting in the circumstances mentioned.

Under clause 9 of the agreement the contractor was bound to make the payments to the authority provided for in the third schedule under which the contractor was as from the date of commencement of broadcasting from the station, being a date within the period between August 15, 1955, and November 15, 1955, to pay to the authority a fee at the rate of £495,600 per annum until March 31, 1958, or the expiration of 2½ years from the commencement date (whichever was the later) and a fee at the rate of £536,900 thereafter. Paragraph 2 of the Third Schedule provided for an increase or decrease of such payments in the event of an increase or decrease of 5 per cent. or more in the half-yearly index figure (thereby defined) compared with the basic

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index figure (defined as meaning the average of the index figures for all items in the Interim Index of Retail Prices published by the Board of Trade for the months specified). Paragraph 3 of the Third Schedule gave the authority the right to increase fees after the expiration of 3½ years from the commencement date (subject to an upper limit) and paragraph 4 provided for review of fees by arbitration in certain circumstances.

Clause 10 of the agreement provided that the term for which the contractor should be a programme contractor should commence on the date thereof and should (subject to avoidance or determination as therein provided) continue in force until July 9, 1964. Clause 10 also contained power for (i) the authority and (ii) the contractor to determine the agreement in the events mentioned.

The commissioners were of opinion that the agreement was chargeable with ad valorem stamp duty under the head of charge "Bond, Covenant, or Instrument of any kind whatsoever (1) "being the only or principal or primary security for any annuity ". . . or for any sum or sums of money at stated periods . . ." in the First Schedule to the Stamp Act, 1891. They were further of opinion that the agreement was not (within the meaning of this head of charge) "for the term of life or any other indefinite "period" (which would entail a stamp duty of £5 per cent. of the sum periodically payable) but "for a definite and certain "period, so that the total amount to be ultimately payable can "be ascertained," and that, in accordance with the terms of the said head of charge, the agreement was chargeable with the "same "ad valorem duty as a bond or covenant for such total amount." The commissioners were of opinion that the "definite and certain "period" within the meaning of this head of charge was under the agreement the period from November 15, 1955 (the last date at which broadcasting was to begin under the terms of the agreement), to July 29, 1964 (up to which date the agreement was to continue in force). On this basis they assessed the duty on the agreement pursuant to sections 1 and 4 of the Stamp Act, 1891, the said head of charge "Bond, Covenant," etc., duty, the head of charge "Mortgage, Bond, Debenture, Covenant," etc., in the First Schedule to the Stamp Act, 1891 (to which latter head securities for a definite and certain period chargeable under the head "Bond, Covenant," etc., were referred), and other relevant statutory provisions as follows: Ad valorem duty at the rate of 5s. for every £100 and also for any fractional part of £100—£11,430 10s. *and* under section 4 of the Stamp Act, 1891, a "deed" stamp of 10s. Total duty £11,431.

No objection was taken by the appellants to the fixed duty of 10s. but they contended—(1) that the agreement was not liable to ad valorem duty at all, as not being a "security" liable to ad valorem duty within the meaning of the head of charge "Bond, "Covenant," etc., duty in the First Schedule to the Stamp Act, 1891. (2) Alternatively that the agreement was not liable to such

ad valorem duty at all as being a security for a definite period which was not certain. (3) That if, contrary to these first two contentions, the agreement was liable to such ad valorem duty as a security for a definite and certain period, it was chargeable only in respect of the fee payable during the period from November 15, 1955, until March 31, 1956, and not further or otherwise.

Wynn-Parry J. affirmed the decision of the Inland Revenue Commissioners.

The authority and the contractor appealed.

Geoffrey Cross Q.C. and *J. G. Monroe* for the appellants.
John Pennycuick Q.C. and *E. Blanshard Stamp* for the Crown.

The following cases were cited in argument, which are not referred to in the judgment: *Wiggins* v. *Watson's Trustees* *; *Limmer Asphalt Paving Co. Ltd.* v. *Inland Revenue Commissioners* †; *Knights Deep Ltd.* v. *Inland Revenue Commissioners*.‡

Cur. adv. vult.

February 9, 1959. JENKINS L.J., reading the judgment of the court, stated the facts and continued: To the assessment of the commissioners, upheld by the judge, Mr. Cross, for the appellants, raised in effect two objections.

First, he contended that the agreement was wholly outside the "Bond, Covenant, or Instrument" head of charge. He admitted that he could not, in view of the authorities, support this contention on the ground that the agreement itself created the obligation to pay the periodical sums in question as opposed to constituting a security for the due performance of some separate and distinct obligation to pay them. See *Jones* v. *Inland Revenue Commissioners*,[1] *per* Wright and Collins JJ.; *National Telephone Co. Ltd.* v. *Inland Revenue Commissioners*,[2] *per* A. L. Smith and Rigby L.JJ.; *Underground Electric Railways Company of London Ltd. and Glyn, Mills, Currie & Co.* v. *Inland Revenue Commissioners*,[3] *per* Swinfen Eady L.J.; and *British-Italian Corporation Ltd.* v. *Inland Revenue Commissioners*[4] (adequately reported only in Appendix I to Sergeant on Stamp Duties), *per* Rowlatt J.[5] and *per* Lord Sterndale M.R.[6] Mr. Cross did, however, albeit with some diffidence, advance as open to us in this court the proposition that the agreement was wholly outside the scope of this head of charge because it was not an agreement securing the payment of periodical sums recoverable by the

* [1934] A.C. 264; 49 T.L.R. 326.
† (1872) L.R. 7 Ex. 211.
‡ [1900] 1 Q.B. 217; 16 T.L.R. 68.
[1] [1895] 1 Q.B. 484, 492, 495; 11 T.L.R. 78.
[2] [1899] 1 Q.B. 250, 258, 259; 15 T.L.R. 98.
[3] [1916] 1 K.B. 306, 313; 22 T.L.R. 160.
[4] [1921] W.N. 220; Sergeant on Stamp Duties, 3rd ed., p. 334.
[5] Sergeant on Stamp Duties, 3rd ed., p. 337.
[6] Ibid. 338.

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obligee as a debt merely upon proof of the agreement and of the fact of non-payment, but was an agreement for the payment of periodical sums by way of remuneration for services to be rendered. We agree with the judge that, on the authorities, this argument is concluded against the appellants so far, at all events, as this court is concerned. See *Jones* v. *Inland Revenue Commissioners* [7]; *National Telephone Co. Ltd.* v. *Inland Revenue Commissioners* [8]; *County of Durham Electrical Power Distribution Co.* v. *Inland Revenue Commissioners* [9] (Court of Appeal); *British-Italian Corporation Ltd.* v. *Inland Revenue Commissioners*,[10] *per* Rowlatt J. and in the Court of Appeal.

This line of authorities appears to us to cover contracts providing for periodical payments in consideration of services to be rendered, as well as providing for payments for other forms of executory consideration. This appears from *Jones'* case,[11] where the consideration for the periodical payments included the maintenance of the telephonic lines and apparatus to be erected by the National Telephone Co., and also from the *National Telephone Co.'s* case,[12] in which *Jones'* case [13] was approved by the Court of Appeal, notwithstanding an argument by Mr. Asquith [14] clearly raising the contention that a contract for services in consideration of periodical payments was not within the "Bond, Covenant, "or other Instrument" head of charge. According to the report of the *National Telephone Co.'s* case [15] in the House of Lords, their Lordships, in affirming the decision of the Court of Appeal, only dealt with the question whether a seal was necessary, and held that it was not; but reference to the printed record prepared for the purposes of the appeal shows that the appellants' case did in fact raise the argument advanced by Mr. Asquith in the Court of Appeal. Mr. Cross submitted that the inclusion of contracts for services, and by parity of reasoning contracts of service, in the "Bond, Covenant, or other Instrument" head of charge accords ill with the exemption numbered (2) under the heading "Agreement or any Memorandum of an Agreement" in the First Schedule to the Act of 1891, which exempts from the fixed duty of 6d. an "Agreement or memorandum for the hire of "any labourer, artificer, manufacturer, or menial servant." He also referred to section 7 of the Finance Act, 1907, which provides with respect to hire-purchase agreements that "any agreement "for or relating to the supply of goods on hire, whereby the goods "in consideration of periodical payments will or may become the "property of the person to whom they are supplied, shall be "charged with stamp duty as an agreement, or, if under seal . . . "as a deed, as the case requires, and the exemption numbered (3) "under the heading 'Agreement or any Memorandum of an

[7] [1895] 1 Q.B. 484.
[8] [1899] 1 Q.B. 250; [1900] A.C. 1.
[9] [1909] 2 K.B. 604; 25 T.L.R. 672.
[10] Sergeant on Stamp Duties, 3rd ed., pp. 334, 337, 338 et seq.
[11] [1895] 1 Q.B. 484.
[12] [1899] 1 Q.B. 250.
[13] [1895] 1 Q.B. 484.
[14] [1899] 1 Q.B. 250, 254.
[15] [1900] A.C. 1.

"'Agreement,' in the First Schedule to the Stamp Act, 1891 "(which exempts agreements for the sale of goods), shall not "apply" to any such instrument. In Mr. Cross's submission this enactment indicates that the legislature can hardly have regarded hire-purchase agreements as theretofore chargeable with duty under the heading "Bond, Covenant, or other Instrument." Considerations such as these might, if the matter had been res integra, have afforded some support for the view that the limited construction for which Mr. Cross contends, and which Rowlatt J., in the *British-Italian* case [16] would have been disposed to adopt if it had been open to him to do so, should be placed on this head of charge, but cannot justify us in departing from the wide construction which has actually been placed upon it by decisions binding upon this court.

The second point taken by Mr. Cross was to the effect that even if the agreement was not excluded from this head of charge on the grounds advanced in support of his first objection, the sums periodically payable were incapable of ascertainment at the date of the agreement save as regards the payment to be made in respect of the first half-yearly period ending on March 31, 1956, owing to the provisions in the third schedule to the agreement for half-yearly increases or decreases in the sum payable by reference to any increase or decrease of 5 per cent. or more in the half-yearly index figure. Accordingly, while he accepted, notwithstanding the powers therein contained of avoiding or determining the agreement in certain events, the commissioners' view that the payments were to be made "for a definite and certain period" (viz., the period beginning on November 15, 1955 (the latest date for the commencement of broadcasting) and ending on July 29, 1964 (being the date fixed for the expiration of the agreement)), Mr. Cross submitted that it could not be predicated of them that they were to be made not merely for a definite and certain period but, as the head of charge requires, "for a definite "and certain period, so that the total amount to be ultimately "payable can" (that is to say, at the date of the agreement) "be "ascertained." We agree with the judge that this argument cannot be maintained consistently with the case of *Underground Electric Railways Company of London Ltd.* v. *Inland Revenue Commissioners*,[17] ("the first *Underground* case"), read in conjunction with the case of *Underground Electric Railways Co. of London Ltd. and Glyn, Mills, Currie & Co.* v. *Inland Revenue Commissioners* [18] ("the second *Underground* case").

The headnote to the report of the first *Underground* case [19] in the Court of Appeal is in these terms:

"A company agreed to sell its undertaking to a new company "in consideration of certain money and shares, and it was agreed

[16] Sergeant on Stamp Duties, 3rd ed., pp. 334, 337.

[17] [1904] 2 K.B. 198; [1905] 1 K.B. 174; [1906] A.C. 21.

[18] [1914] 3 K.B. 210; [1916] 1 K.B. 306.

[19] [1905] 1 K.B. 174.

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"that the profits of the new company in respect of each year "should be applied, first, in the payment of a cumulative "dividend of 5 per cent. per annum on the amount for the time "being paid up on any shares for the time being issued by the "new company; and, secondly, in paying to the original company, "'as a further part of the consideration for the said sale, such a "'sum as shall be equal to a dividend of 3 per cent. for such "'year on the amount for the time being paid up on such of "'the original ordinary share capital . . . in the new company "'as shall for the time being have been issued by the new "'company':—*Held*, that the further consideration, though "payable contingently, was 'money payable periodically in per-"'petuity or for an indefinite period not terminable with life' "within the meaning section 56 (2) of the Stamp Act, 1891, and "was chargeable with ad valorem duty. Judgment of Channell "J.[20] reversed."

That being a case of sale the relevant provision of the Stamp Act, 1891, was section 56 (2), and not the head of charge with which the present case is concerned. Nevertheless, we think it has an important bearing on the question we have to decide.

Sir Richard Henn Collins M.R. said this[21]: "It has been "ascertained by the commissioners that, at the date of the agree-"ment, a sum of £1,300,000 had been paid up on the share "capital, and a dividend of 3 per cent. on that sum is £39,000. "That being, on the terms of the bargain I have just read, part of "the consideration, the question is whether the provisions of the "Stamp Act, 1891, are sufficient to reach that, and the provision "relied upon is that contained in section 56 (2) of the Act: "'Where the consideration, or any part of the consideration, for "'a conveyance on sale consists of money payable periodically "'for a definite period exceeding twenty years or in perpetuity, "'or for an indefinite period not terminable with life, the convey-"'ance is to be charged in respect of that consideration with "'ad valorem duty on the total amount which will or may, "'according to the terms of sale, be payable during the period "'of twenty years next after the day of the date of the instru-"'ment.' In this case a part of the consideration unquestionably "is the payment which is provided for in the clause of the "agreement which I have read: it consists of money, that is the "sum of £39,000, payable annually for an indefinite period not "terminable with life. Therefore it seems to me that so far that "sum appears to fall within the words of the section, and to be "chargeable with ad valorem duty, unless the contention of the "company is correct. It is said on their behalf that the word "'payable' in section 56 (2), refers to money payable absolutely, "and cannot be taken to mean money which is payable only upon "a contingency. Another point was taken that, before the ques-"tion of contingency is reached, there must be an ascertained

[20] [1904] 2 K.B. 198.

[21] [1905] 1 K.B. 174, 179.

"sum in respect of which this duty can be levied, and it is said "that, in this case, there is absolute uncertainty about the sum "upon which the 3 per cent. dividend would be payable, because "that sum is paid-up capital, and the agreement contemplates "more capital being paid up over and above the sum then paid "up. Upon that ground, it is said, that sum is too indefinite to "be the subject-matter of an ad valorem duty; and that a fixed "factor is not available in the calculation, inasmuch as the "amount is capable of being increased. That objection does not "impress me, because if I once find that there is a fixed mini-"mum already reached at the date of the agreement, it does not "seem to me that the fact that the minimum may be afterwards "exceeded alters the fixity of that which has already been ascer-"tained, namely, the sum below which the capital cannot fall, "and the sum, therefore, upon which the 3 per cent. dividend will "have to be paid if the other contingencies, which I will deal "with in a moment, arise. Therefore, that factor of indefinite-"ness, so far as it rests on the fact that the capital is capable of "increase, does not seem to introduce any such uncertainty into "the calculation as to prevent the incidence of the taxation."

He later said [22]: "The question remains that the section deals "with 'money payable,' and that expression, it is said, does not "embrace money which is only payable on a contingency. If it "is once arrived at that the money to which the section refers is "money which may be payable on a contingency, I am not in the "least pressed by the difficulty that several uncertainties combine "to make one contingency. It does not seem to me to matter "how many factors that contingency embraces; it is simply one "contingency, although a number of things may have to happen "in order to bring about the event on which this payment will "have to be made. That being so, I think the question really "narrows itself down to this—Do the words 'money payable' in "the section embrace money payable on a contingency?

"The argument for the Crown drawn from the use of the "word 'may' in the section, in support of the suggestion that "payment on a contingency was included, has been successfully "contested by the counsel for the company; and therefore I do "not rely upon that word in coming to the conclusion that the "words 'money payable' include money payable on a contin-"gency." Finally, he said [23]:

"It seems to me, therefore, that the words 'money payable "'for an indefinite period' include money which may never "become payable unless the particular event happens—that is, "in this case, unless the amount of profits is sufficiently large to "make all the preliminary payments before the obligation to pay "a sum equivalent to a 3 per cent. dividend arises. Unless and "until that condition is fulfilled the money will not be paid: still "it is money which will become payable if that event happens,

[22] [1905] 1 K.B. 174, 179, 181. [23] Ibid. 182.

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"and therefore it is covered in my judgment by the wording of "the section, and the duty is payable. In my opinion, therefore, "this appeal succeeds."

Stirling L.J. said [24]: "The commissioners held that the dividend of 3 per cent. payable on that portion of the capital so "paid up constituted money payable periodically either in "perpetuity or for an indefinite period within the meaning of the "section. I think that that conclusion was right. We start with "this, that the consideration is to be payable periodically. Now "it is insisted, and this is really the basis of the argument on "behalf of the company, that the expression 'money payable "'periodically' is limited to money payable absolutely; but I "see nothing in the Act which compels us to arrive at that conclusion. The words seem to me capable of including money "payable either absolutely or on a contingency, just as much as "the word 'debt' occurring in various sections of the Stamp "Acts has been held to include a debt payable either certainly "or upon a contingency. If that be so, there is nothing in the "subsequent part of the sub-section which would narrow the "meaning of the words 'money payable periodically.' In fact, "the subsequent language is such as lends itself to the view that "it includes money payable contingently as well as absolutely. "I refer to the words 'will or may' which were relied upon by "the Attorney-General in his opening, and which, at all events, "do not tend to negative the construction which was placed on "the words 'money payable periodically' by the commissioners."

Mathew L.J. agreed without adding any further reasons.

It will be seen that Henn Collins M.R. founded himself wholly on the view that the words "money payable" in section 56 (2) included money payable on a contingency, rejecting the alternative argument for the Crown based on the words "will or may"; while Stirling L.J. took the same view as to the meaning of the words "money payable periodically" and only relied on the words "will or may" to the extent that they did not "tend "to negative" that construction of the words "money payable "periodically."

In the House of Lords Lord Lindley delivered the only reasoned opinion. He said [25]: "This sum was a minimum sum "and it was payable periodically for an indefinite time. The "amount payable in future was liable to be increased, but not "to be diminished, except in certain events, to which I will now "allude. One of these events, and the only one in my opinion "which creates any difficulty, was the possible insufficiency of "the profits of the company to pay the amount referred to after "paying a dividend of £5 per cent. on the paid-up capital of the "company. That dividend of 5 per cent. had to be paid out of "the profits of the new company to its shareholders before any "further payment became payable to the selling company. The "minimum sum payable periodically was so payable subject to

[24] [1905] 1 K.B. 174, 179, 183. [25] [1906] A.C. 21, 22.

" a contingency, viz., the existence of a sufficiency of profits to " pay first a dividend of 5 per cent. and then a further dividend " of 3 per cent. We have therefore an ascertained minimum " amount payable periodically as part of the consideration of the " sale, but payable on a contingency. Is such a sum within " section 56 (2) of the Stamp Act, 1891? Its language is very " wide.

" It is contended that the words ' money payable periodically ' " in that section do not apply to money payable on a contingency, " because contingent payments are dealt with by section 57. I " do not myself see how section 57 assists the appellants. Its " effect seems to be that where the consideration for a sale con- " sists of money payable on a contingency, such money is to be " taken into account in ascertaining the stamp duty to be paid on " the conveyance of the property sold. I see nothing in section " 57 which either cuts down or excludes section 56. It is also " contended that the words ' money payable ' in section 56 do not " include money payable upon a contingency, because the con- " tingency may never happen and no money may be payable. But " the words of section 56 appear to me to be wide enough to cover " all moneys which may become payable, and the latter part of " clause 2 certainly favours this construction. Moreover, section " 57 says that money payable on a contingency is to be taken " into account; and that, to my mind, removes any doubt which " might otherwise arise as to the inclusion of contingent payments " in section 56."

This language appears to us to indicate that Lord Lindley, while agreeing with the Court of Appeal in his conclusion, founded himself to some extent on the words " will or may . . . be payable " in section 56 (2). He did not, however, express any dissent from anything that had been said in the Court of Appeal, and so far as that court was concerned Sir Richard Henn Collins M.R. was positively of opinion without placing any reliance on the words " will or may " that the words " money payable periodi- " cally " in section 56 (2) included money payable on a contingency, and Stirling L.J. did not differ from that view, while Mathew L.J. must be taken to have agreed with it.

The use of the word " minimum " in these judgments (see *per* Henn Collins M.R. and Lord Lindley) is not altogether easy to understand, since less than the sum described as the minimum might in certain events have become payable. But we think what was meant was that, if in the events which happened, the full amount calculated according to the formula provided by the agreement became payable, it could not be less than 3 per cent. on the amount which at the date of the agreement had already been paid up on the shares in question.

However that may be, we think the first *Underground* case [26] does afford some authority for the view that the words " money

[26] [1905] 1 K.B. 174; [1906] A.C. 21.

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"payable periodically" in section 56 (2), and therefore also the closely comparable words "any sum or sums of money at "stated periods" in the head of charge, with which we are now concerned, include money payable on a contingency.

The second *Underground* case [27] was concerned with this head of charge. The headnote to the report of the case before Scrutton J. is in these terms:

"By a deed executed by them the appellants agreed, pro-"vided a sufficient number of the holders of ordinary stock of "the Central London Railway Company would take guaranteed "stock in exchange for their ordinary stock, to guarantee interest "at 4 per cent. on such guaranteed stock, payable half-yearly, "if and to the extent that the profits of the Central London "Railway Company were not sufficient to pay that amount of "interest. At the date of the deed it was not known whether a "sufficient number of holders of ordinary stock would accede to "the arrangement or whether all would so accede, but if they "all acceded and if the Central London Railway Company made "no profits in any year, the appellants would be liable to pay "£120,000 in that year, being 4 per cent. on £3,000,000 stock:

"Held (1) that the deed was chargeable with ad valorem "stamp duty under the heading 'Bond, Covenant, or Instrument "'of any kind whatsoever, being the only or principal or primary "'security for any annuity . . . or for any sum or sums of money "'at stated periods . . . for . . . [an] indefinite period,' on the "maximum sum which might become payable under the deed; "and (2) that the amount on which the duty was chargeable was "the yearly sum that might be payable, namely, £120,000 not-"withstanding that it was payable at half-yearly periods."

Scrutton J. said [28]: "These and other cases seem to me to "establish that there may be a sum, or a definite and certain "sum, though it is payable on a contingency and may never "become payable, and though the amount payable may depend "on contingencies. It is said, however, that in all these cases "there was a specified sum or sums at the date of the deed, and "that if there is no sum specified at the date of the deed, no "stamp duty is payable. I do not think this is true of the first "*Underground Railway* case,[29] where any sum up to 3 per cent. "might be payable depending on amount of profits, and the deed "was assessed on the maximum payment which might be re-"quired. This is what the commissioners have done in this case "in assessing on the maximum payment which the deed may "secure, though it depends on contingencies whether that pay-"ment may have to be made." Later on the same page he said:

"I can understand that if you cannot ascertain from the "instrument a fixed sum which may become payable, though on "contingencies, you cannot stamp ad valorem. This is probably

[27] [1914] 3 K.B. 210.
[28] Ibid. 220.
[29] [1905] 1 K.B. 174.

" the reason why in *County of Durham Electrical Power Distribu-* " *tion Co.* v. *Inland Revenue Commissioners* [30] an agreement to " supply electrical power for a term of years at a quarterly pay- " ment of £58 and 1d. per unit consumed was held liable to an " ad valorem stamp on £58 a quarter for the term of years, but " not on the 1d. per unit, which had no maximum limit. The " same remark may explain the measure of taxation in the first " *Underground Railway* case.[31]

" For these reasons I am of opinion that under the heading " ' Bond ' where the maximum sum which can be secured by the " instrument is ascertainable from the instrument itself, the ad " valorem stamp must be estimated with reference to that sum, " though it never may become payable, and it cannot be told at " the date of the instrument whether that sum, or any less sum, " or any sum at all will in fact be payable."

We would amplify Scrutton J.'s reference to *County of Durham Electrical Power Distribution Co.* v. *Commissioners of Inland Revenue* [32] by noting that the fixed charge was liable in certain events to be reduced to a minimum of £50 per quarter, but that the assessment was nevertheless made on the full quarterly sum of £58 for the term of the agreement.

The judgment of Scrutton J. was affirmed in the Court of Appeal.[33] Swinfen Eady L.J. said this:

" I am unable to draw any distinction between ' money pay- " ' able periodically ' and ' money payable at stated periods,' and " the fact that all the payments were contingent seems to me to " be immaterial in considering whether there was a liability to " pay under the deed. The proper number of shareholders had " to assent and come in under the deed. Subject to that there " was an absolute guarantee. It may well be that if and so long " as the Central London Railway paid the full dividend of 4 per " cent., then the Underground Railway would have no further " liability under its guarantee, but from the date when the instru- " ment was signed there was a binding obligation upon the Under- " ground Railway in certain events that might happen to pay at " stated periods certain sums of money.

" In my opinion the deed comes within the language of the " schedule to the Stamp Act. It is immaterial whether it is the " only, or principal, or primary security; it was the security in " respect of the guaranteed dividend—it was the only security " for ' any sum or sums of money at stated periods.' Then the " duty is upon the sum periodically payable.

" Therefore with regard to the first point I am of opinion that " the deed was both in fact and in law a deed being ' a bond, " ' covenant, or instrument,' coming within the language of this " schedule, whereby certain sums were contingently made periodi- " cally payable. In these circumstances I am of opinion

[30] [1909] 2 K.B. 604; 25 T.L.R. 672.
[31] [1905] 1 K.B. 174.
[32] [1909] 2 K.B. 604.
[33] [1916] 1 K.B. 306, 314.

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"that the first point taken by the appellants fails and that the "deed is liable to ad valorem duty." Bankes L.J. agreed without adding anything on the point here material.

Warrington L.J. said [34]: "Then it is said that the obligation "imposed upon the Underground Company is contingent in two "ways: first if a certain proportion of stockholders do not accept "the provisions of the deed by a certain date, the Underground "Company may declare the deed at an end; and secondly, that "the profits of the Central London Railway Company may be "such that the actual obligation on the part of the Underground "Company to pay money will never in fact, or may not, take "effect. In my opinion, neither of those considerations affects "the question whether the deed is, within the meaning of the "statute, a security for the payment of a sum of money. It is "a security for the payment of a sum of money notwithstanding "that events may happen which enable one or other of the "parties to put an end to the obligation of which the security is "a part, and notwithstanding that in the event the obligation "may not result in the recovery from the obligor of any particular "sum of money. That point is also covered by authority."

Mr. Cross agrees that the two *Underground* cases constrain him to accept the position, so far at all events as this court is concerned, that the head of charge, bond, covenant or instrument includes sums contingently payable, so that, in effect, the words "for a definite and certain period so that the total amount to be "ultimately payable can be ascertained" should be construed as meaning "for a definite and certain period so that the total "amount which will or may ultimately become payable can be "ascertained." But he says that it is still necessary that the amount which may ultimately become payable must be capable of ascertainment at the date of the instrument, unless the sum in question can be treated (as in *County of Durham Electrical Power Distribution Co.* v. *Inland Revenue Commissioners* [35]) as made up of two distinct sums, the one fixed and certain (like the quarterly fixed charge of £58 in that case) and the other unascertainable (like the charge of 1d. per unit in that case) when the instrument can be stamped ad valorem by reference to the amount of the fixed payment. But here, he says, there is no ascertained sum contingently payable and no question of severing the periodical payment into two distinct sums, the one ascertained and the other unascertainable. He says the agreement here in question secures an annual sum which, after the first half-yearly period, may be greater or less by an unpredictable amount than the annual sum specified in the agreement, according to any variations up or down of 5 per cent. or more in the half-yearly index figure. We cannot accept this as a ground for distinguishing the *Underground* cases. The contingencies to be considered are (1) that the half-yearly index figure should be increased by 5 per

[34] [1916] 1 K.B. 306, 319. [35] [1909] 2 K.B. 604.

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cent. or more, (2) that the half-yearly index figure should be reduced by 5 per cent. or more and (3) that the half-yearly index figure should remain constant within 5 per cent. either way. The agreement specifies a sum of £495,600 per annum as payable for the first 2½ years and £536,900 per annum thereafter. These are ascertained sums payable in the third of the three contingencies we have mentioned, and we think it follows that the ad valorem duty was, on the authority of the two *Underground* cases, correctly assessed on the aggregate of these yearly sums for the period fixed by the agreement. To put the matter in another way, these ascertained sums may be looked on as payable for the period fixed by the agreement, subject to the possibility of their being increased or reduced in certain events. Whichever way it is put we think the authority of the two *Underground* cases and, we would add, of the *County of Durham Electrical Power Distribution Co.'s* case [36] obliges this court to affirm the judgment of Wynn-Parry J. and to uphold the assessment accordingly.

We find it unnecessary to say anything as to the views we might ourselves have been disposed to take on Mr. Cross's two points if the matter had been res integra. In the present state of the authorities we do not see how we can properly do otherwise than dismiss this appeal.

Appeal dismissed.
Leave to appeal to the House of Lords.

Solicitors: *Allen and Overy; Solicitors of Inland Revenue.*

B. A. B.

[36] [1909] 2 K.B. 604.

[COURT OF APPEAL.]

* NURSEY AND ANOTHER *v.* P. CURRIE (DARTFORD) LTD.

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Hodson and Willmer L.JJ., Wynn-Parry J.

[Plaint No. 0370.]

Landlord and Tenant—Business premises (Security of tenure)—Landlords' intention to occupy for own purposes—Meaning of "the "holding"—Notice of opposition to new tenancy accordingly—Landlords' subsequent intention to demolish and reconstruct—Sufficiency of landlords' notice—Landlord and Tenant Act, 1954 (2 *&* 3 *Eliz.* 2, *c.* 56), *ss.* 23 (3), 30 (1) (*f*) (*g*).

Premises, consisting of some small buildings standing in a yard, were let on a quarterly tenancy and were used by the tenants to store and vulcanize tyres. The landlords, pursuant to section 25 of

[Reported by NORMAN PRIMOST, Barrister-at-Law.]

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the Landlord and Tenant Act, 1954, served notice on the tenants to terminate the tenancy, stating in the notice that they would oppose the grant of a new tenancy on the ground that they intended to occupy the "premises" for the purposes, or partly for the purposes, of a business to be carried on by them therein.

At the date of the notice the landlords had been refused planning permission to develop the yard by the erection of a petrol filling station. After service of the notice, but before the hearing of the tenants' application for a new tenancy, such planning permission was granted, and at the hearing it was proved that the landlords intended to demolish the buildings and develop the property as a petrol filling station.

At the hearing it was contended that the landlords were not within the terms of their notice because they did not intend to occupy the holding; but the county court judge held that the proposed demolition of the buildings was immaterial, since the holding comprised the land on which the buildings stood and the landlords intended to occupy the land; and he dismissed the tenants' application for a new tenancy:—

Held, allowing the tenants' appeal, (1) that, in view of the terms of their notice, the landlords, to succeed, must bring themselves within section 30 (1) (*g*) of the Act of 1954; they could not therefore rely on paragraph (*f*) of section 30 (1).

(2) That, accordingly, the landlords must prove an intention to occupy "the holding," defined by section 23 (3) as "the property "comprised in the tenancy"—namely, the small buildings in the yard—which they were unable to do.

Fisher v. *Taylors Furnishing Stores Ltd.* [1956] 2 Q.B. 78; [1956] 2 W.L.R. 985; [1956] 2 All E.R. 78 considered.

Per curiam. It is unfortunate that there is no power of amending notices under the Landlord and Tenant Act, 1954.

Appeal from Judge Barrington, sitting at Dartford County Court.

The following facts are taken from the judgment of Wynn-Parry J.: By a tenancy agreement, P. Currie Ltd., the landlords, let part of the premises known as 248, Broadway, Bexley Heath, Kent, comprising "drivers' room, can store, pump and the spirit "store, together with the right of ingress and egress thereto "between the hours of 8 a.m. and 6 p.m." to Cecil Roy Nursey and Leslie Edgar Nursey, who were in business trading as the Central Rubber Co. (hereinafter called "the tenants"), on a quarterly tenancy terminable by either party by not less than three months' notice in writing to the other, expiring on any of the usual quarter days, at a rent of £150 per annum. The tenants carried on in these premises the business of storing and vulcanizing tyres. The buildings referred to in the tenancy agreement stood in a yard, of which the landlords were the tenants and where they carried on a garage business. In June, 1955, the landlords applied for planning permission to develop the yard by the erection of a petrol filling station. Planning permission was refused on the first two applications, but it was finally granted on June 9, 1958, when the landlords agreed to modify their plans so as to provide a car park at the rear of the petrol filling station.

On December 8, 1957, the landlords had served notice to terminate the tenancy on the tenants pusuant to section 25 of the Landlord and Tenant Act, 1954, the notice to expire on June 24, 1958. The landlords stated in their notice, pursuant to section 25 (6) of the Act of 1954, that they would oppose the grant of a new tenancy on the ground that "on the termination "of the current tenancy we intend to occupy the premises for the "purposes, or partly for the purposes, of a business to be carried "on by us therein." In February, 1958, the tenant served a counter-notice to the landlords, stating that they were unwilling to give up possession, and, in April, 1958, they applied to the county court for a new tenancy.

The grant of planning permission given after the service of the notice to terminate, but before the date of the hearing, changed the landlords' outlook, so that, at the hearing, they intended to demolish the buildings on the premises and develop the property as a petrol filling station.

It was contended for the tenants that the landlords could not come within the terms of their notice, since they intended to demolish the buildings, and therefore could not intend to occupy the holding. It was contended for the landlords that, since the holding included the land on which the buildings were situate, they intended to occupy the holding. The county court judge accepted the landlords' contention and dismissed the tenants' application for a new tenancy.

The tenants appealed. At the hearing of the appeal, the tenants intimated that they had found other premises which would be available to them in six months, so that if they were successful in the appeal, they would only require a new tenancy of short duration.

Harold Christie Q.C. and *G. B. H. Dillon* for the tenants.
L. K. E. Boreham for the landlords.

The following cases were cited in argument, in addition to the case referred to in the judgments: *Betty's Cafés Ltd.* v. *Phillips Furnishing Stores Ltd.*[1]; *Cunliffe* v. *Goodman*[2]; *Atkinson* v. *Bettison*[3]; *Reohorn* v. *Barry Corporation.*[4]

HODSON L.J. I will ask Wynn-Parry J. to deliver the first judgment.

WYNN-PARRY J. stated the facts and continued: The short question which arises is whether the landlords can bring themselves within paragraph (*g*) of subsection (1) of section 30 of the

[1] [1959] A.C. 20; [1958] 2 W.L.R. 513; [1958] 1 All E.R. 607.
[2] [1950] 2 K.B. 237; 66 T.L.R. (Pt. 2) 109; [1950] 1 All E.R. 720.
[3] [1955] 1 W.L.R. 1127; [1955] 3 All E.R. 340.
[4] [1956] 1 W.L.R. 845; [1956] 2 All E.R. 742.

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Act of 1954,[1] which they must do, in view of the terms of their notice, or whether the fact that an essential part of what they intend to do involves demolishing the very buildings which were the subject of the tenancy prevents them from relying on that paragraph. Paragraph (*f*) deals solely with demolition or reconstruction, and it is perfectly clear that if the respondents had given a notice under paragraph (*f*), no difficulty would have arisen, and this case would never have had to be brought. It has been argued on behalf of the landlords, and it was the view taken by the county court judge, that demolition is really immaterial; what has to be shown is that the landlords intend to occupy the holding; and it is said that "the holding" means the land subject to the tenancy to the tenants, whether with the present buildings on it or not, for the demise effected by the tenancy must have included the land upon which the buildings stood. It was also pointed out that there is a case which is the reverse of the present case, namely, *Fisher* v. *Taylors Furnishing Stores Ltd.*[2] That was a case in which, in September, 1954, the landlords bought two adjoining shops, which were about 250 years old and near the end of their life. They intended to undertake the demolition of the premises for which it was necessary to obtain possession, to rebuild on the site and to occupy the new buildings for the purpose of their business as furniture retailers. They gave the necessary notice under the Act to each tenant, and when the tenant of the first shop applied for a new lease, they opposed the application on the ground that they intended to demolish and reconstruct the premises. It was held that the grant of a new lease should be refused since the landlords had satisfied the requirements of section 30 (1) (*f*) by showing a genuine intention to demolish the premises, notwithstanding their intention also to occupy the newly constructed premises for the purposes of their business. At the end of his judgment Denning L.J. said[3]: "In

[1] Landlord and Tenant Act, 1954, s. 23: "(3) In the following provisions of this Part of this Act "the expression 'the holding,' in "relation to a tenancy to which this "Part of this Act applies, means the "property comprised in the tenancy, "there being excluded any part "thereof which is occupied neither by "the tenant nor by a person "employed by the tenant and so employed for the purposes of a business "by reason of which the tenancy is "one to which this Part of this Act "applies."

S. 30: "(1) The grounds on "which a landlord may oppose an "application under subsection (1) of "section twenty-four of this Act are "such of the following grounds as "may be stated in the landlord's "notice under section twenty-five of "this Act or, as the case may be, "under subsection (6) of section "twenty-six thereof, that is to say:— ". . . (*f*) that on the termination of "the current tenancy the landlord "intends to demolish or reconstruct "the premises comprised in the "holding or a substantial part of "those premises or to carry out substantial work of construction on the "holding or part thereof and that "he could not reasonably do so "without obtaining possession of the "holding; (*g*) subject as hereinafter "provided, that on the termination "of the current tenancy the landlord "intends to occupy the holding for "the purposes, or partly for the purposes, of a business to be carried on "by him therein, or as his residence."

[2] [1956] 2 Q.B. 78; [1956] 2 W.L.R. 985; [1956] 2 All E.R. 78.

[3] [1956] 2 Q.B. 78, 85.

"many cases the landlord will have two purposes, both of which "are genuine and important: the one is to get possession for his "own business, and the other is to reconstruct the premises. He "does not lose the benefit of section 30 (1) (*f*), simply because he "bought the premises less than five years before. Suppose a man "buys up derelict premises and the only sensible thing is to pull "them down at once and rebuild. If he intends to let them to a "new tenant, he clearly can rely on section 30 (1) (*f*). He should "not be debarred from so doing simply because, instead of letting "them, he intends to occupy them himself. The legal position "is made clear by section 31 (1), which says that, if the landlord "establishes *any* of the grounds set out in section 30 (1), a new "lease must be refused. The fact that he cannot establish one "ground does not prevent him from relying on another." We were also referred to a passage from the judgment of Parker L.J.,[4] rather to the same effect, and we were asked to draw the inference that, but for the five-year bar, the conclusion of the court would have been that reliance could have been placed on paragraph (*g*). That is quite truly said to be the converse of the present case, and so it is argued that the corollary should follow. To argue a corollary in law is, it has been said more than once, a dangerous thing, and I think that it is necessary, at any rate in the first instance, to consider the relevant provisions of the Act because it may be found that there is no room in this particular case for arguing the corollary.

In paragraph (*g*) of subsection (1) of section 30, there is a reference, as there is in the preceding paragraph (*f*), to "the "holding," and the phrase "the holding" is defined in section 23 (3) as meaning "in relation to a tenancy to which this Part of this "Act," namely, Part II, "applies," "the property comprised in "the tenancy." In paragraph (*g*) the words "the holding" must be read as interpreted in the light of that definition, and "the "holding" is one which the landlord intends to occupy "for "the purposes, or partly for the purposes, of a business to be "carried on by him therein, or as his residence." It seems to me that that language circumscribes the use of the phrase "the "holding" in that paragraph, and makes it necessary to concentrate the whole of one's attention on the particular piece of land, whether it has buildings on it or not, which is the subject-matter of the tenancy in question. So viewed, it appears to me that the contention for the landlords in the present case is too wide, and that when one is looking at the material time at "the holding" under paragraph (*g*), it is not permissible to take into account the wider scheme which the landlords had in mind, and merely to treat the land comprised in the holding as land which, in one way or another, will be used for the purpose of the wider undertaking.

In my view, for those reasons this case could only come

[4] [1956] 2 Q.B. 78, 85, 91.

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within paragraph (*f*), but, unfortunately, there is no right of amendment and the matter had to go forward on the basis of the notice, and in the events which have happened, the landlords do not bring themselves within paragraph (*g*); they fall within paragraph (*f*), and paragraph (*f*) not having been relied upon in the notice which they gave, this appeal should be allowed.

Willmer L.J. I agree, and I desire to add only a few words because the point which has arisen for decision is a very short one which does not admit of much elaboration. It is not now in dispute that the landlords here proved a case within paragraph (*f*) of section 30 (1) of the Act of 1954, in the sense that they proved an intention to demolish or reconstruct the premises in question. Unhappily for them, no reliance was placed on paragraph (*f*), and no mention of paragraph (*f*) was made in the notice which they served under section 25 of the Act. The only ground put forward in the notice which they served was the ground that: "on the termination of the current tenancy we "intend to occupy the premises for the purposes, or partly for "the purposes, of a business to be carried on by us therein." The words there used follow approximately, although not exactly, the wording used in paragraph (*g*) of the same subsection of the Act. It was contended on behalf of the landlords, and was held by the judge, that in addition to proving a case, as they admittedly had, under paragraph (*f*), they had, in the circumstances, also proved a case under paragraph (*g*), in the sense that they proved an intention, prevailing at the time of the hearing, to occupy the holding for the purposes of a business to be carried on by them therein. It seems to me, however, that so to hold does violence to the wording of the paragraph. I have said that the words used in the landlords' notice do not exactly correspond to the words used in paragraph (*g*). [His Lordship read the paragraph, and continued:] The important word for the purposes of the present case is the word "holding," and that is defined by section 23 (3) of the Act of 1954 as meaning "the property "comprised in the tenancy."

It appears to me, therefore, that in applying paragraph (*g*) of section 30 (1), one must look at the particular holding comprised in the particular tenancy which is before the court in the particular case. Here the building is described in the tenancy agreement as "the buildings forming part of premises known as No. 248, "Broadway, Bexley Heath in the county of Kent, and comprising "the drivers' room, can store, pump and the spirit store, together "with the right of ingress and egress thereto." In relation to this case, therefore, paragraph (*g*) must be construed as though, instead of the word "holding," those words, which I have read from the tenancy agreement, were set out in the paragraph.

The question to be determined, then, is whether the landlords proved that on the termination of the current tenancy they intended to occupy "the buildings forming part of premises

"known as No. 248, Broadway, Bexley Heath in the county of "Kent, and comprising the drivers' room, can store, pump and "the spirit store" for the purposes, or partly for the purposes, of a business to be carried on by them therein. To that there can be only one answer. The only intention proved was an intention to demolish and reconstruct. It appears to me that, on what I conceive to be the true construction of paragraph (*g*), it is straining language to say that the landlords brought themselves within it.

In those circumstances it seems to me that the judge was wrong in holding that the landlords had proved a case in accordance with what they had set out in their notice, and, accordingly, I agree that this appeal should be allowed.

HODSON L.J. I also agree.

Appeal allowed.

Solicitors: *James & Charles Dodd; T. G. Baynes & Sons.*

[CHANCERY DIVISION.]

* *In re* No. 88, HIGH ROAD, KILBURN.

[1957 M. No. 2346.]

1959
Feb. 3, 4, 6.
Wynn-Parry J.

Landlord and Tenant—Business premises (security of tenure)—Terms of new tenancy—Date of commencement—Date of termination of current tenancy—Term—Break to review rent—Guard against inflation—Landlord and Tenant Act, 1954 (2 *&* 3 *Eliz.* 2, *c.* 56), *ss.* 24, 25, 26, 64.

Application was made under section 24 of the Landlord and Tenant Act, 1954, by tenants of business premises for the grant of a new lease. The landlords did not object to the grant of a new lease, but there remained in issue between the parties the amount of rent to be reserved under the new lease, the length of the term to be granted and the date on which it should commence. The present lease expired on June 24, 1958, and the rent payable under it was £250 a year. On a finding by the court that the tenants were entitled to 14 years' security of tenure and that the rent under the new lease should be £3,000 a year:—

Held, (1) that the grant of a new tenancy which would begin at the end of the current tenancy by virtue of section 33 [1] of the Act

[1] Landlord and Tenant Act, 1954, s. 33: "Where on an application "under this Part of this Act the "court makes an order for the grant "of a new tenancy, the new tenancy ". . . shall begin on the coming to "an end of the current tenancy."

S. 64: "(1) In any case where— "(*a*) a notice to terminate a tenancy "has been given under Part I or "Part II of this Act or a request for "a new tenancy has been made under "Part II thereof, and (*b*) an application "to the court has been made "under the said Part I or the said "Part II, as the case may be, and "(*c*) apart from this section the "effect of the notice or request would "be to terminate the tenancy before "the expiration of the period of three "months beginning with the date on "which the application is finally dis-

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of 1954 was governed by section 64 (1) of the Act, and, accordingly, the new lease would not commence until the expiration of a period of three months after the termination of all proceedings relating to the application, notwithstanding any injustice which might result to the landlords by the continuation of the rent payable under the old lease.

Berkovits & Co. Ltd. v. *Monks* (1956) 167 E.G. 573 not followed.

(2) That in order to avoid prejudice to the landlords by possible postponement of the date of its commencement, the new lease should not be for a term of 14 years, but for a term ending on June 24, 1972, and that, as a guard against inflation, it should include a provision that halfway through the term the rent should be reviewed in the light of all circumstances then obtaining, but there would be no corresponding right in the tenants to terminate the lease if on review it was found that a higher rent should be paid.

ADJOURNED SUMMONS.

Meakers Ltd., tenants of No. 88, High Road, Kilburn, which was owned by D.A.W. Consolidated Properties Ltd., applied to the court under section 24 of the Landlord and Tenant Act, 1954, for a new lease of the premises. The landlords did not oppose the grant of a new lease to the tenants in some form, but three matters remained in dispute between the parties, namely: (1) the length of the term to be reserved by the new lease, (2) the rent to be reserved by such lease, and (3) the date as from which it should begin.

The premises in question were about 80 years old, and consisted of a shop on the ground floor (where the tenants carried on the business of men's outfitters and hosiers), a basement and three upper floors. The premises were situated on the east side of the High Road, Kilburn, and the evidence satisfied Wynn-Parry J. that, from the point of view of value as a shop, that was a better position than on the west side, and that No. 88, High Road was in the middle of a stretch on that side which represented the best shopping area.

The tenants held the premises under a lease dated December 5, 1921, for a term of 36¾ years beginning on September 29, 1921, and expiring on June 24, 1958. It was determinable by the lessees at various dates which were not now material. The rent reserved by the lease was £230 per annum for the first seven years and £250 for the remainder of the term. The lease contained a number of provisions which it had been argued were onerous covenants, such as a covenant restricting the type of business to be carried on during the currency of the lease to that which the tenants had in fact carried on, but there was a provision that the veto or restriction was only to operate in the absence of the consent of the landlords, which was not to be unreasonably withheld.

Limited alterations were made to the premises under two licences dated 1903 and 1921 respectively. The lease contained a

"posed of, the effect of the notice or "request shall be to terminate the "tenancy at the expiration of the said "period of three months and not at "any other time."

covenant on the part of the lessees that at the end or sooner determination of the lease they would reinstate the premises in the form in which they originally were in 1903, if so required by the landlords.

The tenants asked that a new term should be granted for 14 years, the landlords were willing to grant one for seven years.

H. Heathcote-Williams Q.C. and *T. G. Field-Fisher* for the tenants.

Sir Lynn Ungoed-Thomas Q.C. and *George Avgherinos* for the landlords.

The cases cited in argument are referred to in the judgment.

Wynn-Parry J., having stated the facts, continued: I have to consider first the question of the term for which this new lease should be granted, disregarding for the moment that which I shall have to decide later—a question of law as to the date from which the lease is to begin, and a question which has not yet formed the subject of any judicial decision in the High Court, although there is a decision of a judge of county courts. The tenants ask that the new lease should be for a term of 14 years, and they ask for that because naturally they want security of tenure. The landlords, on the other hand, understandably, would like the shorter term of seven years. There is no likelihood of their wanting to use the premises themselves—they are a private family company which buys properties for investment and do not propose to embark on any retail trade themselves—but they say that if the tenants are to have security of tenure in the shape of the longer term, then a guard against inflation should be provided for them, and that a provision should therefore be included in the lease that, at the end of the first half, a right should be given to the landlords by the lease, to have the rent reviewed, provided that any review shall not have the effect of lowering the rent but only of increasing it, if on a review it is considered that, in the circumstances then obtaining, the rental value of the property has increased.

My inclination is to provide the tenants with the longer term of years, provided that I do not prejudice the landlords. Mr. Heathcote-Williams asked that a further term should be put in, giving to the tenants a right to break the lease at seven years if the result of the review of the rent, in their opinion, resulted in too high a figure. I think, on the whole, that they are asking for the best of both worlds, and I propose to grant to the tenants the equivalent of a 14-year term, but to direct that there be included in the lease a provision for the review of the rent at the end of the first half of the term for which the landlords ask.

I will consider now the more difficult question of what should be the annual rent reserved by the lease. This depends upon a consideration of the expert evidence which has been given before

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me. [His Lordship then considered the expert evidence relating to valuation given on behalf of both parties, and having accepted that given on behalf of the landlords, held that the rent to be reserved by the new lease should be at the rate of £3,000 per annum.]

That leaves me with the last point to consider, namely, from what date is the new lease to begin. Section 33 of the Landlord and Tenant Act, 1954, provides that, where the court makes an order for the grant of a new tenancy, the tenancy, as regards term, shall be "for a term not exceeding fourteen years, and "shall begin on the coming to an end of the current tenancy." In order to find out what is meant by the phrase "current "tenancy" it is necessary to progress backwards to section 26 (1), where it is said: "A tenant's request for a new tenancy may "be made where the tenancy under which he holds for the time "being (hereinafter referred to as 'the current tenancy') is a "tenancy granted for a term of years exceeding one year. . . ." The result of that in the present case is to make the current tenancy the lease dated December 5, 1921. Again, in order to ascertain how the current tenancy, that is the lease of 1921, can be terminated, it is necessary to look at section 25. By subsection (1) of that section it is provided that "The landlord may "terminate a tenancy to which this Part of this Act applies by a "notice given to the tenant in the prescribed form specifying the "date at which the tenancy is to come to an end (hereinafter "referred to as 'the date of termination')." If subsection (1) stopped there there would be no difficulty at all in coming to the conclusion that the lease in question here came to an end on June 24, 1958. But there is added to subsection (1) this proviso: "Provided that this subsection has effect subject to the provisions "of Part IV of this Act as to the interim continuation of tenancies "pending the disposal of applications to the court." I have therefore to consider Part IV, where the relevant section is section 64. The sidenote to that section is: "Interim continuation of "tenancies pending determination by court." [His Lordship read section 64 (1) of the Act, and continued:] The effect of the proviso to section 25 appears to me to be the same as if section 64 (1) had been written in at the end of the first paragraph of section 25 (1) instead of the proviso. I am quite unable, in view of the force of the language used, to come to any conclusion other than that, once the conditions stated in paragraphs (*a*), (*b*) and (*c*) of section 64 (1) are fulfilled, the notice given by the landlord under section 25 (1) ceases to be of any effect so far as terminating the tenancy at the date specified in his notice is concerned, and that the tenancy will be continued and will only be terminated under section 64 (1).

Counsel for the landlords, in a very attractive argument, contended that section 64 should have a more limited application. He pointed out—and I think that everyone who has had cause to consider these sections either in a judicial capacity or at the

Bar is unanimous in this view—that the Act in this respect produces, or is liable to produce, injustice to landlords, because the rent reserved by the tenancy which the landlord seeks to determine will continue to be payable until the expiration of the period mentioned in section 64. That period may be extended—although I do not say that it is likely to be the case here—by delays on the part of the tenant in taking the matter to appeal, and perhaps to the House of Lords. I make no suggestion against the tenants here, but I use these figures as an example how the interpretation which I have felt compelled to put on the section might work out. The rent fixed in 1921, which obtained until June 24, 1958, under the contractual document, was at the highest £250 per annum. In view of the changed circumstances and the expert evidence, I have had to decide that the proper present-day rate is £3,000. I can imagine—and I put it as a purely hypothetical case—a tenant using every possible means of delay to prolong the enjoyment of a present low rent in order to avoid the liability of an increased rent which is the price of his being granted a new lease under the Act. However, the result of the construction which I have felt constrained to put on these sections is one which cannot be avoided as the Act stands. It is not for me to speculate whether the legislature intended as a matter of policy what I hold to have been brought about by these sections, or whether there has been some mistake; whether, for instance, all that was intended (which was the result at which counsel invited me to arrive) was that the tenant's position as tenant should not be prejudiced when, being faced with a notice by his landlord under section 25, he wished to apply to the court to have a new tenancy. But, whether it be a matter of policy or a matter of mistake, I can find no way of giving any other construction to these sections than that which I have given, which must result in the lease of 1921 continuing until the expiration of the period provided in section 64.

I observe that in *In re Sunlight House*,[1] a case before Danckwerts J., the details of which I need not consider, the parties and the court proceeded, without there being any argument, upon the basis that the view which I have felt compelled to take of the relevant sections was the correct one. I should also mention that I was referred to *Berkovits & Co. Ltd.* v. *Monks*,[2] in the Lambeth County Court, in which Judge Clothier came to an opposite construction of section 64, which enabled him to direct that the new lease which he proposed to grant should begin to run from the expiration of the existing tenancy, that was, from the date on which the landlord terminated it effectively by notice. With all respect to the judge, I cannot agree with his conclusion. The strength of the language of the proviso to section 25, and the

[1] The Times, Feb. 4, 1959. [2] (1956) 167 E.G. 753.

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language of section 64, appear to me to preclude any such construction.

The result is, therefore, that the new tenancy must begin at the earliest three months from today, but its commencement will, of course, be further delayed if the tenants (as they have every right to do) decide to test this matter before the Court of Appeal.

I consider that the result at which I am compelled to arrive is one which is unjust to the landlord. But I cannot mitigate that injustice as regards rent, for the new rent can only operate at the end of the period determined by section 64. I can, however, intervene so far as the term of years is concerned, and I do not propose to grant a term of 14 years, but to direct that, when the lease comes to be executed—that is, when the matter is finally disposed of—the term of the lease to be executed shall be for a term ending on June 24, 1972. I shall also direct that there be included in the lease a right in the landlords at such point of time as it eventually emerges shall represent half of that term to apply to have the rent reviewed.

[It was agreed in order to avoid application to the court, that a review of the rent, if desired, should be referred to an agreed surveyor or a surveyor to be nominated.]

February 19. On an application by the tenants under section 36 (2) of the Landlord and Tenant Act, 1954, Wynn-Parry J. made an order revoking the new tenancy granted under the Act, but ordering the tenants under section 36 (3) to pay the whole of the landlords' costs including those of the application.

Order accordingly.

Solicitors: *Warmingtons & Trevor Jones; Sidney Hackman & Co.*

I. G. R. M.

[HOUSE OF LORDS.]

H. L. (E.)†

1958 *Nov.* 17, 18, 19, 20, 24, 26; *Dec.* 18.

* WINTLE . . . . . Appellant;

AND

NYE . . . . . Respondent.

Will—Knowledge and approval of testator—Direction to jury—Will drafted by solicitor named sole executor—Major benefit taken by him—Testatrix elderly woman unversed in business—Complexity of will—Validity challenged—Onus on solicitor to establish knowledge and approval—Court's duty to be vigilant and jealous.

† *Present*: Viscount Simonds, Lord Reid, Lord Tucker, Lord Keith of Avonholm and Lord Birkett.

Probate—Practice—Trial—Allegation of want of knowledge and approval—No allegation of fraud—Evidence of solicitor supporting will—Cross-examination suggesting inference of fraud.

An elderly woman, unversed in business, signed a will and subsequently a codicil prepared by her solicitor, who was not an intimate friend. The solicitor was named as sole executor and, after provision had been made for various legacies and gifts, he was to take the residue, which amounted to the bulk of her large estate. The will was complex; she was not independently advised and no copies of the documents were given to her. The validity of the will and codicil was challenged on the ground that she did not know or approve of their contents, but no allegation of fraud was made in the pleadings. There was no evidence but that of the solicitor as to the instructions given by the testatrix.

Barnard J., in his summing-up to the jury, having stated the law and the issues accurately and clearly, went on (*per* Sellers L.J. in the Court of Appeal) to encourage in the minds of the jury a benevolent and sympathetic consideration of the solicitor's evidence. The jury found in favour of the will and codicil, and judgment was entered accordingly:—

Held, that the onus being on the solicitor to establish knowledge and approval by the testatrix, it was the duty of the court to be vigilant and jealous in scrutinising all the circumstances; inasmuch as the judge's summing-up to the jury did not sufficiently scrutinise them, in relation to the exceptionally heavy burden of proof which lay on the solicitor, and did not place before them the considerations to be borne in mind in deciding whether or not to believe his evidence, there was misdirection, and the verdict, so far as the gift of residue was concerned, could not stand.

Per curiam. Although fraud was not alleged in the pleadings, it was open to those who challenged the will so to cross-examine the solicitor as to suggest the inference that the reason the testatrix did not know and approve the contents of the will was that he was fraudulent.

Barry v. *Butlin* (1838) 2 Moo.P.C.C. 480 applied.

Decision of the Court of Appeal reversed.

APPEAL from the Court of Appeal (Hodson and Morris L.JJ., Sellers L.J. dissenting).

This was an appeal by Lieutenant-Colonel Alfred Daniel Wintle from an order of the Court of Appeal [1] made on December 16, 1957, dismissing with costs his appeal from the judgment of Barnard J.,[2] given in favour of Frederick Harry Nye, the respondent, on May 20, 1957, on the trial of an action with a jury in the Probate, Divorce and Admiralty Division (Probate) of the High Court of Justice.

The facts are fully set out in the opinion of Viscount Simonds.

The appellant appeared in person.

Ifor Lloyd Q.C. and *Clyde Marshall-Reynolds* for the respondent.

The following authorities, besides those referred to in their Lordships' opinions, were cited on behalf of the respondent:

[1] The Times, December 17, 1957. [2] The Times, May 21, 1957.

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Bray v. *Ford*[3]; *Ryan* v. *Oceanic Steam Navigation Co. Ltd.*[4]; *Jefferson* v. *Paskell*[5]; *Low* v. *Guthrie*[6]; *In re R., Decd.*[7]; *Davy* v. *Garrett*[8]; *Blay* v. *Pollard and Morris*[9]; *White* v. *White and Cato*[10]; *Riding* v. *Hawkins*[11]; *Paske* v. *Ollat*[12]; *Parker* v. *Felgate*[13] and *Clearson* v. *Teague*.[14]

Their Lordships took time for consideration.

December 18. Viscount Simonds. My Lords, the right to trial by jury is traditionally precious to the citizen. If their verdict is to be lightly set aside and either a new trial ordered or the opinion of an appellate court substituted for theirs, the value of that right would be substantially diminished. I have not, I hope, in my consideration of this case, failed to pay that jealous regard to the verdict of a jury which is its due.

This appeal, my Lords, is from an order of the Court of Appeal of December 16, 1957, dismissing the appellant's appeal from a judgment of Barnard J. in favour of the respondent, Frederick Harry Nye, a solicitor, upon the trial of an action with a jury in the Probate, Divorce and Admiralty Division of the High Court.

On March 12, 1948, a grant of probate of the will dated August 4, 1937, of Kathleen Helen Wells and a codicil thereto dated November 13, 1939, was made to the respondent. She had died on December 6, 1947. On January 27, 1956, the appellant, who claimed to be interested in her estate in the event of her intestacy, together with another person, who has not now any concern in the matter, brought the action out of which this appeal arises against the respondent. It is sufficient at this stage to say that he alleged (inter alia) that at the time when the will and codicil were respectively executed the testatrix did not know and approve their contents. He claimed that the court should revoke the grant of probate, pronounce against the validity of the will and codicil and grant to him and his co-plaintiff letters of administration of the estate of the testatrix. The respondent denied the alleged want of knowledge and approval of the testatrix and counterclaimed that the court should pronounce for the will and codicil in solem form of law. Here was the issue, and it is not in dispute that it was for the respondent to prove affirmatively the knowledge and approval of the testatrix.

A few words are necessary about the background of the case. The testatrix, whose mother had been a Miss Wintle, was born in 1871, and was therefore 66 years old when she made her will. She never married. She had one brother, Arthur, and a younger

[3] [1896] A.C. 44; 12 T.L.R. 119.
[4] [1914] 3 K.B. 731; 30 T.L.R. 302.
[5] [1916] 1 K.B. 57; 32 T.L.R. 69.
[6] [1909] A.C. 278.
[7] [1951] P. 10; 66 T.L.R. (Pt. 2) 26; [1950] 2 All E.R. 117.
[8] (1878) 7 Ch.D. 473.
[9] [1930] 1 K.B. 628.
[10] (1862) 2 Sw. & T. 504.
[11] (1889) 14 P.D. 56.
[12] (1815) 2 Phillim. 323.
[13] (1883) 8 P.D. 171.
[14] (1851) 18 L.T.O.S. 175.

sister, Mildred. Her mother, from whom she derived almost the whole of her substantial fortune, died in 1909. She had by her will left her property equally between her three children, but by a codicil made in 1907 she revoked the gift of a share to Mildred and gave her only an annuity of £100. Her reason for doing so was that Mildred had become a Roman Catholic and the mother feared she might dispose of her property to that Church. The result was that she died intestate as to one-third of her estate, and her son Arthur, as her heir-at-law, became solely entitled to that part of it, almost the whole of it, which was real estate. Arthur and the testatrix, however, agreed to make further provision for Mildred and by a deed of settlement of March 16, 1910, covenanted to pay to trustees the sum of £9,000, and in the meantime to pay her interest at the rate of 4 per cent. per annum (i.e., £360) on protective trusts. In 1913 Arthur and the testatrix entered into a deed of partition whereby the whole of the property derived from their mother's estate was divided equally between them. In return for Arthur sharing the real estate with the testatrix she agreed to pay the whole of the sum of £360 due to Mildred under the deed of settlement.

After the death of their mother the testatrix and Mildred lived together, first at Clapham Park, then at Orpington, and finally, from 1929 onwards, at Leigh House, East Grinstead, where they stayed until the death of the testatrix. From the date of the deed of partition until her death her property consisted almost entirely of house property in Hove and Brighton. One of her houses in Hove she retained for her own use, staying there for two or three weeks at a time until 1937, and thereafter often going there for the day. On these visits she was usually accompanied by her cousin, Marjorie Wintle, a sister of the appellant. I can conclude this part of the narrative by reminding your Lordships that Arthur died in May, 1936, and that on the death of the testatrix her sister Mildred, who survived her, was her sole next-of-kin, and that on the death of Mildred, which took place shortly after, her next-of-kin were a numerous class, consisting of her Wells cousins.

The respondent was admitted to be a solicitor in 1906. He and his father before him had acted professionally for the testatrix and her father and mother. He had known her since his childhood but there was no evidence of intimate friendship. Upon the death of Arthur he had taken over the management of her property, having been given by her a power of attorney for that purpose. She was unversed in business and did not want to be worried with the details of management.

I now come to the events which led up to the execution by the testatrix of her will on August 4, 1937. I can do so at no great length without, I hope, omitting anything that would favour the respondent's case. It was in 1929, while Arthur was still alive and managing her property, that the testatrix first consulted the respondent about making her will. It appears that in that year

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she had three interviews with him, and that the matter mainly discussed was the increase of her sister Mildred's annuity, then £360, to a sum of £600 per annum free of tax. But she had not such details of her property as would enable him to advise her. Nor had he. It was for this reason that the matter was not then further pursued, and it was not until October 7, 1936, some months after Arthur's death, when he had taken over the management of the property, that she again consulted him about her will. For what follows I draw upon the oral evidence of the respondent and the notes of attendance and instructions and drafts made by him. There is not a line in the handwriting of the testatrix nor any independent evidence.

I see no reason to doubt that in 1936, as in 1929, the main anxiety of the testatrix was for her sister Mildred. It was twofold: on the one hand, that adequate provision should be made for her, on the other, in accordance with their mother's wishes, that she should have no more than that. At the first interview of October 7 the preliminary wishes of the testatrix were stated to be the appointment of the respondent and the Westminster Bank as executors, the giving of annuities of £250 each to Marjorie Wintle and her sister Dorothy, the making up of Mildred's income to £650 per annum with the right to live in Leigh House, the giving of legacies of £200 each to three local hospitals and the establishment of two pensions at the cost of £600 each for patients at the Streatham Home for Incurables, and the giving of legacies of unspecified amounts to the children of John and Frederick Wintle. Nothing was then said about residue. The testatrix did not then know the amount of her estate, but shortly afterwards the respondent produced to her, as he said, two pages of figures showing roughly her income and capital position. It is sufficient to say that her fortune, consisting of freehold and other property, was estimated to be worth £52,000 gross and, after payment of duties, £38,000. A draft will was then prepared for the testatrix. She required certain insertions and variations to be made in it, including the important naming of eight hospitals in the Brighton area as the residuary devisees. On January 25, 1937, a further paper having been in the meantime prepared which contained further figures, the respondent presented an engrossment of the will as amended for the approval of the testatrix. She, however, said it was not quite what she wished and she wanted time to think it over. For some time she thought it over. There then followed from April 14 onwards a series of interviews in the course of which a number of changes were made. I say nothing of the complication and unusual structure of the will as it eventually emerged. But I must note the salient fact that on April 28 the testatrix, according to the respondent, of her own motion, instructed him to make certain alterations but for which it is unlikely that these proceedings would ever have been started. They were (1) to omit the Westminster Bank as executor and to leave the respondent as sole executor, (2) to

leave the residue of the estate to him in substitution for the eight hospitals, and (3) to include a clause providing that she could leave a letter giving him directions as to dealing with the residue, in case she had forgotten somebody or thought of somebody afterwards to whom she wanted to leave a legacy. The respondent deposed that the reason given by the testatrix for leaving the residue to him was that she did not want to leave her sister Mildred more than £600 a year, but, if she left the residue to him, he would be able to supply further funds for her maintenance: there was no one whom she preferred or could rely on to look after her. He further deposed that, when the testatrix said she wished to leave the residue to him, he told her that she should consult another solicitor or be separately advised, but she said she did not wish to do so. One other matter must be mentioned which took place at about this time, since it assumed some importance in the case. Under the original draft Marjorie Wintle and her sister Dorothy each got an annuity of £260; under the new will as drafted and as ultimately executed their annuities were deleted and they were each given the income of a sum of £1,000 (which was treated as an annuity of £40) with a general power of appointment over £300 part of that sum, the remainder of the sum falling into residue. The respondent deposed that the testatrix told him that, if there was money available, he might increase the annuity to Marjorie to £120. This was, in more than one aspect, a matter of vigorous comment. At further interviews in May figures were again put before the testatrix which purported to show that the ultimate residue, after payment of legacies and duties and providing for the annuities, would amount to £15,000. This was, in any event, a miscalculation. Before the final engrossment and execution of the will a further important alteration was made. It was designed to meet the event of the respondent predeceasing the testatrix and provided that the residue should pass to the respondent "his executors administra-"tors and assigns to the intent that this gift shall not lapse." The reason assigned for this was that the testatrix asked the respondent upon whom she could rely to look after Mildred if he died before her, and he suggested that his executor could do so if the will was thus worded. After still further interviews, at which another clause was approved by which one-third of the investments set aside to provide the annuity of £300 for Mildred should on her death go to three named charities, the will was finally engrossed and duly executed by the testatrix in the office of the respondent on August 4, 1937.

I come now to the codicil and must again draw upon the testimony of the respondent and the relevant documents, though I cannot refrain from the immediate comment that it was a most extraordinary transaction. Otherwise your Lordships might think I had fallen into some error of statement. It was said that shortly after the war began in 1939 the testatrix told the respondent that

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she was concerned about her freehold property depreciating in value, and she was anxious whether there would be sufficient in her estate to pay the annuities, and asked what she should do about it. To this he at first replied that he thought she need do nothing, but at a later date, having read an article in the Law Times [1] which dealt with the depreciation in value of estates and their possible inadequacy to meet pecuniary legacies, he wrote to her advising her to revoke the legacies bequeathed to the three charities on the death of Mildred. She accepted this advice and he drew a codicil to give effect to it which she duly executed on November 13, 1949. The obvious result was that the whole of the funds set aside for the annuity fell into residue. No other codicil was executed, though one had been prepared by which the respondent's executors were named as her executors in the event of his predeceasing her, and a further pecuniary legacy was given to a charity. It was overlooked for some reason.

The testatrix died on December 6, 1947, at the age of 76, and on March 12, 1948, probate of her will and codicil was granted to the respondent. The value of the estate was originally sworn at £82,000, but at a later date a corrective affidavit was filed and the estate was finally assessed for duty at £115,000. The respondent proceeded to administer the estate. The testatrix was survived by her sister Mildred, who was her sole next-of-kin in the event of her intestacy. Mildred died intestate on January 1, 1949. She was survived by thirty or more cousins german who were her statutory next-of-kin, including Vera Sibeon Wells, originally a co-plaintiff in the action, and Frederick Leslie Wells, who, on January 24, 1956, assigned to the appellant all his estate and interest in the estate of the testatrix and Mildred. Three days later this action was commenced.

The action was tried by Barnard J. with a jury. The material questions left to the jury were whether the testatrix knew and approved of the contents of (1) the will and (2) the codicil. To both these questions the jury answered "Yes." With regard to the will, they had been told by the learned judge that they could answer: "Yes, save and except as to the residuary bequest, that "is the bequest to Mr. Nye of what turns out to be the bulk of "the estate."

The appellant appealed to the Court of Appeal, the ground of appeal being that the learned judge had misdirected the jury. That court, by a majority (Hodson and Morris L.JJ.) dismissed the appeal. Sellers L.J., in a dissenting judgment, expressed a contrary opinion.

My Lords, I must in fairness to the respondent elaborate some of the points upon which the learned judge's summing-up was so gravely at fault as to amount to a misdirection, but I would at the outset say that I cannot improve upon, and would with respect adopt, these words of Sellers L.J.: "Having stated," he

[1] (1939) 188 L.T.(J.) 258–259.

said, "the law and the issues accurately and clearly, the question "to my mind is whether the judge, as he continued the summing-"up, complied with the approach to the investigation which the "law, as stated, required. It is in this respect that I find that "it fell short of the law's requirements. In my judgment, "whether it is regarded as a whole or is analysed in detail the "summing-up provided, and encouraged in the minds of the jury, "a benevolent and sympathetic consideration of Mr. Nye's "evidence and in no way led the jury to a critical or hostile "approach to what he said in his evidence and to what he would "appear to have done. In effect, the summing-up of the evidence "substantially negatived the law which the learned judge had in "terms enunciated."

My Lords, the relevant law is not, I think, in doubt. It was, as the Court of Appeal were unanimously of opinion, correctly stated by the learned judge by reference in particular to the judgment of Parke B. in *Barry* v. *Butlin*.[2] It is not the law that in no circumstances can a solicitor or other person who has prepared a will for a testator take a benefit under it. But that fact creates a suspicion that must be removed by the person propounding the will. In all cases the court must be vigilant and jealous. The degree of suspicion will vary with the circumstances of the case. It may be slight and easily dispelled. It may, on the other hand, be so grave that it can hardly be removed. In the present case the circumstances were such as to impose on the respondent as heavy a burden as can well be imagined. Here was an elderly lady who might be called old, unversed in business, having no one upon whom to rely except the solicitor who had acted for her and her family; a will made by him under which he takes the bulk of her large estate; a will made, it is true, after a number of interviews extending over a considerable time, during which details of her property and of her proposed legacies and annuities were said to have been put before her, but in the end of a complexity which demanded for its comprehension no common understanding: on her part, a wish disclosed in January, 1937, to leave her residuary estate to charity which was by April superseded by a devise of it to him, and, on his part, an explanation of the change which was calculated as much to aggravate as to allay suspicion: the will retained by him and no copy of it given to her: no independent advice received by her, and, even according to his own account, little pressure exercised by him to persuade her to get it: a codicil cutting out reversionary legacies to charities allegedly for the benefit of annuitants but in fact, as was reasonably foreseeable, for the benefit of the residuary beneficiary. All these facts and others that I do not pause to enumerate demanded a vigilant and jealous scrutiny by the judge in his summing-up and by the jury in the consideration of their verdict.

[2] (1838) 2 Moo.P.C.C. 480, 482.

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My Lords, I agree with Sellers L.J. that the summing-up fell short of what the law required, and that the jury did not get the guidance to which they were entitled. I am not saying that the judge was bound to call the attention of the jury to every detail of the evidence nor that he was not entitled to express his own view upon it. But a general direction to regard with suspicion evidence given by the author of a will, who is also its chief beneficiary, is of little value if the judge so far neglects his own precept that upon each item of evidence he turns an indulgent eye and accepts without vigilance or jealousy testimony that demanded the closest scrutiny. In such a case as this, complicated as it was by many documents not easily understood, it was not enough for the judge to say to the jury that, if they believed the respondent, whom they had seen and heard, they could decide in his favour. It was imperative that he should at least point out the considerations, which were not lacking, for them to bear in mind in deciding whether they should or should not believe him.

But, my Lords, it is not merely the impression created by the summing-up as a whole which is open to criticism. As to that I would say no more than that, having read all the evidence and documents in the light of the relevant law, I should myself have unhesitatingly come to one conclusion, but that I can at least understand how a jury, after listening to the learned judge's summing-up, could come to the opposite conclusion. But turning to more detailed criticism I find it significant how many are the points at which the learned Lord Justice and your Lordships in the course of the discussion in this House found the summing-up unsatisfactory. Upon all of them I agree with the criticism that was made and would only make observations upon some which appeared particularly defective or misleading. The first is one that was not much discussed. I agree that in this case the question of the testamentary capacity of the testatrix was not in issue. What was in issue was whether she understood and approved the contents of the will she executed. To this issue the quality of her understanding was relevant. So at least thought the respondent, who led evidence designed to show that she was able to understand and approve the contents of a very complicated will—not, of course, the language of art in which it was couched, but the character of the disposition that she was making. It was meagre and unconvincing evidence, and it was countered by the appellant. He called a doctor who had attended the testatrix over a number of years and gave his opinion that she was "a very "unintelligent woman," that she was "just content to exist." The learned judge having first said that, if this were a case in which there was a charge of unsoundness of mind, he would direct the jury to pay great weight to the medical evidence, added: ". . . but there is no such charge. Dr. Pringle is only telling you, "just as any other person will tell you, his impression of this old "lady—and I am wondering whether a doctor would get the best "impression of her; he only saw her when she was lying in bed

"and in pain and feeling miserable." But the evidence by no means justified this description of the doctor's knowledge of her. The jury were left with a direction that a matter which was, as counsel on both sides thought, of substantial importance, was of little or no importance, and they were gravely misled as to the nature of the evidence upon it.

Another particular example that I would give is this. In more than one passage of his summing-up the learned judge encouraged the jury to treat the will and codicil as standing or falling together. That might be unobjectionable if he had then gone on to point out how fraught with suspicion was the codicil. He failed to do so. Counsel for the respondent, who, I take this opportunity of saying, conducted his case with great ability and proper candour, was constrained to admit that the effect of the codicil can hardly have been explained to the testatrix. It is very certain that the jury did not understand that its effect in the likeliest contingency was to benefit the respondent by several thousand pounds. Had they done so they might have found it more difficult to believe that the testatrix understood and approved its contents. Who can say what repercussion this might have had upon their view of her understanding and approval of the contents of the will also?

I referred at an earlier stage of this opinion to the annuity of £260 given by the first draft of the will to a cousin of the testatrix, Marjorie Wintle, with whom she lived on terms of intimate affection, and to its reduction by the final will to the income of a sum of £1,000 with a power of appointment over £300 part of that capital sum. There was, I think, room for grave criticism of the respondent in his dealings with this matter. He was singularly evasive in his letters to Marjorie and in his evidence about it. I will not repeat what Sellers L.J. said upon this aspect of the case, but will call particular attention to the fact that according to the respondent's own story it was on April 28, 1937, that the testatrix told him that he could increase her annuity to £120 if there was money available. This was at a time when (again according to his own story) figures had already been placed before her which, had she understood them, could have left her in no doubt that ample money would be available to meet the increased annuity. Such a circumstance must create the gravest suspicion that the testatrix had little idea of the extent of the benefit she was conferring on the respondent. I am not suggesting that it would be necessary that she should know the precise amount: that in the case of a residuary gift would not be possible. But, if it is a legitimate inference that she thought that the residue was of a measure which might or might not support the increase of an annuity of £40 to £120, then it is clear that she was unaware that she was conferring on him a substantial fortune. Having myself read the pages of complicated figures which were said to have been put before her, and studied what appeared to me to be the very uncandid answers given by

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the respondent upon this part of the case, I cannot think that the jury were directed to view the transaction with the vigilance and jealousy which the law requires.

My Lords, I could give many other examples of the uncritical way in which the learned judge deployed the evidence for the consideration of the jury, some of them, if taken by themselves, of no great importance but adding up to a serious failure to give a true sense of their duty to the jury. I think it is unnecessary to do so, for at the end I come back to the words which at the beginning of this opinion I cited from the judgment of Sellers L.J. It is with diffidence that I differ from the judgments of Hodson L.J. and Morris L.J., but I think, with great respect, that they have paid too much attention to the fact that the learned judge correctly stated the relevant law, too little to the fact that, having done so, he violated it over and over again in his examination of the evidence. In my opinion, there was such misdirection that the jury's verdict cannot stand. I will presently consider what order should be made, but, before doing so, I must deal with a procedural point that was raised by learned counsel for the respondent.

The issue, and the only issue, in this case was whether the testatrix knew and approved of the contents of the will and codicil. That was what the respondent was required to prove. The pleadings contained no allegation of fraud which under the rules (see rule 40A of the Contentious Business Rules and Orders) must be specifically pleaded if it is to be introduced into the case. Therefore, it was said, it was not admissible under the guise of requiring from the respondent strict proof of knowledge and approval for counsel to ask any question or make any suggestion from which it could be inferred that, if the testatrix did not know and approve, it was because the respondent was fraudulent. I should be prepared to overrule this submission on the single ground that no objection was taken before the judge to such questions, that the judge himself, however benevolently he himself appeared to regard the respondent, at least offered to the jury the alternative that they could think he was an "evil man," that the Court of Appeal were not asked to consider the point and did not do so, and finally, that there is no trace of it in the respondent's formal case and reasons. It is therefore too late to raise it now. But, apart from that, I think that there is no substance in the point. The appellant made no charge of fraud. If he had done so, he would have had to prove his case affirmatively. He put the respondent to the proof that the testatrix knew and approved the contents of the will and, if that could only be established by the evidence of the respondent himself, he was entitled to subject him to the severest cross-examination, and at every point to challenge his veracity even though the result might be that the jury would not believe him.

After the appellant had opened his case and learned counsel had concluded his speech for the respondent, their Lordships

intimated that, in their opinion, the verdict of the jury could not stand and that the appeal must be allowed. It was then open to them either to send the case back for a new trial or, taking a less usual course, to declare the will and codicil invalid in their entirety or declare the codicil invalid and the will invalid so far as it purported to confer any benefit upon the respondent. They therefore allowed a brief adjournment in order that the parties might consider their position. At the end of it the respondent, by his counsel, intimated that he no longer wished to assert the validity of the will or codicil so far as any benefit to himself was concerned.

I propose, therefore, that the following order should be made. In the preparation of it their Lordships have had some assistance from the parties but it is not to be regarded as a consent order. The appeal will be allowed and the order of the Court of Appeal of December 16, 1957, and the verdict and decree of Barnard J. (save in so far as it provided for the costs of the first plaintiff, Vera Sibeon Wells) will be set aside. The cause will be remitted to the High Court of Justice, Probate, Divorce and Admiralty Division (Probate), upon the footing that the will dated August 4, 1937, of Kathleen Helen Wells is invalid in respect of the beneficial bequests and devises to the respondent contained in clauses 4 and 5 thereof, and that the codicil of November 13, 1939, is invalid, and that the said will except as aforesaid is pronounced for in solemn form of law and that the said codicil is to be pronounced against, and that such further orders as are right are to be made as to recalling the probate of the said will and codicil granted on March 12, 1948, and as to granting fresh probate of the said will, omitting the said beneficial bequests and devises to the respondent and omitting the said codicil. The appellant will be paid his costs in the High Court and the Court of Appeal and this House out of the estate of the testatrix; the respondent will have his costs in the High Court out of the estate and will bear his own costs in the Court of Appeal and this House.

LORD REID. My Lords, I agree that this appeal should be allowed for the reasons given by my noble and learned friend, Lord Simonds, and I shall only add a few observations. It is well established that the law to be applied is that stated by Lord Wensleydale (then Parke B.) in *Barry* v. *Butlin*,[3] but I do not think that in a case of this kind it is enough simply to explain the law to a jury by using the general expressions which are found in that judgment. To tell a layman that he must be vigilant or jealous or suspicious of the evidence may not convey to his mind the weight of the onus which must be discharged if the will is to stand. In *Fulton* v. *Andrews*[4] Lord Cairns L.C. referred to the duty "to bring home to the mind of the testator the effect "of his testamentary act," and pointed out that failure to

[3] (1838) 2 Moo.P.C.C. 480, 482. [4] (1875) L.R. 7 H.L. 448, 463.

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perform that duty might amount to a greater or less degree of fraud. In *Atter* v. *Atkinson*[5] Lord Penzance (then Sir J. P. Wilde) said: "The proposition, however, is undoubted that if you "have to deal with a will in which the person who made it "himself takes a large benefit, you ought to be well satisfied, "from evidence calculated to exclude all doubt, that the testator "not only signed it but that he knew and approved of its "contents."

In this case, on the respondent's own evidence, it was at least possible to doubt whether the testatrix had any real understanding of the magnitude of her estate in spite of the fact that figures had been shown to her, and whether she was not thinking of putting the respondent in a position to look after her sister Millie—in effect making him a trustee—rather than of conferring a large personal benefit on him. And there was really nothing to show that she intended to confer a large personal benefit on the respondent's executors, administrators or assigns in the event of his predeceasing her. To my mind, the direction of the learned judge was not at all calculated to make the jury realise that they must be "satisfied from evidence calculated to exclude all doubt," or even all reasonable doubt that the respondent had not only shown to the testatrix the relevant information and discussed the will with her, but had brought home to her mind the effect of her will: and that applies with even more force to the codicil.

Lord Tucker. My Lords, I agree, for the reasons which have been stated, that this appeal should be allowed. I also concur in the order proposed by my noble and learned friend on the Woolsack.

Lord Keith of Avonholm. My Lords, I agree.

Lord Birkett. My Lords, I agree that the appeal should be allowed for the reasons already given by my noble and learned friend on the Woolsack, and I also agree with the order propounded by my noble and learned friend.

Appeal allowed.

Solicitors: *Janson, Cobb, Pearson & Co. for F. H. Nye & Murdoch, Brighton.*

F. C.

[5] (1869) L.R. 1 P. & D. 665, 668.

[PROBATE, ETC., DIVISION.]

* STEAMSHIP ENTERPRISES OF PANAMA INC., LIVERPOOL (OWNERS) *v.* OUSEL (OWNERS) AND OTHERS. THE LIVERPOOL.

1959
Jan. 20.

Karminski J.

Admiralty — Practice — Limitation decree — Form — Defect in decree — Amendment — Merchant Shipping (Liability of Shipowners and Others) Act, 1900 (63 *&* 64 *Vict. c.* 32), *s.* 1—*R.S.C., Ord.* 28, *r.* 11, *Ord.* 55H, *r.* 12, *Appendix Q.*
Practice—Slip rule.

The plaintiffs obtained a decree limiting their liability to damages in respect of a collision between their vessel, the *Liverpool,* and the *Ousel.* The decree followed the wording of the form in Appendix Q in the Annual Practice. The Mersey Docks and Harbour Board, who had a claim in respect of the raising and removal of the wreck of the *Ousel,* sought to share in the limitation fund of the *Liverpool.* The owners of part of the cargo laden on board the *Ousel* objected to the claim of the board on the ground that the decree only limited the plaintiffs' liability in relation to claims in respect of loss of, or damage to, vessels, goods, merchandise or other things, and that the board's claim was not such a claim.

The plaintiffs on a summons asked that the decree be amended to allow them to limit their liability to damages, including any loss or damage caused to property or rights of any kind, whether on land or water, or whether fixed or movable, and in the alternative sought a further decree limiting their liability in these respects: —

Held, that the form given in Appendix Q of the Annual Practice was not apt, without modification, to cover liability which could only be limited under the Merchant Shipping (Liability of Shipowners and Others) Act, 1900, s. 1; but that the amendment sought by the plaintiffs was not one which could be made under the slip rule provisions of R.S.C., Ord. 28, r. 11; that the court could not make a further decree of limitation of liability without a fresh action being commenced, and the proper method of correcting an error of this nature was by way of appeal from the original decree.

McCarthy v. *Agard* [1933] 2 K.B. 417 applied.

SUMMONS adjourned into open court.

On January 8, 1957, the plaintiffs' vessel, the *Liverpool,* collided with the *Ousel* in the river Mersey and the *Ousel,* which was laden, sank.

The plaintiffs admitted that the collision was caused by the improper navigation or management of the *Liverpool* and commenced an action to limit their liability under the provisions of the Merchant Shipping Acts, 1894–1954.

On May 28, 1958, the Liverpool district registrar (Mr. Registrar Bryson) made a decree of limitation which followed the form in Appendix Q of the Annual Practice (1959), p. 2561, and provided, inter alia, that "the liability of the plaintiffs to damages "in respect of the casualty which is the subject of this action, "that is to say, the collision between their vessel the steam-"ship *Liverpool* and the steamship *Ousel,* shall not exceed the

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"following limit—as respect claims in respect of loss of, or "damage to, vessels, goods, merchandise or other things, namely "£106,226 12s. 10d. with interest thereon at 4 per cent. from "January 8, 1957, to the date of payment into court or payment."

On August 2, 1958, the Mersey Docks and Harbour Board, having entered an appearance in the action, filed their claim in respect of the expense incurred and damage suffered by them in raising and removing the *Ousel* from the bed of the river Mersey.

On December 4, 1958, the owners of part of the cargo laden on board the *Ousel* filed objections to the claim of the Mersey Docks and Harbour Board, but by a letter dated January 15, 1959, the cargo-owners' solicitors informed the plaintiffs that only one of their objections would be pursued, namely that "if the board "has a cause of action against the plaintiffs in respect of the "sinking of the *Ousel* it is not a cause of action in respect of "which the plaintiffs are entitled to limit their liability and, "accordingly, the board's claim is not one which can properly "be made against the fund in court. In support of this objection "it will be contended . . . that the order of Mr. Registrar Bryson "dated May 28, 1958, only provides for limitation of the plaintiffs' "liability in relation to claims in respect of loss of, or damage to, "vessels, goods, merchandise or other things, and that the "board's claim is not such a claim."

The plaintiffs issued a summons asking for their decree to be amended by adding the words "or any loss or damage caused to "property or rights of any kind, whether on land or on water, or "whether fixed or movable, by reason of the improper navigation "or management of the *Liverpool*." Alternatively, the plaintiffs sought a further decree "under the Merchant Shipping Acts, "1894–1954, limiting the liability of the plaintiffs for damages "including any loss or damage caused to property or rights of "any kind, whether on land or on water, or whether fixed or "movable, by reason of the improper navigation or management "of the *Liverpool*, in respect of the casualty, which is the subject "of this action, that is to say the collision between their steam-"ship *Liverpool* and the steamship *Ousel*."

During the hearing the plaintiffs further sought leave to appeal out of time against the decree made on May 28, 1958, that service of notice of appeal against this decree be dispensed with, and that the time within which this appeal should be heard be abridged so that the appeal be heard immediately.

Roland Adams Q.C. and *Barry Sheen* for the plaintiffs.

J. V. Naisby Q.C. and *G. N. W. Boyes* for the Mersey Docks and Harbour Board.

R. F. Stone for the owners of the *Ousel*.

H. V. Brandon for the owners of part of the cargo on board the *Ousel*.

The following case, cited in argument, is not referred to in the judgment: *Mersey Docks and Harbour Board* v. *Hay*.[1]

KARMINSKI J. stated the facts, and, after referring to the objections filed by the owners of the cargo on board the *Ousel*, continued: Those are matters which could have led to prolonged discussion as matters of law of great interest, at any rate to ship-owners and underwriters; but last week those matters were, in effect, abandoned, except that the owners of part of the cargo on board the *Ousel*, represented by Mr. Brandon, maintained, and still maintain, that the decree as it stands at present does not cover the claim of the Mersey Docks and Harbour Board. Mr. Adams, for the *Liverpool*, is not disposed to accept that argument; but I think that he felt that the decree as it at present stands does not offer that protection which he hoped it might; and equally Mr. Naisby, for the Mersey Docks and Harbour Board, was very anxious that it should be made clear that he claimed to have a share, to which he is entitled, of the fund in court.

The difficulty in this case has perhaps arisen through the form set out in Appendix Q to the Annual Practice (1959), p. 2561, and which is referred to in R.S.C., Ord. 55H. It is not necessary to refer to that order and the rules under it in detail; but it does state in rule 12 of the order: "The forms set out in Appendix Q "to these rules shall be used for the purposes of the proceedings "to which this order applies, with such modifications as circum-"stances may require."

The history of the form which now finds itself in Appendix Q is still, to me, a little obscure. In all probability it is derived from one of the early editions of Roscoe's Admiralty Practice, and may have been in use for a very great many years under earlier Merchant Shipping Acts; but, although the Merchant Shipping Act, 1900, widened the scope of limitation expressly, the existing form of limitation decree still seems to be in use although it was probably designed to meet earlier Acts. It is right to point out that the rules expressly state that the form as set out in the Appendix can be varied; but I gather that, in practice, it has been very constantly used. I am not concerned with a form of that kind; but possibly it might be re-examined with a view to being redrafted and applied in a rather wider form in the future.

I have to deal with the matter as it stands, and it is sought on behalf of the plaintiffs to amend the decree of limitation made by the district registrar, although it is not for a moment suggested that the district registrar committed any kind of error. Indeed, he was asked to make a decree in the form in which it was made, and the draft was examined and initialled by two of the firms of solicitors (who have great experience in these matters), who were concerned in the matter. But I have to consider first whether I

[1] [1923] A.C. 345, 490; 39 T.L.R. 302.

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can, as Mr. Adams has invited me to do, correct or amend the decree of the district registrar. To make that possible I would have to act under the very limited provisions of what is usually called the slip rule, R.S.C., Ord. 28, r. 11. It is desirable that I should read that rule because its words are important. It reads as follows: "Clerical mistakes in judgments or orders, or errors "arising therein from any accidental slip or omission, may at any "time be corrected by the court or a judge on motion or summons "without an appeal." It will be noticed that the rule refers expressly to "clerical mistakes in judgments or orders, or errors "arising therein from any accidental slip or omission." I do not think it can be said here that there was a clerical error of any kind, or that there was "any accidental slip or omission." That rule has always been somewhat carefully construed and only acted upon when the court has been satisfied that the mistake or omission came within the wording of the rule.

Mr. Brandon referred me to the decision of the Court of Appeal in *MacCarthy* v. *Agard*,[1] in which a judgment was obtained against a married woman in the well-known *Scott* v. *Morley*[2] form.; but in fact she was not a married woman, but a widow, having actively misrepresented to the court her status. When the facts were ascertained the plaintiff applied to the master to alter the judgment and that application was acceded to by Goddard J. The matter then went to the Court of Appeal where a majority (Scrutton L.J. dissenting), decided that the court had no power under the slip rule or under the inherent jurisdiction of the court to correct the judgment which had been intentionally given in that form, although procured by the active misrepresentation of the defendant. It cannot, I think, be doubted that the majority of the court (Greer and Romer L.JJ.) came to the clear conclusion, although I think with some obvious regrets, that the real remedy was by appeal or by a further action. Greer L.J. described that as rather "like using a steam-"hammer to crack a nut."[3] But in the present case the procedural difficulties have been smoothed out by my being able to grant leave to appeal and dealing with the matter now.

The other suggestion which was argued by Mr. Adams, for the *Liverpool*, was that, even if I could not deal with the matter under the slip rule, I could in terms amend the order by granting a further decree. I do not think the court has power to deal with that without a fresh action being brought. In my view, either the matter comes under the slip rule or it does not. I have decided without any difficulty that it does not come under the slip rule, and I do not see how the court, even under its inherent jurisdiction, can grant a further decree without further proceedings being brought.

However, in this case it is conceded very fairly by Mr.

[1] [1933] 2 K.B. 417.
[2] (1888) 20 Q.B.D. 120.
[3] [1933] 2 K.B. 417, 425.

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Brandon, that the real way to deal with this matter, if I think it a proper course, is to give leave to appeal out of time against the decree of the district registrar, and I am satisfied that that is the proper course to adopt here. I shall, therefore, give that leave, and I shall allow the appeal by adding to the decree the words "or any loss or damage caused to property or rights of "any kind, whether on land or on water, or whether fixed or "movable, by reason of the improper navigation or management "of the *Liverpool.*"

Plaintiffs' summons dismissed.
Leave to appeal out of time granted.
Plaintiffs' appeal allowed.

Solicitors: *Batesons & Co., Liverpool; R. H. Bransbury, Liverpool; Weightman, Pedder & Co., Liverpool; Waltons & Co.*

A. S-R.

[QUEEN'S BENCH DIVISION.]

* DIXON *v.* B.R.S. (PICKFORDS) LTD.

1959
Feb. 3.

Lord Parker C.J., Donovan and Ashworth JJ.

Road Traffic—Special type of vehicle—Overall width of vehicle and load exceeding 9 *feet* 6 *inches—Number of attendants required—Whether "vehicle" includes vehicles—Motor Vehicles (Authorisation of Special Types) General Order,* 1955 (*S.I.* 1955, *No.* 1038), *art.* 18 (1).

The defendants, the owners of a Scammel and a Leyland tractor, were charged with two offences against the provisions of article 18 (1) of the Motor Vehicles (Authorisation of Special Types) General Order, 1955,[1] in that they unlawfully drove these two vehicles, whose loads exceeded 9 feet 6 inches respectively, without having at least three persons, inclusive of the driver or drivers, in attendance on each vehicle as required by the article. The two tractors with four men in attendance including their two drivers were transporting a large steel cylinder, from each end of which two metal girders were attached to bogies which, in turn, were attached to the tractors at each end of the load. The magistrate held that this arrangement for transporting the cylinders formed one vehicle and load within the meaning of the article and dismissed the informations. On appeal:—

Held, allowing the appeal, that the word "vehicle" where it occurred in article 18 could not be read as, in effect, meaning vehicles or a combination of vehicles, and that the words "any "vehicle" in the article covered not merely a motor-propelled vehicle, but also a trailer itself.

[1] Motor Vehicles (Authorisation of Special Types) General Order, 1955, art. 18 (1): "Where the overall "width of any vehicle, the use of "which upon roads is authorised by "this Part of this order, and its load "or of the vehicle or its load exceeds "9 feet 6 inches, at least three per-"sons inclusive of the driver or "drivers shall while the vehicle is "being driven be in attendance to "attend the vehicle and load."

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Case stated by the Leeds stipendiary magistrate.

On June 17, 1958, two informations were preferred by the prosecutor against the defendants that they on March 4, 1958, did unlawfully use two vehicles, namely, a motor Scammel tractor and a motor Leyland tractor respectively, on a road in Leeds in contravention of article 18 (1) of the Motor Vehicles (Authorisation of Special Types) General Order, 1955,[1] in that the load of each vehicle being in excess of 9 feet 6 inches, there were not at least three persons inclusive of the driver or drivers in attendance respectively while each vehicle was being driven to attend to each vehicle and its load, contrary to the article and section 3 of the Road Traffic Act, 1930.

The magistrate heard the informations and found the following facts: The defendants were the owners of the vehicle or vehicles in question and were on March 4, 1958, using the same on a road in Leeds for the purpose of transporting a heavy load described as a cylindrical section. The maximum width of the vehicle including the load exceeded 9 feet 6 inches. At all material times there were never fewer than four men including the drivers of the tractors in direct attendance on the load and what carried it. The defendants in giving notice as required by law to the Leeds City Police of their intention to use the vehicle or vehicles to transport the load therein described referred to the Scammel and Leyland tractors as separate motor vehicles, also to twin eight-wheeled pneumatic-tyred bogies and the cylindrical section. The load and vehicle or vehicles consisted of the following parts: (1) The load itself, that is, the cylindrical section, which was not borne upon a trailer in any usually accepted sense, but was rigged in such a way as to act as its own "trailer" in that inside the cylindrical section there was a construction from which there protruded, at each end of the cylindrical section, two metal girders, so that the extremities of such girders were attached to fore and hind bogies. (2) A bogie at the front of the cylindrical section and a second bogie at the rear. (3) A motor tractor at the front of the cylindrical section, which was attached to the front bogie, and a second motor tractor at the rear attached to the rear bogie. The whole of the transport, consisting of the load and the machines described, was connected up so as to move as one in bearing and transporting the load.

It was contended by the prosecutor that each of the vehicles mentioned in each of the informations was a vehicle within the meaning of article 18, that, therefore, at least three persons, inclusive of the driver or drivers, should have been in attendance on each vehicle and that, on the facts as found or agreed, the offences alleged had been committed.

It was contended by the defendants that under article 18 (1) "any vehicle" must contemplate more than one mechanically propelled vehicle because in the same regulation it referred to

[1] See note on p. 301.

"driver or drivers," but never to a "vehicle or vehicles," and there could be only one driver at any one time of a mechanically propelled vehicle. Presumably, "any vehicle" referred to the whole unit, and in this case there were two drivers and all that was required was one man in addition, there being in fact two. It was further contended that, in any event, there was only one mechanically propelled vehicle with a "load," that there was only one "load," that the rear tractor had no "load" since its purpose was only to steer the unit round corners, that the regulations could not contemplate three men for each mechanically propelled vehicle where there was only one load so that if there were seven mechanically propelled vehicles and one load the regulations would require 21 men, and that it was only the load which exceeded 9 feet 6 inches and so brought the unit within the article. Further, that article 14 (*f*) stated "the over-"all width of a heavy motor car, locomotive or tractor shall not "exceed 9 feet 6 inches and the overall width of a trailer shall "not exceed 9 feet 6 inches except where a greater width (but "in no case exceeding 20 feet) is necessary for the safe carriage "of the particular load carried by the trailer," and that, therefore, when article 18 (1) states "where the overall width of any "vehicle, the use of which upon roads is authorised by this Part "of this Order, and its load or of the vehicle or its load exceeds "9 feet 6 inches" the word "vehicle" can only apply to the trailer portion of the combination because it was only a "trailer" which could exceed 9 feet 6 inches in width, from which it would follow that the article really required that there should be three people to attend to the load (including the trailer portion upon which the load was carried), and that there could be included in these three persons "driver or drivers." The articles referred to a "vehicle," not a "motor vehicle," and a "vehicle" included a trailer. Finally, it was contended that the defendants could not be guilty under both summonses because there were four people in attendance including the "driver or drivers," and there was therefore the necessary number to attend to one mechanically propelled vehicle and its load.

The magistrate was of the opinion that: (a) The fact that the defendants referred to the motor tractors as separate vehicles in their notice to the Leeds City Police did not estop them from claiming that these tractors and other means of transport of the load formed one vehicle for the carriage of the load, particularly having regard to the circumstances that the normal means of identifying motor vehicles was by their individual marks of registration. (b) Article 18 envisaged only two factors in relation to a transport within its provisions: The load and that which carried it, therein called "the vehicle." (c) The article nowhere used the term "vehicle or vehicles," but it did use the term "driver or drivers." (d) It was reasonable to infer that the expression "driver or drivers" imported the use of more than one self-propelled motivating vehicle inasmuch as such a vehicle

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must be driven by one person at one time, notwithstanding that he might have assistants either to take his place or for any other purpose. (e) If his interpretation was correct as to the transport being regarded by the article as two entities only, namely the load and the vehicle, the total number of attendants required by law, including the driver or drivers of any vehicle, comprised in the means of carriage of the load, need at no time exceed three. (f) As he had found as a fact that at all material times there were never fewer than four men in direct attendance on the load and what carried it, the defendants were not in breach of the terms of the article, and they had committed no offence and, accordingly, he found the defendants not guilty on both charges.

The question for the opinion of the High Court was whether the magistrate was right in law in holding that, in the light of the facts found and the terms of article 18, the motor tractors used in the transport formed, together with the bogies and cylindrical section, one vehicle and load, within the meaning of the article, notwithstanding the fact that the defendants described those tractors as separate vehicles in their notice to the Leeds City Police, and whether the meaning ascribed by the magistrate to the terms of article 18 was correct.

The prosecutor appealed.

J. P. Widgery Q.C. and *Alan Fletcher* for the prosecutor.
John May for the respondents.

No cases were cited in argument.

Lord Parker C.J. stated the facts and continued: In my opinion it is quite impossible to read the word "vehicle" where it occurs in article 18 as in effect meaning vehicles or a combination of vehicles. Such a construction not only does violence to the language actually used but it is to be contrasted with other provisions in the articles which explicitly provide either for vehicles or for a combination of vehicles. Thus, in article 14 (*k*) it is provided: "no vehicle or combination of vehicles shall carry "more than one abnormal indivisible load at any one time"; and by article 21, which is providing for vehicles carrying abnormal indivisible loads over bridges, it is specifically provided that in article 21 a combination of vehicles carrying an abnormal indivisble load shall be deemed to be one vehicle. Further, from the passage which I have read, it would appear that the magistrate attached considerable importance to the expression "the "driver or drivers," because he said that, although "vehicle" was only used in the singular, the presence of those words denoted that more than one self-propelled vehicle was being considered under the term "the vehicle." But Mr. Widgery has drawn our attention to various passages in the Road Traffic Act, 1930, under which this order was made, and it is to be observed, for example, that in section 17 (1) it is provided: "In the case of heavy

"locomotives and light locomotives, two persons shall be "employed in driving or attending the locomotive whilst being "driven on any highway." Therefore, one starts with this, that the Act under which this order was made is dealing with a case where a single vehicle might well have more than one driver. Accordingly, it seems to me that, on the plain reading of article 18, one must consider, not a combination of vehicles as included within the words "any vehicle," but give "any vehicle" its ordinary meaning which clearly in this article covers, not merely a vehicle which is a motor-propelled vehicle, but also a trailer itself. That being so, it is enough for this court to answer the question raised by the magistrate in the negative. It is not right to hold that as a matter of law a combination of vehicles is a vehicle, nor, I might add, on the facts of this case as far as they are known, could it conceivably be possible to hold that this method of transport which I have described consisted merely of one vehicle. Accordingly, in my judgment, this case must go back to the magistrate to consider the matter afresh. What the exact position is in this case it is quite impossible for this court to say. There are many alternatives which will be for the magistrate to decide. It may be—we do not know—that the bogies are attached to the tractors at each end in such a way as to form part of the tractors, in which case there would be two vehicles each of which is carrying as its load a load which was in excess of 9 feet 6 inches. It may be, on the other hand, that each of the sets of bogies forms a vehicle in itself, and a third alternative may be that the cylinder, resting as it does on the bogies at each end and attached by iron girders to them, forms itself a trailer, in which case there would be a single vehicle. But in that event, even if it were to be treated as a single vehicle, a trailer of more than 9 feet 6 inches would have to have three attendants quite apart from the necessary drivers of the two tractors. It will be for the magistrate to find the facts and, in particular, to see whether these defendants have been rightly charged, and in that connection he will no doubt pay attention to any application which may be made to him to amend.

For these reasons it is sufficient to answer the questions raised in the negative and to remit the matter to the magistrate.

I should say that Mr. May raised the point for the defendants that it was unnecessary to send the case back because, as he put it, in any event whatever the findings were the result must be in his clients' favour. His argument, quite shortly, was that in construing article 18 one could read for "vehicle," "vehicles" in the plural and that, accordingly, whatever the number of vehicles, be they two, three, four or five, it would never be necessary in any case to have more than three persons inclusive of the driver or drivers. It is sufficient to say that in my judgment that argument fails. It seems to me that in the context here it is impossible to read the plural for the singular; indeed, if that had been the intention nothing would have been more easy

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than to provide that, however many vehicles were used for a single load, no more than three attendants were necessary.

Donovan J. I entirely agree.

Ashworth J. I agree.

Appeal allowed.

Solicitors: *Sharpe, Pritchard & Co. for Town Clerk, Leeds; Goldingham, Wellington & Co. for Morrish & Co., Leeds.*

J. D. P.

[RESTRICTIVE PRACTICES COURT.]

R. P. Ct.†
(E. & W.)

1959
Jan. 19, 20;
Feb. 2.

* *In re* BRITISH CONSTRUCTIONAL STEELWORK ASSOCIATION'S AGREEMENT.

[1957 No. 3 (E. & W.).]

Restrictive Practices—Practice—Reference—Termination of agreement—Agreement containing price-fixing scheme and recommendations as to conditions of sale—Withdrawal of price-fixing scheme—Admission that price restrictions contrary to public interest—Undertaking not to revive or introduce similar scheme without giving notice to registrar—Evidence in justification of recommendations—No substantial economic significance—Representation by registrar to Board of Trade—Removal of particulars of recommendations from register—Form of order—Restrictive Trade Practices Act, 1956 (4 *&* 5 *Eliz.* 2, *c.* 68), *ss.* 12 (1), 20 (3).

Practice — Restrictive practice — Contrary to public interest — Undertaking not to reintroduce—Procedure.

At the date of reference to the court a trade association's agreement was in two parts; the first part amounted to an agreement between the members of the association to bring into effect a price-fixing scheme, and the second part consisted of a number of recommendations. After the date of the reference, but before the hearing, the association terminated the price-fixing scheme in the first part of the agreement; they also withdrew the recommendations and replaced them by seven new recommendations, three of which related to standard forms of contract and four to agreements made by the association with particular customers, which recommendations they sought to justify under section 21 (1) (*b*) of the Restrictive Trade Practices Act, 1956. During the hearing the association intimated that it was prepared to give an undertaking not to revive the price-fixing agreement or to introduce a similar agreement without giving 28 days' notice to the registrar, and the registrar, after evidence had been called in justification of the recommendations, invited the court to adjourn so as to permit a representation to be made to the Board of Trade so that the board might give directions under

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† *Before*: Devlin J. (President), Upjohn J., Pearson J., Sir Stanford Cooper, Mr. W. L. Heywood, Mr. W. Wallace and Mr. W. G. Campbell.

section 12 (1) of the Act authorising him to remove the particulars of the recommendations from the register as being of no substantial economic significance. The court adjourned, and the Board of Trade having given such a direction, particulars of the recommendations were removed from the register. All that remained on the register, therefore, were particulars of the terminated price-fixing scheme in the first part of the agreement:—

Held, that, in the circumstances, the restrictions in the first part of the agreement would be declared contrary to the public interest, and that the appropriate procedure in respect of the undertaking was by way of a formal application by the registrar for an order in the terms of section 20 (3) (*a*) and (*b*) when, on the undertaking being given, by consent, no order would be made on that application.

Observations on the appropriate form of order.

REFERENCE.

On May 30, 1957, the Registrar of Restrictive Trading Agreements, pursuant to section 20 (2) (*a*) of the Restrictive Trade Practices Act, 1956, referred to the court an agreement numbered 210 on the register of agreements maintained under section 1 (2) of the Act of 1956, subsisting between all the members of the British Constructional Steelwork Association and contained in the constitution of the association, the list of members, all resolutions of the association made pursuant to the constitution and all recommendations made by the association to the members.

The association was made sole respondent to the proceedings on behalf of all its members by a representation order made by the court under rule 11 of the Restrictive Practices Court Rules, 1957.

The association was formed for the purposes, inter alia, of protecting and advancing the interests of the Structural Steelwork Industry of the United Kingdom. The agreement the subject of the reference consisted of two parts. The first part was comprised in a scheme known as the "Scheme for Procedure for Pricing "Structural Steelwork," a scheme fixing the maximum and minimum prices for the supply, delivery and erection of steel-framed structures, certain of the component parts of the structures, and ancillary services provided by members in connection with the structures or component parts. The second part comprised a number of recommendations made by the association to its members.

By its original statement of case the association sought to justify both parts of the agreement as conferring specific and substantial benefits on the public under section 21 (1) (*b*) of the Act of 1956, which they contended would be denied to the public if the agreement were to be abrogated. It further sought to justify the recommendations comprised in the second part of the agreement under section 21 (1) (*g*) of the Act as being reasonably required for the maintenance of the price-fixing scheme.

By an extraordinary resolution passed at a general meeting of the association on September 18, 1958, the price-fixing scheme was terminated with effect from that date, and by a resolution of the executive committee of the association on November

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14, 1958, the recommendations in the agreement were withdrawn and replaced with effect from November 18, 1958, by seven recommendations as follows: "(1) That, except in the case of "requirements which will be the subject of the standard conditions "of contract issued by the contracts co-ordinating committee, "members make a practice of attaching to their quotations for "structural steelwork for buildings, as a condition upon which "their tenders are based, the 'Standard Conditions of Sale for "'Structural Steelwork for Building' (copy attached) adopted by "the association.

"(2) That, where members are acting as sub-contractors to a "general contractor or builder, they should decline to accept any "conditions of contract proposed by the general contractor or "builder other than the standard form of sub-contract issued "under the sanction of and approved by the National Federation "of Building Trades Employers and the Federation of Associa-"tions of Specialists and Sub-contractors (copy attached).

"(3) That, where members are quoting for requirements which "will be subject to the conditions of contract entitled NCB/"stores/I—August, 1951, they should adhere to the arrangement "made between the National Coal Board and the association "(copy attached).

"(4) That, where a member wishes to tender for structural "steelwork for delivery in the home market a price subject to "price variation, he should qualify his tender by the inclusion of "the association's standard variation clause, Form C.F.2 (copy "attached). This recommendation does not apply to tenders to "Government Departments.

"(5) That adjustments of contract price arising from variations "in cost on contracts with the Central Electricity Generating "Board for power station steelwork or transmission (electricity) "line towers should be calculated in accordance with the arrange-"ments agreed between the board and the association (copies "attached).

"(6) That, where members are acting under a contract for "structural steelwork which contains a standard cost investigation "clause imposed by a Government Department, they should "adhere to the arrangement made between the Contracts Co-"ordinating Committee and the association dated August 12, 1948 "(copy attached).

"(7) That, where Government Departments invite tenders on "a variable price basis at a date when there is a possibility of a "wage increase being announced, and they introduce a supple-"mentary condition in the following terms: 'my/our tender takes "'into consideration all awards announced by the recognised wage "'fixing bodies up to the date of this tender, including any such "'awards that take place after that date. I/We agree that my/"'our tender price shall not be subject to adjustment under the "'Variation of Price (Labour Costs) Condition on account of such "'awards.' If, by reason of the time factor, members have not

"been able to take account of an award in calculating their tender "price, they should in their tender state specifically that such "award has not been taken into consideration."

By their amended statement of case the association sought to justify each of the seven recommendations as conferring on the public as purchasers, consumers or users of structural steelwork specific and substantial benefits within section 21 (1) (*b*) of the Act of 1956. In support of this plea the association relied on six matters: (a) In so far as the recommended terms constituted uniform conditions which could be applied in the industry, they saved purchasers of steelwork the trouble, difficulty, time and expense of negotiating an agreement to cover all the matters included in the recommended terms. Further, the recommended terms tended to avoid disputes and uncertainty. (b) The recommended terms gave purchasers of steelwork a standard by which to judge other terms and conditions offered them by suppliers of steelwork. (c) The recommended terms were themselves fair and reasonable and the recommendation of those terms was thereby beneficial to purchasers of steelwork. (d) In so far as the recommended terms were settled by the association in agreement with the purchasers of steelwork, the fact that there was such an agreement was evidence that the recommended terms were beneficial to those purchasers. (e) The practice of discussing and negotiating with purchasers of steelwork the terms applicable to contracts for the supply of steelwork was beneficial to the purchasers and resulted from the association making recommendations in respect of the negotiated terms. If the association did not make such recommendations, the discussions and negotiations with purchasers would cease or, if held, would not be effective. (f) In so far as the recommended terms were similar to terms and conditions in use in other industries similar to the structural steelwork industry, the use of similar terms in similar industries showed that the recommended terms were fair and reasonable and beneficial to the purchaser.

The association contended that none of the recommendations was unreasonable having regard to the balance between the circumstances justifying the recommendations and any detriment to the public or persons not parties to the agreement resulting or likely to result from the recommendations.

By his amended answer, the registrar denied that the recommendations conferred on the public as purchasers, consumers or users of steelwork any specific or substantial benefit or advantage. He contended their removal would not deny to the public the advantages pleaded, since the recommended terms were published for the information of persons interested and were available without any recommendation to members from the association. The registrar did not admit that the recommended terms were fair and reasonable or that any such inference could be drawn from the fact that some of the terms resulted from agreement with purchasers or after negotiations and discussions, or were similar to

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other terms in similar industries, and he contended that the agreements, negotiations, consultations and discussions relied upon by the association occurred during a period when the association operated a price-fixing scheme, and afforded no guidance in present conditions when such a scheme did not exist.

The registrar did not allege that the recommendations caused any detriment to the public.

During the hearing it was stated that the association was willing to give an undertaking[1] not to revive the price-fixing scheme or to introduce another one without giving the registrar twenty-eight days' notice of their intention and was prepared to submit to an order declaring that the price-fixing scheme was contrary to the public interest, strictly in the sense put upon those words by the Act.

Evidence was then called by the association in justification of the recommendations.

B. J. M. MacKenna Q.C. and *D. A. Grant* for the association.

J. R. Cumming-Bruce for the registrar. When the statement of case was amended, the registrar examined the seven recommendations substituted for the previous recommendations to test the validity of the justification made for them. There was no evidence of any detriment being caused by their existence, and

[1] The undertaking was in the following terms:

"The respondents who are identified in the list annexed hereto and marked 'A' undertake—

"(a) Not by themselves their servants or agents or subsidiary companies or otherwise to give effect to or enforce or purport to enforce the agreement adopted by the Executive Committee of the Association on November 9, 1956, which is set forth in Parts I and II of the Scheme for Procedure for Pricing Structural Steelwork and in the Pricing Procedure for Structural Steelwork Schedules B–G, H, M and P (hereinafter referred to as 'The Pricing Scheme') contained in the document annexed hereto and marked 'B' in respect of any of the restrictions numbered 1 to 5 set forth in Part I of the document entitled 'Agreed List of Terms and 'Restrictions within the meaning of 'section 6 of the Restrictive Trade 'Restrictions within the meaning of to and marked 'C' without giving to the Registrar of Restrictive Trading Agreements full particulars of their intention so to do not less than 28 days before any of the respondents their servants or agents or subsidiary companies or otherwise give effect to or enforce or purport to enforce the said pricing scheme in respect of any of the said restrictions.

"(b) Not by themselves their servants or agents or subsidiary companies or otherwise to enter into any other agreement or arrangement, whether or not it is intended to be enforceable by legal proceedings, to the like effect to the pricing scheme in respect of the said restriction without giving to the Registrar of Restrictive Trading Agreements full particulars of such other agreement or arrangement not less than 28 days before such other agreement or arrangement is formed or comes into force, whichever is the earlier.

"(c) That the Association will not by itself or by any person acting on its behalf or otherwise make any recommendation to its members or to any of them to the effect that, when members are selling plain material from stock, they should adhere to the prices established by the National Association of Iron and Steel Stockholders without giving to the Registrar of Restrictive Trading Agreements full particulars of any such recommendation not less than 28 days before the recommendation is made."

when considering their significance the registrar thought that they did not create either substantial benefit or substantial harm. At that stage there was no undertaking by the association in respect of the price-fixing scheme and it was incumbent upon the registrar to move warily until he knew where the association stood. Now that the association has undertaken to give the registrar twenty-eight days' notice of any intention to revive the old scheme or introduce a new one, the registrar has no apprehension about the recommendations.

In those circumstances, it does not seem right that the court should be invited to pronounce upon recommendations which appear to have no major economic significance. Section 12 (1) of the Act of 1956 [2] gives the Board of Trade the responsibility upon a representation by the registrar of authorising the removal from the register of agreements of limited economic significance. The registrar proposes to make such a representation to the Board of Trade in the present case, and the court might think it appropriate to adjourn so as to permit the use of the procedure prescribed by section 12 (1). The registrar is confident that any observations made by the court, were it minded to take the same view, would fortify the representation and would be regarded with the utmost care by the Board of Trade. It would greatly assist the registrar if the court, now that it was seized of the case and had heard the evidence, should it adjourn, would indicate whether in its view the case was an appropriate one for a representation by the registrar under section 12 (1). It is appreciated that the question under section 12 (1) is quite different from that which the court has to determine under section 21 of the Act of 1956.

DEVLIN J. We think that the present case is a proper and appropriate one for a representation to be made under section 12 (1) of the Act of 1956. The court would not allow an adjournment, unless it was of that opinion and unless it thought that the representation would have a reasonable prospect of being acted upon by the Board of Trade.

[2] Restrictive Trade Practices Act, 1956, s. 12 (1): "The Board of "Trade may, upon the representation "of the registrar, give directions "authorising him to remove from the "register particulars of such agree-"ments of which particulars are for "the time being entered therein as "appear to the Board to be of no "substantial economic significance."

S. 20: "(1) The court shall "have jurisdiction, . . . in respect of "any agreement of which particulars "are for the time being registered "under this Part of this Act, to "declare whether or not any restric-"tions by virtue of which this Part "of this Act applies to the agree-"ment . . . are contrary to the public "interest. . . . (3) Where any such "restrictions are found by the court "to be contrary to the public interest, "the agreement shall be void in "respect of those restrictions; and "without prejudice to the foregoing "provision the court may, upon the "application of the registrar, make "such order as appears to the court "to be proper for restraining all or "any of the persons party to the "agreement . . . (*a*) from giving "effect to, or enforcing or purporting "to enforce, the agreement in respect "of those restrictions; (*b*) from "making any other agreement . . . "to the like effect. . . ."

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British Constructional Steelwork Association's Agreement, *In re.*

The proceedings were then adjourned for ten days.

February 2. When the hearing was resumed the court was informed that the Board of Trade had given a direction under section 12 (1) authorising the removal of particulars of the recommendations from the register of agreements, and that the particulars had accordingly been removed.

J. R. Cumming-Bruce for the registrar. The present position is that the part of the agreement which the court was investigating has been removed from the register. The registrar therefore invites the court to terminate these proceedings and it is suggested that, upon a recital to the effect that the particulars of the recommendations in part two of the agreement have been removed from the register pursuant to authority given under section 12 (1) of the Act, the court should make no order. As to the first part of the agreement—that is, the price-fixing scheme which has been terminated—which remains on the register, the court is asked to make an order reciting that it is of the opinion that the restrictions contained in that part of the agreement are contrary to the public interest and to declare accordingly.

[Devlin J. I do not like the court expressing an opinion on matters which it has not investigated.]

[Upjohn J. Perhaps the same result might be achieved by an admission on the part of the association.]

B. J. M. MacKenna Q.C. There is no objection to the order stating that the association was not prepared to defend the proceedings. It follows from there being no defence that the restrictions are contrary to the Act.

[Devlin J. Is the court obliged to make a declaration?]

J. R. Cumming-Bruce. It is desired to have a declaration so that the registrar may be able to apply to the court for an injunction if any respondent gives notice, in accordance with the undertaking, of intention to bring a price-fixing scheme into operation. If no declaration is made, there is nothing on the record, and the association is free to plead the same case again. If there is a declaration reciting the association's admission that the restrictions are contrary to the public interest pursuant to section 21 of the Act, there is a point of departure for any subsequent proceedings.

B. J. M. MacKenna Q.C. No objection would be raised to a recital that the agreement contains registrable restrictions.

J. R. Cumming-Bruce. Then it is proposed that the order should be to the effect that the court declares that the restrictions contained in the named documents are contrary to the public interest and in accordance therewith and pursuant to section 20 (3) of the Act the agreement is void in respect of those restrictions.

Devlin J. That might lead to it being said that we have power to declare whether the restrictions are void, which we have

not. We have power to declare restrictions contrary to the public interest, whence it follows by virtue of section 20 (3) that they are void. The order, therefore, should include a recital that that part of the agreement has been terminated, of the admission by the association, and that no evidence was offered, and should declare that the restrictions contained in it are contrary to the public interest. As to the undertaking, we think that the best course would be for the registrar to make an application for an order under section 20 (3) and that, upon the undertaking being given, by consent, we should make no order upon that application. It is desirable that the words "by consent" should appear in the order; no doubt other parties will wish to follow this form of undertaking but it has not been considered by the court and we should not like it to be thought that its form is not open to argument. A draft order should be settled and submitted to the clerk of the court and if any further consideration of it is required, we will deal with it in chambers.

Order accordingly.

Solicitors: *Bristows, Cooke & Carpmael; Treasury Solicitor.*

J. F. L.

[COURT OF APPEAL.]

* SIM *v.* H. J. HEINZ CO. LTD. AND ANOTHER.

1958 *Dec.* 18.
McNair J.
C. A.
1959 *Feb.* 5, 6.
Hodson, Morris and Willmer L.JJ.

Injunction—Interlocutory—Jury action—Libel—Passing off—No irreparable damage—Whether relief should be granted.
Passing Off—Human voice—Unauthorised imitation—Whether action would lie.

The second defendants, a firm of advertising agents, prepared and produced on commercial television six short sketches for the purpose of advertising the first defendants' goods. The sketches included a human figure in a cartoon form bearing no resemblance to any known person, but accompanying the productions was the voice of a commentator, an actor, who in the past had simulated the plaintiff's voice on the stage. The plaintiff was a well-known stage and film star, and a number of people who knew him well formed the view that the voice in fact being reproduced was the plaintiff's voice, and that, in allowing his voice to be used in this way, he was doing something which was beneath the dignity of his standing as an actor.

On November 13, 1958, the plaintiff issued a writ claiming damages for, inter alia, libel, passing off, and for an injunction. On November 20, 1958, the plaintiff took out a summons asking for an interlocutory injunction restraining the defendants until the trial of the action or further order from broadcasting or procuring the broadcasting of any commentary purporting to be made by the plaintiff relating to the first defendants' goods.

At the hearing of the summons the plaintiff's claim for an

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injunction at that stage based on libel was, in the light of the authorities, abandoned, but it was contended that the broadcasting amounted to a passing off by the defendants of something that belonged to the plaintiff, and that he was entitled to an interlocutory injunction to restrain that broadcasting. McNair J. refused the application. On appeal:—

Held, that the issue whether the plaintiff's reputation as an actor was damaged raised issues similar to those which would have to be tried in the libel action, namely, whether the voice could reasonably be understood to be that of the plaintiff and, if so, whether the use of such a voice did damage to his reputation; that, as in the libel action so in the claim for passing off, the issue would ultimately have to be decided by a jury, and it was therefore undesirable, in the absence of evidence that the plaintiff would suffer irreparable damage, that it should be decided in advance by a judge on the present application; accordingly, the application was properly refused.

Bonnard v. *Perryman* [1891] 2 Ch. 269 applied.

Dictum of Lord Parker in *A. G. Spalding & Bros.* v. *A. W. Gamage Ltd.* (1915) 32 R.P.C. 273, 283 considered.

Quaere, whether an action of passing off would lie for the unauthorised use of a man's voice.

Application for an interlocutory injunction.

The following statement of facts is taken from the judgment of McNair J.:

In the early part of 1958, the first defendants, H. J. Heinz Co. Ltd., decided to embark on an extensive programme of advertising their commodities on commercial television, and for that purpose they engaged the second defendants, Young & Rubicam Ltd., to prepare a scheme. The resulting scheme which was adopted was that six short sketches were prepared for the purpose of advertising the different specialities of the first defendants. There was shown on the screen with, and as part of, these sketches a human figure in a cartoon form, not bearing a resemblance to any known person, but accompanying the production there was the voice of a commentator, Ron Moody, who was an actor, and who, amongst his activities, had in the past given performances in which he simulated the voice of the plaintiff, Alastair Sim, a well-known stage and film actor. Moody denied that on the occasion of the production of the voice of commentator he used his impersonation of the plaintiff's voice. When these sketches had been produced on a few occasions, a number of persons who knew the plaintiff well formed the view that the voice being reproduced was that of the plaintiff, and expressed the opinion that if he allowed his voice to be used in this way, he was doing something which was beneath the dignity of his standing as an actor.

The plaintiff, when the matter was brought to his attention, caused his solicitors to write to both the defendants, asking for an immediate undertaking "that these defamatory and deceptive "broadcasts should cease at once." It was stated in those letters: "The broadcasts have done, and if continued will do, our "client great harm in his reputation. It is derogatory to the

"reputation of a person in the outstanding position of our client "to suppose that he would be concerned in a broadcast of this "nature. Further, the statements made about your goods do "not represent our client's beliefs and persons listening to the "broadcasts would think that our client was prepared, for money, "to make statements that he did not believe."

No undertakings being given, the writ was issued on November 13, 1958, in which the plaintiff claimed against the defendants: "1. Damages for libel and malicious falsehood in respect "of broadcasts by or procured by the defendants and each of "them upon Independent Television of commentaries falsely "purporting to be spoken by the plaintiff extolling the first "defendants' goods. 2. Damages for passing off. 3. An injunc-"tion to restrain the defendants and each of them from broad-"casting or procuring the broadcasting of any commentary "purporting to be made by the plaintiff relating to the first "defendants' goods."

On November 20, 1958, a summons was taken out, asking for an interlocutory injunction "restraining the defendants and each "of them until the trial of this action or until further order from "broadcasting or procuring the broadcasting of any commentary "purporting to be made by the plaintiff relating to the first "defendants' goods or for such further or other order as to this "honourable court may seem just."

On December 18, 1958, McNair J., having heard the summons in chambers, delivered judgment in open court.

Guy Aldous Q.C. and *J. N. B. Penny* for the plaintiff.

Peter Bristow for the first defendants.

Gerald Gardiner Q.C. and *Helenus Milmo* for the second defendants.

McNair J. stated the facts and continued: Mr. Aldous, appearing for the plaintiff, based his claim for the injunction on two grounds: First, that this broadcast being, under section 1 of the Defamation Act, 1952, libel, he was entitled to have that libel restrained if (as he submitted the evidence established) the effect of using the plaintiff's unauthorised voice, or a voice which could be reasonably understood to be the plaintiff's voice, was to lower him in the estimation of right-minded people. Secondly, he claimed an injunction based upon what Mr. Aldous admitted, and I certainly feel, to be a novel ground, namely, that there was a passing off, the nature of which I will describe in a moment.

A considerable body of evidence was put in, but I do not at this stage propose to state my findings of fact upon it. It is quite clear that there was a substantial body of evidence called on the plaintiff's behalf that in fact there was confusion. Persons who knew the plaintiff and his voice well thought that it was his voice; and in different degrees they expressed their surprise that he should allow his voice to be used, and in different degrees

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expressed their feelings as to the effect the use of his voice in these circumstances would have on his professional reputation. On the other hand, there was evidence filed on behalf of the defendants that the plaintiff had a peculiarly characteristic voice which was to be distinguished from the voice reproduced in the broadcast.

In the libel proceedings the primary issue of fact would be whether the voice which was heard on the broadcast could, by reasonable persons, be taken to be or confused with the voice of the plaintiff himself.

It is plain on authority which is binding on me that if the claim here had been for libel alone, it would be wrong in that state of the evidence for me to grant an interim injunction. The matter is summarised in Gatley on Libel and Slander, 4th ed., at p. 707, in these words: "Where the defendant continues to "publish the false or defamatory words"—I would interpose by saying that here the defendants do continue to publish the words alleged to be false or defamatory—"and immediate and "irreparable injury to person or property is likely to result "the court has jurisdiction to grant an interlocutory injunction "restraining the defendant from further publishing the words "until the hearing of the action or until further order. But the "jurisdiction is 'of a delicate nature,' and will only be exercised "with great caution, especially in cases of slander. It will not "in general be exercised unless there is 'strong prima facie "'evidence that the statement complained of is untrue' for "'until it is clear that an alleged libel is untrue, it is not clear "'that any right at all has been infringed.' Moreover"—this is the important passage—"as the question of libel or no libel is "eminently a matter to be determined by the verdict of a jury, "and the court, in order to grant an interlocutory injunction, "must necessarily come to a decision upon that question in "advance, it will exercise its jurisdiction only 'in the clearest "'cases, where any jury would say that the matter complained of "'was libellous, and where, if the jury did not so find, the court "'would set aside the verdict as unreasonable.'"

On the evidence at present filed before me, it would be quite impossible to set aside the verdict of a jury if they said on that evidence that the matter complained of was not libellous.

That being the position, and it being supported by authority such as *William Coulson & Sons* v. *James Coulson & Co.*,[1] where Lord Esher M.R. for the first time laid down the principle, which was approved and adopted by the Court of Appeal in *Liverpool Household Association* v. *Smith*,[2] and again adopted and approved by a full Court of Appeal in *Bonnard* v. *Perryman*,[3] counsel for the plaintiff quite rightly abandoned his application at this stage to ask for an injunction to restrain the further broadcasting of this matter based upon the allegations that they

[1] (1887) 3 T.L.R. 846.
[2] (1887) 37 Ch.D. 170.
[3] [1891] 2 Ch. 269.

were defamatory of the plaintiff, but nevertheless he persisted in his application for an injunction restraining that same broadcasting, based upon the submission that the broadcasting amounted to a passing off by the defendants of something which belonged to the plaintiff.

That submission, which was argued with great skill and in an extremely interesting manner, because it is a novel point, was based, in the first place, upon the well-known judgment of Lord Parker in *A. G. Spalding & Bros.* v. *A. W. Gamage Ltd.*[4] Counsel said rightly that in Lord Parker's speech in that case is to be found really the whole of the essential law relating to the action of passing off, which is, according to Lord Parker, based upon the proposition that "nobody has any right to represent "his goods as the goods of somebody else"; and it is pointed out in that speech that to found the action, the representation need not be fraudulently made, and that it is enough that it has in fact been made, whether fraudulently or otherwise, and that damage may probably ensue.

It was urged before me that in the case of a professional man like an actor, his reputation in the mind of the public, based upon his performances, is a right of property capable of invasion, just as the right of property contained in a particular kind of goods or method of get-up of goods, and that here the defendants were passing off as and for a performance by the plaintiff a performance not by him.

Put in a slightly different way, it is said that an actor has business or trade resting in performance by him of dramatic or musical works and his goodwill lies in that performance. To confuse the public as to his performances is to do injury to that goodwill.

I am not at this stage going to rule upon the question whether, in any circumstances, an action of passing off would lie for the unauthorised use of a man's voice, be he actor or not an actor, though it would seem to me to be a grave defect in the law if it were possible for a party, for the purpose of commercial gain, to make use of the voice of another party without his consent.

What makes it unnecessary for me to solve the problem whether such an action lies is to be found, in my judgment, in this, that the essence of the action of passing off as urged before me by Mr. Aldous, as I understood the argument, was damage to the plaintiff's reputation as an actor. The issue whether his reputation as an actor was damaged raises two issues of fact which seem to be almost identical with the issues of fact which would have to be tried in the libel action; first, whether the voice could reasonably be understood to be the voice of the plaintiff (as to which I express no view), and, secondly, if the answer to the first be in the affirmative, whether the use of such a voice did damage the reputation of the plaintiff in the minds of right-

[4] (1915) 32 R.P.C. 273, 283; 31 T.L.R. 328.

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minded people. If by the well-recognised practice of these courts laid down by the Court of Appeal, in a manner which is binding upon me, I am prohibited or told that it is unwise to grant an injunction in the case of the libel aspect of this action, it seems to me inevitably to follow that I should not grant the injunction on that aspect of the matter which is comprised in the passing-off action. Both of those heads of claim, the libel and the passing off, will, if the action proceeds, ultimately have to be decided by a jury, and it is stated in the authorities that it is most unfortunate that a judge should have to decide in advance an issue which will ultimately have to be decided by a jury.

Accordingly, the grant of an interlocutory injunction being a matter of discretion, in this case I exercise my discretion against the grant of the injunction asked for, either in its form on the summons or the more modified form which was suggested in the course of the argument.

Application refused.

J. D. P.

On appeal by the plaintiff, the following cases, in addition to those referred to in the judgment, were cited in argument: *Hines* v. *Winnok* *; *Landon* v. *Greenberg* †; *London General Omnibus Co.* v. *Lavell* ‡; *Clark* v. *Freeman* §; *Motor Society of Manufacturers and Insurers* v. *Motor Manufacturers and Traders Mutual Insurance Co. Ltd.*¶; *McCullock* v. *May* (*Lewis A.*) *Produce Distributors Ltd.*‖; *British Medical Association* v. *Marsh.***

Hodson L.J. I have heard read the admirable statement of the judge on the facts of this case, and the reasons which he gave for refusing the interlocutory application for an injunction, and I cannot improve upon that judgment. It was an order made in exercise of his discretion, and, in my view, that discretion cannot be assailed in the way in which it was exercised. He based himself fundamentally upon this. There was here a claim that a voice used in the television broadcast was a representation that it was the voice of the plaintiff, an actor, the voice used in the television broadcast coming from the lips of another actor and sounding as if it were the voice of the plaintiff. There was, it was claimed, a cause of action in libel, but the plaintiff before the judge, in the light of the authorities, abandoned the claim for an injunction based upon libel, because it was clear that it could not succeed, as in libel cases it has been held in many cases, including *Bonnard* v. *Perryman*,[1] that the court will not prejudge the issue of libel or no libel where that is a live issue in the case, and where the question is whether the words are capable of a defamatory meaning or whether the words are justified.

* (1947) 64 R.P.C. 113.
† (1908) 24 T.L.R. 441.
‡ [1901] 1 Ch. 135; 18 R.P.C. 74.
§ (1948) 17 L.J. 142.
¶ [1925] 1 Ch. 675.
‖ [1947] 2 All E.R. 845.
** (1931) 48 R.P.C. 565.
[1] [1891] 2 Ch. 269.

In the present case the judge came to the conclusion that, there being no right or duty in the court to grant an injunction, in so far as this was a libel case, that he ought, in the circumstances, to take the some course on the footing of passing off; I think that his reasoning was correct. He pointed out that the issue which was to be tried in the libel action was, broadly, the same as the issue to be tried in the passing-off action: the issue being, in the first place, whether the voice could be reasonably understood to be the voice of the plaintiff, and, secondly, there was the question of damage. The plaintiff's case, on the evidence which he put forward in his affidavit in support of this application, alleged damage to his property, that is to say, his voice, as a general part of his stock-in-trade as an actor, which he said was damaged by being prostituted in the way in which it has been used on television. Mr. Aldous, for the plaintiff, says it does not matter if the damage in the passing-off action is the same as the damage in the libel action, as the plaintiff is entitled to the assistance of the court on the basis of his claim in respect of passing off. But I am in agreement with the judge's reasoning that it would be inappropriate to take the course, while refusing an injunction in the matter of libel, of granting an injunction in the matter of passing off.

I would only add this. This is, on any view of the matter, a novel form of action of passing off. The plaintiff contends that his voice as an actor is part of his stock-in-trade and therefore is something which he is entitled to protect as part of his goods. No doubt that is an arguable case, but there are various questions to be determined in this action, which has not yet been tried, including the question whether this voice can in truth be regarded as a property and whether, in the circumstances of this case, there could be said to be anything in the nature of unfair trade competition in a common field, where in the one case you have an actor who uses his voice in the performance of his particular occupation and, on the other hand, another actor who, in some way or other, uses his voice to imitate a voice on television for advertising purposes. In my view, it is not right for this court to express any opinion upon those matters.

I will conclude by referring to one authority on the question of damage—*Samuelson* v. *Producers Distributing Co. Ltd.*[2] That was a case concerned with the passing off of a theatrical sketch called "The New Car," of which the plaintiff owned the copyright in the sketch. Romer L.J. said[3]: "But the cases in which the "court has restrained passing-off in the popular and usual sense "are merely instances of the application by the court of a much "wider principle, the principle being that the court will always "interfere by injunction to restrain irreparable injury being "done to the plaintiff's property." No doubt the Lord Justice had in mind the language of Lord Parker in the leading case on

[2] (1931) 48 R.P.C. 580. [3] Ibid. 593.

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this branch of the law, *A. G. Spalding & Bros.* v. *A. W. Gamage Ltd.*,[4] in which discarded footballs of the plaintiffs were sold by Gamages as being of their own manufacture. Lord Parker said it was enough that the representation had in fact been made, "whether fraudulently or otherwise, and that damages may "probably ensue, though the complete innocence of the party "making it may be a reason for limiting the account of profits "to the period subsequent to the date at which he becomes aware "of the true facts." To my mind, the plaintiff in the present case has not, through his counsel, made out a case of such a kind that he has persuaded the court that it ought to interfere by way of injunction, on the ground that unless the court does so, irreparable damage will ensue.

For these reasons, I think that the appeal fails and should be dismissed.

Morris L.J. I entirely agree with the judgment that my Lord has just delivered and, in view of the nature of the present proceedings, I do not think that there is anything I wish to add to what my Lord has said.

Willmer L.J. I also agree.

Appeal dismissed.

Solicitors: *Goodman, Derrick & Co.; Warmingtons & Trevor Jones; Allen & Overy.*

A. W. G.

[4] (1915) 32 R.P.C. 273, 283.

[PROBATE, ETC., DIVISION.]

* NEVILL *v.* NEVILL.

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Feb. 9–13.
Sachs J.

Legal Aid—Certificate—Discharge—Disclosure that certificate obtained on basis of false statement made at hearing—Circumstances in which court will exercise its power to revoke or discharge certificate —Legal Aid (General) Regulations, 1950 (*S.I.* 1950, *No.* 1359), *reg.* 11 (4).

Husband and Wife—Practice (in matrimonial causes)—Pleading—Reasonable belief in improper associations pleaded as defence to charge of false accusations—Whether evidence of conduct on which belief based can be adduced if not pleaded.

A wife, who had obtained a civil aid certificate, presented a petition for divorce on the ground of her husband's adultery and cruelty, the latter consisting, inter alia, of alleged false accusations by the husband of improper association with other men. The husband, by his answer, denied the cruelty, admitted the alleged

accusations, but said that he, at all times, reasonably believed them to be true, and cross-prayed for a decree on the ground of the wife's adultery, which the wife, by her reply, denied. Immediately before the hearing the wife disclosed for the first time that she had in fact committed adultery. On an application by her counsel for leave to make the appropriate amendments in the pleadings, counsel for the husband submitted that the circumstances were such that the court should, in the exercise of its power under regulation 11 (4) of the Legal Aid (General) Regulations, 1950, discharge the wife's civil aid certificate:—

Held, that the power given to the court by regulation 11 (4) should be exercised only when it was clear that the Law Society, on being apprised of the facts, would revoke or discharge the civil aid certificate; that that was not the situation in the present case and, in the circumstances, the proper course was to allow the suit to proceed without incurring the additional costs of an adjournment for the matter to be considered by the Law Society.

During the course of the hearing counsel for the husband sought to lead evidence of an inquiry agent to establish that the wife was, in fact, guilty of the improper associations referred to in the pleadings:—

Held, that it was not open to a party pleading reasonable belief as an answer to allegations of false accusations of improper conduct followed by a general traverse to adduce evidence as to the truth of the conduct which formed the substance of the accusations unless the facts alleged were specifically pleaded.

DEFENDED SUIT.

A wife, who had obtained a civil aid certificate, petitioned for dissolution of marriage on the grounds of her husband's cruelty and adultery between December, 1944, and September, 1947, condoned but revived by acts just short of cruelty or by desertion. Paragraph 12 of her petition read as follows: "That in and "since December, 1954, the respondent has frequently but falsely "accused the petitioner of improperly associating with other "men."

She did not ask for the exercise of the court's discretion in her favour.

The husband, by his answer, denied the cruelty alleged, but made certain admissions by way of confession and avoidance, one of which, in paragraph 4 (c), was as follows: "He often accused "the petitioner of improperly associating with other men but on "all such occasions reasonably believed her to have done so. . . ." There followed a general traverse of the specific charges of cruelty.

He cross-prayed for a divorce, in the exercise of the court's discretion, on the ground of the wife's adultery in 1947, condoned but revived by her desertion. The wife, by her reply, denied the adultery alleged. Immediately before the hearing, however, she revealed to her legal advisers for the first time that the allegation was, in fact, true.

At the hearing of the suit counsel for the wife, disclosing to the court the wife's adultery and the fact that her application for a civil aid certificate had been made on the basis that she had not

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committed adultery, applied for leave to make the appropriate amendments in the petition. Counsel for the husband did not oppose the application for leave to amend the petition, but submitted that, the wife's civil aid certificate having been obtained by virtue of a false statement on her part, the court should exercise its power under regulation 11 (4) of the Legal Aid (General) Regulations, 1950,[1] and discharge the wife's civil aid certificate.

James Comyn for the wife.
Anthony Cripps Q.C. and *G. F. B. Laughland* for the husband.

No cases were referred to in argument.

Sachs J. referred to the facts, gave leave for the appropriate amendments to be made to the pleadings, and continued: The position, as I see it, is clear. Supposing, in the first instance, the wife had, on the form of application for a civil aid certificate, admitted her adultery, there would still have emerged the question whether she was entitled to a decree on the ground of her husband's cruelty and there would still have emerged the question whether she was entitled to a decree on the ground of the revival of his long-condoned act of adultery. It would seem to me quite impossible to suppose that any committee of the Law Society would have done otherwise, in the circumstances, than grant her legal aid. Accordingly, it follows that legal aid is appropriate to this particular cause, and the only question that can arise from the Law Society's point of view, taking a practical outlook, is whether to initiate criminal proceedings for the breach of the provisions of section 15 of the Legal Aid and Advice Act, 1949. That is a matter entirely for the Law Society.

So far as applications to the court under regulation 11 (4) of the Legal Aid (General) Regulations, 1950, are concerned, to my mind the court will only, as a rule, give an immediate decision in clear cases. Thus it may be clear that for one reason or another the cause is not one in which there is any real likelihood of the Law Society revoking the certificate, in which case it is obviously, from the point of view of costs, right that the cause should proceed, and that any application such as has been made by Mr. Cripps should be rejected. In the alternative, as in a contract

[1] Legal Aid (General) Regulations, 1950, reg. 11 (4): "At any time "during the hearing of any proceed- "ings to which an assisted person is "a party the court may, upon appli- "cation by or on behalf of any other "party to the proceedings or by the "Law Society, consider whether the "assisted person—(*a*) has wilfully "failed to comply with any Regula- "tion as to the information to be "furnished by him; or (*b*) in furnish- "ing any such information has know- "ingly made a false statement or "false representation; and on any "such application the court may "make an order revoking the certi- "cate or discharging it from such "date as may be appropriate and "the court's decision shall be final: "Provided that no order shall be "made under this sub-paragraph "until the assisted person has been "given an opportunity to show cause "why the certificate should not be "discharged or . . . revoked."

case, when the legally assisted plaintiff has to face in the witness-box the plain fact that the document on which he is proceeding was, to his knowledge at all material times, forged, it would equally be idle to think for a moment that the Law Society would do anything else but revoke the certificate: in that case the obvious course would be for the court to take advantage of its powers under regulation 11 (4).

In the present case it seems to me abundantly clear that the right course is to reject the application and, accordingly, no question of an adjournment in order that the Law Society may consider the position arises. Any such adjournment is, in its nature, bound to involve undue additional costs. (Such an adjournment, of course, as Mr. Comyn pointed out, would have been necessary if it had been desirable for the assisted person to be cross-examined, because one does not want to conduct a preliminary trial before one comes to the true trial.) The application must be rejected.

[The hearing continued, during the course of which counsel for the husband proposed to lead evidence given by an inquiry agent that the wife was in fact guilty of the improper associations alleged in paragraph 4 (c) of the answer. Upon objection by counsel for the wife the court refused to allow that evidence to be given, but admitted de bene esse the reports of his activities. In the course of his judgment SACHS J. referred to the relevant paragraphs of the pleadings and made the following observations:] The effect of the pleadings is that there is no affirmative allegation of improper conduct or of any facts which could constitute improper conduct. If it is desired, in answer to an allegation of false accusations of adulterous, immoral or other improper conduct, to adduce evidence that the wife was in fact guilty of such conduct, this cannot, in my view, be done by alleging belief in the truth of the allegations and, stopping short of alleging that truth, relying on the general traverse. The actual facts alleged must be specifically pleaded.

[On the facts as found by the court the question did not arise whether the reports of the inquiry agent were admissible in support of the plea of reasonable belief. His Lordship, concluding his judgment, pronounced a decree nisi in favour of the wife and rejected the cross-prayer of the husband's answer.]

Order accordingly.

Solicitors: *Collyer-Bristow & Co. for Bird & Lovibond, Uxbridge; Edward Mackie & Co.*

E. J.

[COURT OF APPEAL.]

C. A.

1959
Feb. 24, 25.

Hodson, Morris and Willmer L.JJ.

* BRAGG *v.* CROSVILLE MOTOR SERVICES LTD. AND OTHERS.

[Plaint No. 0979A.]

Costs—Joint tortfeasors—Contribution—Written offer of contribution before trial—Offer refused—Liability for costs—R.S.C., Ord. 16A, *r.* 12A.

Judicial Precedent—Discretion—Exercise of—Danger of treating as precedent.

The plaintiff, who was a passenger in his employers' lorry, was injured when the lorry came into collision with an omnibus owned by the first defendants. He brought an action for damages against the first defendants, the driver of the omnibus, and his own employers. On April 17, 1958, the plaintiff's employers, by a letter pursuant to R.S.C., Ord. 16A, r. 12A,[1] made an offer to the first defendants to pay one-third of any damages which the plaintiff might recover. This offer was refused, and the action went to trial. The effective contest in court was between the first defendants and the plaintiff's employers. The county court judge awarded the plaintiff £225 damages and ordered the employers to pay one-third thereof. He refused an application that the first defendants should pay all the costs after the date of the offer of April 17, 1958, and, accordingly, ordered the plaintiff's employers to pay one-third of the costs. On appeal:—

Held, that the county court judge had wrongly considered his discretion to be fettered by the decision of Devlin J. in *Basted's* case (infra); and that, in the circumstances, to give effect to Ord. 16A, r. 12A, an order would be made that the plaintiff's employers should be given the costs of the action after April 17, 1958.

Basted v. *Cozens and Sutcliffe Ltd.* [1954] 1 W.L.R. 1069; [1954] 2 All E.R. 735; [1954] 2 Lloyd's Rep. 132 distinguished.

Per Hodson L.J. I think it is dangerous in exercise of discretion to take a reported case as a guide for that exercise in another case.

Appeal from Judge Fraser Harrison sitting at Liverpool County Court.

The plaintiff, James Joseph Bragg, was injured when a lorry,

[1] R.S.C., Ord. 16A, r. 12A: "A party to an action who, either as a third party or as one of two or more tortfeasors liable in respect of the same damage, stands to be held liable in the action to another party to contribute towards any debt or damages which may be recovered by the plaintiff in the action, and who, at any time before the trial of the action, makes a written offer to that other party (whether absolute or conditional and whether limited or not as respects the time for acceptance thereof) to contribute to a specified extent to the debt or damages, may, in making that offer, while stipulating that it is to be without prejudice to his defence (whether as against the plaintiff or as against the party to whom the offer is made or as against any other party to the action), nevertheless reserve the right to bring the offer to the attention of the judge at the trial as if it were a payment into court (that is to say, after all questions of liability and amount of debt or damages have been decided), and if such an offer is so brought to the attention of the judge in pursuance of a right so reserved, the judge shall, to such extent, if any, as he may think appropriate in all the circumstances, take the offer into account in exercising his discretion as to costs."

in which he was a passenger, owned by his employers, the third defendants, F. C. Kirk & Co. Ltd., came into collision with an omnibus owned by the first defendants, Crosville Motor Services Ltd.

The plaintiff, in the first instance, brought an action against the first defendants, the omnibus company, and the second defendant, the driver of the omnibus, and he subsequently joined his own employers as third defendants. Contribution notices were served by the third defendants on the first defendants, and by the first defendants on the third defendants. The action was one in which the plaintiff was bound to succeed either against the omnibus company or his employers or both of them.

On April 17, 1958, the third defendants, through their solicitors, wrote a letter to the solicitors of the first defendants couched in the terms of R.S.C., Ord. 16A, r. 12A, as follows: "Further "to our letter of the 8th instant we have now received instruc- "tions concerning the matter. We regret to say that our clients "are not prepared to make any increase on the offer previously "made and we therefore repeat the offer made in our letter of the "11th of March last, namely, that the defendants, F. L. Kirk "& Co., offer to contribute towards the plaintiff's claim and "costs to the extent of one-third thereof. We confirm that the "offer is made with the denial of liability, and we reserve the "right to bring such offer to the notice of the judge at the trial, "as if it were a payment into court, to be taken into account if "necessary in the exercise of his discretion concerning the costs "of the proceedings." A contribution notice was enclosed with this letter. This offer was refused and the action went to trial.

At the hearing the county court judge gave judgment for the plaintiff and found that the first and second defendants were two-thirds to blame and the third defendants one-third to blame. He awarded the plaintiff £225 damages and ordered the third defendants to pay one-third thereof. The third defendants thereupon made application to the judge that in the exercise of his discretion as to costs he should give effect to the letter of April 17, 1958, by ordering the first defendants to pay all the costs after that date. But upon his attention being drawn to *Basted* v. *Cozens and Sutcliffe Ltd.*[2] he held that he was bound by that decision and ordered the third defendants to pay one-third of the costs. The third defendants appealed on the question of costs.

R. R. Leech for the third defendants.
F. J. Nance for the first defendants.

The following cases, not referred to in the judgments, were cited in argument: *Donald Campbell & Co. Ltd.* v. *Pollak*[3]; *Clarke* v. *Wright & Son (A Firm)*.[4]

[2] [1954] 1 W.L.R. 1069; [1954] 2 All E.R. 735; [1954] 2 Lloyd's Rep. 132.

[3] [1927] A.C. 732; 43 T.L.R. 495, 787.

[4] [1957] 1 W.L.R. 1191; [1957] 3 All E.R. 486.

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Hodson L.J. stated the facts and continued: The county court judge, as we understand the position, would have acceded to the application of the third defendants that in the exercise of his discretion as to costs he could give effect to the letter of April 17, 1958, by ordering the first defendants to pay the costs after that date. He was, however, deflected from this by his attention being drawn to the judgment of Devlin J. in *Basted* v. *Cozens and Sutcliffe Ltd.*,[1] of which a full report appears only in Lloyd's List Reports. The attention of the county court judge was not drawn to the report in the Lloyd's List Reports. It appears from an examination of that report that there was considerably more in that case than in the present one. The two defendants were each seeking to cast the blame on the other. The second defendant was the Port of London Authority, and the first defendants, whose name appears in the title of the case, were the employers of the plaintiff. The second defendants alleged contributory negligence against the first defendants and attempted to avoid liability by saying that the crane, which was the cause of the accident, and which turned out to be defective, was in that condition without negligence on their part. I think it is dangerous in exercise of discretion to take a reported case as a guide for that exercise in another case. This is specially true when the judgment on costs is taken apart from its context of the findings of fact which are contained in the same judgment.

In the case as reported in Lloyd's List Reports it appears that substantially the time of the court was taken up not only in considering a heavy claim for damages, but also in considering the condition of this alleged defective crane and the reason for its condition. Devlin J., as I read his judgment, did not intend to lay down as a proposition of law that a defendant who paid in or did the equivalent vis-a-vis another defendant is to be deprived of the benefit of that payment in, even if at the trial he shows that he is not liable to the plaintiff.

I should make it clear that Devlin J. was not dealing with the rule which I have read, but with an earlier rule which is not now in force, namely, R.S.C., Ord. 30, r. 2 (*j*), which provides that on the hearing of the summons for directions the master may make an order as follows: "In cases where two or more tort-"feasors are sued together in respect of the same tort or damage "and any one of them in the same proceedings claims contribution "from the other or others, order that a written offer of con-"tribution made by any one of such tortfeasors to the other or "others of them shall be treated for the purposes of such claim "as a notice of payment into court." I should read the judgment in the *Basted* case,[2] and read it as it was read to the county court judge out of context. Devlin J. said[3]: "I can give full effect "to the rule in this case in the way in which I imagine effect

[1] [1954] 1 W.L.R. 1069; [1954] 2 All E.R. 735.

[2] [1954] 1 W.L.R. 1069.

[3] Ibid. 1070.

"ought to be given. The offer that the Port of London Authority "had made is to be treated as if it were equivalent to a payment "into court. That means that any person who disputes the "payment into court or the offer as being sufficient, must pay "all the costs that have been incurred as a result of the con-"tinuance of such dispute, which would otherwise be thrown "away. The rule may be very effective in a case where there are, "for example, separate proceedings for contribution. The rule "may be effective where a large part, or some appreciable part, "of a single trial is taken up by a dispute as to whether the "proper proportions, if there is any liability, are 50 per cent. or "are not 50 per cent.; but in this case there has been no dispute "of that sort. Neither party at any time during the trial has "even so much as addressed me upon what the proper proportion "of contribution should be. They were content to leave it, as, no "doubt, it must be left, to the view that I took of the facts of the "case. Accordingly, in the circumstances, no costs have been "thrown away as a result of the employers having failed to agree "the apportionment at 50 per cent., and they cannot be made "liable under this rule for costs which the second defendants have "incurred in continuing (wrongly as it turned out) to resist that "they were liable at all."

In saying what he did, Devlin J. was, I think, doing no more than alluding to the absence of any real contest between the two defendants in the case before him. If he had intended, which I do not think that he did, to go further and deprive the defendant of the advantage of the rule in a case such as we are now considering, I think that the judgment could not be supported. The object of the rule and its predecessor is to enable the parties to save costs, and it draws their attention to a method in which this can be done, and then requires the court to take into consideration the fact that the rule has been acted upon.

It is scarcely necessary to add that, apart from the rule, unsuccessful efforts by parties such as are exemplified by the letter of April 17, 1958, directed to save costs, are properly taken into account by the court in the exercise of the jurisdiction as to costs.

In my view, the county court judge was misled by the reference to *Basted's* case,[4] and wrongly allowed his discretion to be fettered thereby.

It would be indeed unfortunate, the damages here being only some £200, if it were found necessary to send this case back for a further order about costs, but, in my view, the court is in a position to exercise its discretion on the simple facts of this case. Apart from liability, as to which the contest was between the first and third defendants, there remains only the question of damages. The special damages having been agreed, and the medical reports also having been agreed, there is only a small

[4] [1954] 1 W.L.R. 1069.

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margin attributable to general damages, and I cannot think that the case would ever have gone to trial on this question alone. I would therefore give effect to the rule and exercise the court's discretion in favour of the third defendants by giving them the costs of the action after April 17, 1958. The judgment obtained by the plaintiff against both defendants is unaffected.

Morris L.J. I agree. There was a collision at cross-roads between two vehicles, a Crosville bus and a lorry. The plaintiff, who was injured, was a passenger in the lorry. No one suggested that the plaintiff had done anything wrong. He was therefore entitled to succeed in recovering damages in one of three ways: (a) against the owners of the bus; (b) against the owners of the lorry; (c) against both.

As between the owners of the two vehicles there were certain communications. The bus owners said that they would pay half the damages to which the plaintiff was entitled if the owners of the lorry would do likewise. The lorry owners would not, but they said that they would pay one-third if the bus owners paid two-thirds. The bus owners would not agree to this. So each party served a contribution notice on the other, and the letter of April 17, 1958, was written on behalf of the lorry owners.

If the two owners had been able to agree, there could and would have been an admission of liability to the plaintiff. Either the amount of the damages would have been agreed, as, indeed, seems probable, or there could have been an offer and a payment into court, and in any contest in court relating to damages only there would probably have been one representation by counsel or solicitors for both defendants.

As it was, there was a contest. But no one suggested that the plaintiff could lose. Either of the owners could have admitted liability to the plaintiff while reserving the claim to contribution. But it was unlikely that one would do this when the other was not doing so. In the result, the contest in court was in reality one between the two owners. Each wanted the sole blame to be held to be in the other, or, failing such a result, to have as high a proportion of blame as possible ascribed to the other. But in every practical sense the two owners were fighting each other.

The judge eventually held that both parties were liable to the plaintiff, but that, as between themselves, the bus owners should bear two-thirds and the lorry owners one-third of the liability to the plaintiff. But that result could have been reached if the bus owners had agreed to the proposal made in the letter of April 17. The costs would have been saved either in whole, as is probable, or, as to all except any incurred in assessing the damages.

When the letter of April 17, 1958, was made known to the judge, it seems clear from what we have been told that he was disposed to make an order that as between the defendants the bus owners should be liable for the plaintiff's costs subsequent to

April 17, and should pay the lorry owners' costs in that subsequent period. He was deflected by a consideration of *Basted* v. *Cozens and Sutcliffe Ltd.*[5] But that case had very different issues, as the full report shows. The employee sued his employers alleging faulty system and the suppliers of the crane alleging negligence. The latter alleged contributory negligence against the plaintiff. It was not a case in which he was sure to succeed against one or both. The decision of Devlin J. is not under appeal, and it is not necessary to express either concurrence or dissent from his decision in regard to the costs.

Devlin J., in his judgment, said in reference to the rule then existing[6]: "The rule may be very effective in a case where there "are, for example, separate proceedings for contribution. The "rule may be effective where a large part, or some appreciable "part, of a single trial is taken up by a dispute as to whether "the proper proportions, if there is any liability, are 50 per cent. "or are not 50 per cent., but in this case there has been no "dispute of that sort. Neither party at any time during the trial "has even so much as addressed me upon what the proper "proportion of contribution should be."

The present was essentially a case in which the effective contest, save as to the actual amount of the damages, was between the two defendants, and the issues need never have been fought if the bus owners had accepted the offer made by the lorry owners. The latter had said on April 17, 1958: "We will "contribute one-third," leaving the bus owners to contribute two-thirds. That was what the judge decided should be the result. The decision of Devlin J. does not, in my judgment, debar the lorry owners from advancing their claim for costs but tends to support it, and had the judge taken this view, he would, I think, on the facts of this case, have said that the contentions of the lorry owners were just and reasonable.

His discretion in favour of the lorry owners was only not exercised because he felt that the decision in *Basted's* case[7] prevented him; as it does not, we can make the order which I have no doubt he would have made.

WILLMER L.J. I agree. I had prepared myself to deliver a separate judgment of my own, but, having listened to what has fallen from my Lords, I find it quite unnecessary to do more than to say that I wholly agree with everything that has been said by them.

Appeal allowed.

Solicitors: *Field, Roscoe & Co. for Guy Williams & Co, Liverpool; Stanley & Co. for A. W. Mawer & Co., Liverpool.*

J. A. G.

[5] [1954] 1 W.L.R. 1069.
[6] Ibid. 1070.
[7] [1954] 1 W.L.R. 1069.

[HOUSE OF LORDS.]

H. L. (Sc.)† 1959 *Jan.* 13, 14; *March* 4.

* MORTIMER . . . . . APPELLANT;

AND

SAMUEL B. ALLISON LTD. . . . . RESPONDENTS.

Building—Safety regulations—Demolition—Damaged house—Hole in floor—Breaking of part of perimeter—Fall of employee—Employer's liability—Meaning of "collapse"—Meaning of "adequate shoring "or otherwise"—Building (Safety, Health and Welfare) Regulations, 1948 (*S.I.* 1948, *No.* 1145), *reg.* 79 (7).

Ejusdem Generis Rule—Statute—Building—Precautions against collapse "by adequate shoring or otherwise"—Meaning of "other-"wise"—Building (Safety, etc.) Regulations, 1948, *reg.* 79 (7).

By regulation 79 (7) of the Building (Safety, Health and Welfare) Regulations, 1948: "Before demolition is commenced and also "during the progress of the work precautions shall, where neces-"sary, be taken by adequate shoring or otherwise to prevent, as "far as practicable, the accidental collapse of any part of the "building . . . the collapse of which may endanger any person "employed."

The appellant, being employed by the respondents in the demolition of a building damaged by fire, was injured when part of the floor gave way beneath his feet and he fell through. In that floor there was a large hole through which debris was dropped from a higher floor into a lorry beneath. Its edges were repeatedly struck by this debris, some of which collected on the floor around it and had to be thrown through the hole. The appellant had just completed such a clearance when the flooring on which he was standing broke. He claimed damages from the respondents, not on any allegation of breach of duty at common law but on an alleged breach of regulation 79 (7). On trial of his action with a jury a verdict was entered in his favour. The First Division of the Court of Session set aside the verdict. On appeal to the House of Lords:—

Held, that the verdict was rightly set aside.

Per Viscount Kilmuir L.C., Lord Goddard, Lord Reid and Lord Keith of Avonholm. What occurred did not amount to a "collapse "of any part of the building" within the regulation.

Per Viscount Kilmuir L.C., Lord Goddard and Lord Reid. The words "by adequate shoring or otherwise" did not cover such precautions as were suggested on behalf of the appellant, viz., withdrawing the men from the floor or laying planks over the perimeter of the hole and so giving the men a new platform on which to work.

Per Lord Tucker and Lord Keith of Avonholm. On the evidence the occurrence was not one which a reasonable employer would have considered it necessary to guard against by shoring or by any other supporting device, since the pillars, beams and joists were unaffected when the accident happened.

Decision of the First Division of the Court of Session affirmed.

APPEAL from the First Division of the Court of Session.

This was an appeal against an interlocutor pronounced by the First Division of the Court of Session, dated March 14, 1958,

† *Present*: VISCOUNT KILMUIR L.C., LORD GODDARD, LORD REID, LORD TUCKER and LORD KEITH OF AVONHOLM.

setting aside the verdict of a jury sitting with Lord Guest pronounced on October 18, 1957. The appellant, William Mortimer, who was the pursuer, claimed damages from the respondents, Samuel B. Allison Ltd., who were the defenders, on the allegation that part of the flooring of a building in the course of demolition gave way beneath his feet and that, as a result, he fell to the ground beneath. His case was based on an alleged breach by the respondents of the duties said to have been imposed on them by regulation 79 (4) and (7) of the Building (Safety, Health and Welfare) Regulations, 1948. The respondents submitted that the verdict of the jury was contrary to the evidence, and that the interlocutor of the First Division was well founded in fact and law and should be affirmed.

The facts are fully stated in the opinion of Viscount Kilmuir L.C.

L. H. Daiches Q.C. and *Ewan Stewart* (both of the Scottish Bar) for the appellant.

W. I. R. Fraser Q.C. and *R. I. Sutherland* (both of the Scottish Bar) for the respondent company.

The following authorities were cited in argument: *Marshall* v. *Gotham Co. Ltd.*[1]; *McCarthy* v. *Coldair Ltd.*[2]; *Knight* v. *Demolition and Construction Co. Ltd.*[3]; *Hendry* v. *Clan Line Steamers Ltd.*[4]; *Allen* v. *Emerson*[5] and *Callaghan* v. *Fred. Kidd & Son (Engineers) Ltd.*[6]

Their Lordships took time for consideration.

March 4. VISCOUNT KILMUIR L.C. My Lords, this is an appeal against an interlocutor of the First Division of the Court of Session in Scotland, dated March 14, 1958.

The appellant was the pursuer in an action for damages for personal injuries against the respondents who carry out demolition work, and who employed him as a labourer at the date of the accident which caused his injuries. He had been set to work by the respondents in a building which had been seriously damaged by fire and was in course of demolition. In the first floor of the building a large hole had been made, through which debris was dropped from a higher floor into a lorry standing in a pend beneath the hole. Over a period of time the edges of the hole had been repeatedly struck by pieces of rubble and debris thrown down and missing the hole. Debris thus collected on the floor and from time to time had to be cleared by a workman lifting it and throwing it through the hole. The appellant had just completed such a clearance when the accident occurred. A floor

[1] [1954] A.C. 360; [1954] 2 W.L.R. 812; [1954] 1 All E.R. 937.
[2] [1951] 2 T.L.R. 1226.
[3] [1953] 1 W.L.R. 981; [1953] 2 All E.R. 508.
[4] 1949 S.C. 320.
[5] [1944] K.B. 362; [1944] 1 All E.R. 344.
[6] [1944] K.B. 560; 60 T.L.R. 409; [1944] 1 All E.R. 525.

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board broke beneath his feet and the appellant, who was then turning away from the hole, fell through the hole, sustaining serious injury.

The appellant's case was based entirely on breaches of the Building (Safety, Health and Welfare) Regulations, 1948. At no time was the case based on negligence at common law in regard, for example, to system of work or provision of a safe place of working for the respondents' workmen.

The appellant originally relied on two sub-regulations; namely, sub-regulations (4) and (7) of regulation 79. Sub-regulation (4) deals with overloading and sub-regulation (7) with the taking of precautions to prevent accidental collapse of any part of the building. The respondents took no plea to the relevancy of the appellant's case. Issues were allowed and approved in ordinary form. The case was tried on October 17 and 18, 1957, by a jury sitting with Lord Guest. The jury unanimously answered the issue for the appellant in the affirmative and assessed damages at £1,500.

The respondents moved for a new trial on the grounds that the verdict of the jury was contrary to the evidence and that the award of damages was excessive. On March 14, 1958, the motion was heard by the First Division along with Lord Guest. The respondents did not maintain that the award of damages was excessive. On that date the First Division pronounced the interlocutor now appealed against. This interlocutor applied the procedure introduced by the Jury Trials Amendment (Scotland) Act, 1910, section 2, and was a final interlocutor entering judgment for the party unsuccessful at the trial, namely, the respondents. At the hearing of the respondents' motion for a new trial the appellant's case under regulation 79 (4) was not persisted in. It had, however, been deployed both in the pleadings and at the hearing before Lord Guest and a jury. It is therefore impossible to say what influence it had in obtaining the affirmative answer from the jury. Before this House no request was made for a new trial on this ground, and I have assumed that the jury must be taken to have formed a view favourable to the appellant on every point which arose at the trial with regard to taking precautions to prevent accidental collapse.

Sub-regulation (7) reads as follows: "Before demolition is "commenced and also during the progress of the work precautions "shall, where necessary, be taken by adequate shoring or other-"wise to prevent, as far as practicable, the accidental collapse of "any part of the building or of any adjoining building the collapse "of which may endanger any person employed: Provided that this "requirement shall not apply in relation to any person actually "engaged in erecting or placing shoring or other safeguards for "the purpose of compliance with this regulation if appropriate "precautions are taken to ensure his safety as far as circum-"stances permit."

It is important to observe how the matter was put in the third

condescendence. After alleging the overloading the pleader goes on: "It was the effect of this overloading that the said floor was "rendered unsafe and that part of it near the said hole ultimately "gave way as condescended on. Moreover, in the circumstances, "it was necessary to take precautions by shoring or otherwise "to support the said floor to prevent the accidental collapse "thereof or any part thereof. The defenders well know, or ought "to have known, that the said floor was only supported by façade "and said walls as previously condescended upon, that it had "further been severely weakened by fire damage, by the making "of a large hole at least four or five feet wide in it, by the said "overloading with debris, and by the repeated striking of the "edges of the said hole by falling pieces of debris. The defenders "took no steps by shoring or otherwise to support the said floor "and to prevent as far as practicable the accidental collapse "thereof. Had the defenders carried out the statutory duties "incumbent upon them the accident would not have occurred."

The argument of counsel for the appellant before this House can, I think, be fairly summarised as follows: The floor had been burnt, there was damage to the edges of the hole, and the perimeter of the hole had been (I use his words), "subject to a "bombardment of debris which had been thrown towards the "lorry but had landed on this perimeter." The perimeter was therefore in a weak condition and the plank that broke and caused the fall of the appellant formed part of the perimeter which was in the condition alleged. On this part of his argument the pursuer prayed in aid this sentence from the opinion of Lord Guest: "There was evidence, which the jury were entitled to believe, "that the condition of the floor in the vicinity of the hole was "dangerous." The argument went on to urge that the jury could have properly taken the view that the fact that this part of the floor was dangerous should have caused a reasonable man engaged on demolition to have anticipated that a collapse of part of the floor might occur; that, therefore, it would have appeared necessary to such a reasonable man to take precautions by shoring or otherwise to prevent a collapse; that, in fact, part of the floor did collapse; that this collapse caused the fall of the appellant; that no precaution at any time had been taken, and that a witness called for the respondents had conceded that if the state of the floor had been appreciated as being dangerous he would have taken precautions. These last words referred to certain cross-examination of the witness McKay at pp. 95 (*c*) to 96 (*a*) of Part II of the Appendix, which was in the following terms:

"Q. But if in fact the floor surrounding this hole was being "bombarded by falling debris do you not agree that it would "have been a wise and practical precaution to have shored or "strengthened the flooring in some way or another? A. If that "had been necessary I would have done so. Q. But if it had "been bombarded in this way, don't you agree that it would "have been a necessary precaution to take? A. Only if there

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"was material damage being done. Q. Suppose for a moment "that in fact the sides of the planking at the sides of that "hole were being visibly damaged by falling debris, would you "not agree that some kind of precautionary measure should have "been taken? A. If it had been visibly damaged. Q. But, of "course, you say you saw no such visible damage? A. Nothing "untoward."

The argument contained and developed the following criticism of the opinions of the First Division: 1. That they misconstrued regulation 79 (7) by holding that the giving-way of the floor was not an accidental collapse of a part of the building within the meaning of the regulation; 2. that they further misconstrued the regulation by holding that the only precautions which the employers were thereby required to take were precautions by shoring or by some method akin to shoring.

In my opinion, the word "collapse" in this regulation must be given its ordinary meaning which is the action of falling together, or a sudden shrinking together, or a giving-way through external pressure or loss of rigidity or loss of support. When one has to consider the words "collapse of part of the building" I do not think that it is necessary to delimit precisely the size of the part so long as that part is sufficient to allow the action described in my definition to operate. There may well be circumstances where the giving-way of part of a floor through pressure or loss of rigidity or loss of support might constitute the collapse of part of a building. There must always be some element of degree in deciding whether damage constitutes a collapse; nevertheless, wherever the line may be drawn in particular circumstances there will remain occurrences which no one can fairly describe as collapses of, but only as damage to, a part of the floor. The view that I have formed of the meaning of "collapse" is supported by the terms of sub-regulation (5).

In the present case there was evidence of the danger of finding either a broken floor board or a floor board which might crack and break under the foot of the workman. Nevertheless, giving full weight to the evidence, and to the quotation from Lord Guest, I cannot find that there was evidence of a collapse in the true sense of that term. Equally, I am unable to say that the jury should have inferred, from the state of the perimeter and the fact that floor boards might break, that a reasonable man experienced in demolition would have anticipated a collapse of the perimeter (that is the part of the floor round the hole), or that it would have appeared necessary to such a reasonable man that precautions should be taken by shoring or otherwise to prevent a collapse.

I now turn to the construction of the words "by shoring or "otherwise." It was accepted in the argument before us that shoring means support from below. In my opinion, the words "or otherwise" cover other physical measures to prevent collapse. Such "anti-collapse" measures, as they were called in the course of the argument, could include lateral support which

might be provided by some external means or, it may be, by binding. The proviso to sub-regulation (7) which I have quoted is in accord with this construction. If this be the true meaning of "precautions by shoring or otherwise" the extract relied on from the cross-examination of Mr. McKay leaves the matter too vague and too much in the air to help the appellant.

Before us, it was suggested that the precautions which should have been taken were either a withdrawing of the men from the floor or a laying of battens or planks over the perimeter of the hole and so giving the workmen a new platform on which to walk and work. In my opinion, these suggested precautions are not within those precautions prescribed by the sub-regulation. Further, they do not appear to me to be within the case made against the respondents in the pleadings of failing to support the floor.

I say nothing as to whether the absence of the precautions suggested would have been relevant in an action differently framed. The case before us is confined to an allegation of non-compliance with this sub-regulation. That case fails and I would dismiss the appeal.

LORD GODDARD. My Lords, I have had the advantage of reading the opinion just delivered by the Lord Chancellor and entirely agree with it. I agree that the appeal should be dismissed.

LORD REID. My Lords, the appellant was employed by the respondents in demolishing a building in York Street, Glasgow, which had been seriously damaged by fire. In order to remove the debris of the upper floors a hole was made in the floor of the lower storey through which this debris was thrown into lorries brought through a pend to a position immediately below this hole. Some of the material thrown down from above did not fall through the hole: it accumulated on the floor round about the hole. On the occasion of the accident on February 2, 1955, the appellant went down to the first floor to clear this material away by throwing or pushing it through the hole. When he had finished this work he was standing about a foot from the hole and something happened which caused him to lose his balance and fall through the hole, with the result that he sustained injuries for which he seeks damages in this action.

The ground of fault averred against the respondents is breach of regulation 79 of the Building (Safety, Health and Welfare) Regulations, 1948 (S.I. 1948, No. 1145). No common law liability is alleged. The appellant succeeded before a jury and was awarded £1,500 damages. The respondents moved for a new trial on the ground that the verdict was contrary to the evidence, and by an interlocutor of March 14, 1958, the First Division, with Lord Guest who presided at the trial, set aside the verdict and assoilzied the respondents from the conclusion of the summons. This appeal is taken against that

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interlocutor. The appellant maintains that there is sufficient evidence to support the verdict of the jury: but if the verdict is set aside he does not seek a new trial.

Originally the appellant alleged breaches of both paragraph (4) and paragraph (7) of regulation 79. Before the First Division it was rightly admitted that there was no evidence of a breach of paragraph (4) and the sole question now is whether there was evidence on which the jury were entitled to find that the respondents were in breach of paragraph (7).

Regulation 79 sets out a number of safety provisions which must be observed in the demolition of any building or substantial part of a building. Paragraph (7) provides: [His Lordship read regulation 79 (7) and continued:] The respondents took no such precautions: their case is that there is no evidence from which it could legitimately be inferred that any such precautions were necessary, and that in fact there was no "collapse" of any part of the building. To determine whether any such precautions were necessary, one must, I think, take the time immediately before the accident and consider whether a reasonable man, skilled in this work and having made a proper inspection, would have thought that there was any danger of collapse of any part of the building which could be obviated or reduced by taking any such precautions. Counsel did not dispute that this was the proper test.

There was no evidence that there was any weakness in or danger of collapse of the joists or the beams which supported the floor: the evidence was all the other way and, in fact, there was no collapse or movement of the joists or beams. The evidence on which the appellant relies related entirely to the floor boards. This evidence is confused, but for the present purpose I must take those parts of it most favourable to the appellant because the jury may have accepted those parts and rejected the rest. On that basis, the jury were, I think, entitled to hold that parts of the floor surface had been damaged either by fire or by the impact of heavy pieces of debris which had been thrown down from the upper storeys and had struck this floor instead of passing through the hole as they ought to have done: and further, that there had been some enlargement of the hole where the impact of such debris had broken away some pieces of the floor boards at the edges of the hole. The jury were also entitled to find that the appellant fell through the hole because the floor board on which he was standing moved. It is not at all clear why or how it moved, but there is perhaps just enough evidence to entitle the jury to think that it broke when the appellant put his weight on it.

The breaking of that board is said to have been the "collapse" of a part of the building. It is argued that, although one may generally think of a collapse as the giving-way or crumpling up of a fairly large part of a building, it is impossible to draw a line and say that the giving-way of one part would be a collapse but the giving-way, in similar circumstances, of a slightly smaller part

would not. That kind of argument is of respectable antiquity, but when one is dealing with the meaning of words it can never be conclusive. I would agree that the breaking away of a whole floor or a part of a floor might well be held to be a collapse of a part of a building. But I find it impossible to apply that expression to the breaking off of a part of a single floor board, especially when I look at the context in which the word "collapse" is found.

The paragraph requires that where necessary precautions shall be taken "by adequate shoring or otherwise" to prevent accidental collapse. Shoring would not be appropriate unless the part liable to collapse was substantial, and the words "or otherwise" appear to me to refer to other methods of physical support which may be adopted in some cases in preference to shoring. The proviso refers to "erecting or placing shoring or "other safeguards," and this appears to me to confirm the meaning which, I think, should be given to the words "or otherwise": it indicates that what the paragraph requires is the erecting or placing of something calculated to prevent collapse. Additional support might be given to the beams or the joists of a floor, but it would seem to be impracticable to have afforded additional support to individual floor boards in this case, and additional support to the beams or joists would not have prevented the accident.

Counsel for the appellant relied on certain evidence given by Mr. McKay, who was employed by a firm of architects in connection with the demolition operations. In examination in chief he was asked: "Q. Did you ever feel the slightest danger of "collapse of the floor? A. No. I did not. Q. If you had, of "course I take it you would have taken appropriate measures? "A. Yes, I would have stopped any more loading of the motors." That must refer to something more extensive than the giving-way of a single floor board. Then in cross-examination: "Q. But if in "fact the floor surrounding this hole was being bombarded by "falling debris do you not agree that it would have been a wise "and practical precaution to have shored or strengthened the "flooring in some way or other? A. If that had been necessary "I would have done so. Q. But if it had been bombarded in this "way, don't you agree that it would have been a necessary "precaution to take? A. Only if there was material damage "being done. Q. Suppose for a moment that in fact the sides "of the planking at the sides of that hole were being visibly "damaged by falling debris, would you not agree that some kind "of precautionary measure should have been taken? A. If it had "been visibly damaged."

It was argued that the jury, accepting the evidence that there was visible damage at the sides of the hole, were entitled to take this as an admission that some kind of precautionary measure should have been taken. Be it so. But what kind of precautionary measure? The matter was taken no further in evidence, and in argument only two suggestions were made—that

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the workmen should have been withdrawn from the area, or that the floor boards near the hole should have been covered with sound timber which would not give way under a man's weight. It was not, and could not reasonably be, suggested that individual floor boards should have been given support, and that was clearly not what Mr. McKay meant. The case made by the appellant in his condescendence is that "in the circumstances it was necessary to take precautions by shoring or otherwise to support the "said floor to prevent the accidental collapse thereof or any part "thereof." There is nothing in the evidence from which it could be inferred that this was necessary, and if additional support had been given to the floor that would not have prevented this accident.

I have already stated my opinion that precautions of the kind now suggested in argument are not within the scope of the regulation. Regulation 79 is not a codification of all the employers' duties to workmen engaged in demolition. It is not co-extensive with the common law. It deals with certain particular perils and it requires, under penalty, that certain particular things shall be done. But it may often be proper that other unspecified things should be done to protect workmen from injury—proper in the sense that these things would be done by a careful and reasonable employer, and that, if a workman is injured by reason of their not having been done he can recover damages from his employer at common law. But the employer will not be in breach of the regulation if he fails to do these things. It may be that a case could have been made at common law that precautions such as those now suggested in argument should have been taken. I express no opinion whether such a case could have succeeded: there might have been further evidence if such a case had been made. But, in my opinion, there is no evidence to support the appellant's case under the regulation and, therefore, this appeal should be dismissed.

Lord Tucker. My Lords, I felt some doubt during the hearing of this appeal whether there was not sufficient evidence to justify the jury's verdict that the pursuer's injuries had been caused by the accidental collapse of part of the building in course of demolition within the meaning of regulation 79 (7) of the Building (Safety, Health and Welfare) Regulations, 1948, and my doubt on this score has not even now been entirely resolved.

Assuming a collapse, I am, however, of opinion that, once the allegation of overloading was abandoned, there was no evidence that the condition of the plank was such that a reasonable demolition contractor would have considered it necessary to take precautions by shoring or otherwise to support the floor which was the allegation made against the defenders in paragraph 3 of the pursuer's condescendence. The occurrence, if technically a collapse of part of the floor, was not one which a reasonable man would have considered it necessary to guard against by shoring or

by any other supporting device, having regard to the fact that there was no suggestion that the joists, the beams or the iron pillars supporting the floor were not at all times firmly in position.

I therefore agree that the appeal fails.

LORD KEITH OF AVONHOLM. My Lords, I find it unnecessary to go into all the points that have been argued on the construction of regulation 79 (7) of the Building (Safety, Health and Welfare) Regulations, 1948, for I think that, in the circumstances of this case, the appellant pursuer must fail on two grounds. On the most favourable reading for the pursuer of the evidence placed before the jury the most that, in my opinion, can be said is that a plank of the flooring situated between two joists, on which the pursuer was standing, broke under his foot, as a result of which the pursuer was thrown off his balance and fell off the floor through the hole in the floor which had been made for the passage of debris. The extent of the break spoken to by the only witness who professes to have seen it is given as 12 inches by 6 inches. The plank itself was undisturbed and the broken piece was left hanging to the plank. In my opinion, this occurrence cannot be regarded as an accidental collapse of part of a building in the course of demolition. I arrive at this view on a general consideration of the purpose and content of the regulation and particularly of paragraph (7) of the regulation. The meaning of "collapse" may, I think, be gathered from the method by which the paragraph contemplates that accidental collapse may, not necessarily always but as far as practicable, be prevented, namely, "by "adequate shoring or otherwise." It stands to reason that no amount of shoring or other protection would prevent the fall of a small piece of damaged plaster or a loose brick, and I cannot conceive that such an occurrence would be called a collapse of part of a building. Nor would I describe a small break in a floor less than one foot square, caused by the weight of a man's foot, a collapse of part of the floor within the meaning of the regulation. It may be tempting to say that the question is one of degree, and so was a question of fact for the jury. There may be some cases where the question is one of degree, but this, in my opinion, is not one of them. This occurrence, in my view, is so remote from collapse that the question of degree does not arise.

On another ground, also, I think the pursuer must fail. It would never occur, in my opinion, to a reasonable man, by whom I mean a reasonable man experienced in, or capable of estimating the risks associated with demolition work, that it was necessary to take precautions by shoring or otherwise against the breaking of the plank said to have happened here. The flooring was carried by pillars, beams and joists which were quite unaffected when the accident happened, and there is no evidence to suggest that it should occur to anyone that it was necessary to give further support to the planking in between the joists. No such natural inference arises in the case of a floor carried on joists and, in my

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opinion, no evidence led by the pursuer was sufficient to warrant the jury in holding that it would occur to a reasonable man that any such special necessity existed. In this I agree with the opinions of the judges of the First Division.

On the view that I take it is unnecessary to consider what is the ambit of the words in the regulation "by adequate shoring or "otherwise." It was argued that there was no room here for the application of the ejusdem generis rule because there was no enumeration of instances from which a genus could be inferred. I am not satisfied that a genus cannot be found from the content of the word "shoring," and from the context in which the words are found. My impression is that the words cover any device that will tend to prevent the accidental collapse of a building or part of a building in course of demolition. But as it is unnecessary to determine the point in this case I offer no concluded opinion on it.

I would dismiss the appeal.

Appeal dismissed.

Solicitors: *Asher, Fishman & Co. for Allan McDougall & Co. S.S.C., Edinburgh, and John S. Boyle & Co., Glasgow; Clifford-Turner & Co. for Allan, Dawson, Simpson & Hampton W.S., Edinburgh, and Jno. Shaughnessy & McColl, Glasgow.*

F. C.

[PROBATE, ETC., DIVISION.]

1959
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* PRACTICE DIRECTION (LEGAL AID).

Legal Aid—Costs—Husband and wife—Maintenance—Registration of orders—Maintenance Orders Act, 1958 (6 *&* 7 *Eliz.* 2, *c.* 39), *s.* 2.

It is considered that where an applicant for the registration in a magistrates' court of an order for ancillary relief has a civil aid certificate which covers the obtaining of that order, the application for registration (whether made on or after the making of the order) may be regarded on taxation under the Legal Aid and Advice Act, 1949, as part of the proceedings for obtaining the order and not as proceedings for its enforcement.

B. LONG,
Senior Registrar

Registrar's Circular,
February 25, 1959.

[COURT OF APPEAL.]

* DE JEAN *v.* FLETCHER.

C. A.

[Plaint No. O. 1340.]

1959
Feb. 23, 24.

Lord Evershed M.R., Ormerod L.J. and Lloyd-Jacob J.

Landlord and Tenant — Rent tribunal — Furnished premises — Rent registered—Subsequent letting at increased rent—Claim for refund of overpaid rent—Rent fixed by tribunal and registered—Registered rent applicable to subsequent lettings—Furnished Houses (Rent Control) Act, 1946 (9 *&* 10 *Geo.* 6, *c.* 34), *ss.* 2, 3, 4.

The defendant was the owner of residential premises which he had let furnished to tenants at a rent of £2 a week. Those tenants had applied under the Furnished Houses (Rent Control) Act, 1946,[1] to the local rent tribunal which had, by an order of December, 14, 1955, reduced the rent to £1 a week. That rent was duly registered in the register kept under the Act by the local authority. The original tenants having left, the defendant, at the request of the plaintiffs, spent about £70 on bettering the premises and then, on July 7, 1956, let the premises to the plaintiffs at a rent of £3 a week. The defendant having determined the plaintiffs' tenancy, in

[1] Furnished Houses (Rent Control) Act, 1946, s. 2: "(1) Where a contract has, . . . been entered into whereby one person (hereinafter referred to as the 'lessor') grants to another person (hereinafter referred to as the 'lessee') the right to occupy as a residence a house or part of a house . . . in consideration of a rent which includes payment for the use of furniture or for services, . . . it shall be lawful for either party to the contract or for the local authority to refer the contract to the tribunal for the district, . . . (2) Where any contract to which this Act applies is referred to a tribunal, then, . . . the tribunal shall consider it and, . . . shall approve the rent payable under the contract or reduce it to such sum as they may, in all the circumstances, think reasonable, . . . (3) Where the rent payable for any premises has been entered in the register in accordance with the provisions hereinafter contained, it shall be lawful for the lessor or the lessee or the local authority to refer the case to the tribunal for reconsideration of the rent so entered on the ground of change of circumstances, and the provisions of subsection (2) of this section shall apply on any such reference in like manner as they apply on a reference under subsection (1) of this section subject to the modification that the tribunal shall have power to increase the rent payable."

S. 3: "(1) The local authority shall prepare and keep up to date a register for the purposes of this Act, and shall make the register available for inspection in such place or places and in such manner as the Minister may direct. (2) The register shall be so prepared and kept up to date as to contain, with regard to any contract under which a rent is payable that has been approved, reduced or increased under the last foregoing section (being a contract relating to premises situated in the area of the local authority), entries of—(*a*) the prescribed particulars with regard to the contract; (*b*) a specification of the premises to which the contract relates; and (*c*) the rent as approved, reduced or increased by the tribunal, and, in a case in which the approval, reduction or increase is limited to rent payable in respect of a particular period, a specification of that period."

S. 4: "(1) Where the rent payable for any premises is entered in the register under the provisions of this Act, it shall not be lawful to require or receive—(*a*) on account of rent for those premises in respect of any period subsequent to the date of such entry (or, in a case in which a particular period is specified, in respect of that period) payment of any sum in excess of the rent so entered; or . . ."

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these proceedings the plaintiffs sought to recover £2 a week for 98 weeks as overpaid rent:—

Held, that having regard to the provisions of sections 2, 3 and 4 of the Furnished Houses (Rent Control) Act, 1946, once, quoad any premises, a rent had been entered on the register kept by the local authority pursuant to the provisions of section 3 of the Act, that became "the rent payable" for the premises until it was changed by a subsequent determination or until the period for which the entry had been made had expired; that it was not justifiable to read words into section 4 limiting the rent payable to the rent payable during the currency of the particular contract considered by the tribunal; and, accordingly, that the defendant under section 4 was not entitled to require on account of rent a sum in excess of the registered rent, and he was liable to repay the overpaid rent.

Lazarus-Barlow v. *Regent Estates Co. Ltd.* [1949] 2 K.B. 465; 65 T.L.R. 412; [1949] 2 All E.R. 118; *Rex* v. *Fulham, Hammersmith and Kensington Rent Tribunal, Ex parte Gormly* [1952] 1 K.B. 179; [1951] 2 T.L.R. 1037; [1951] 2 All E.R. 1030 and *Gluchowska* v. *Tottenham Borough Council* [1954] 1 Q.B. 439; [1954] 2 W.L.R. 302; [1954] 1 All E.R. 408 considered.

Appeal from Judge Daynes sitting at West London County Court.

The defendant, Arthur William Fletcher, was the landlord of No. 31, Ashchurch Grove, London, W.12. He had originally let the attic floor of these premises fully furnished to a Mr. and Mrs. Gaten at a weekly rent of £2 a week. They applied under the Furnished Houses (Rent Control) Act, 1946, to the Rent Tribunal of the Metropolitan Boroughs of Fulham and Hammersmith to have the rent reduced. On December 14, 1955, the tribunal reduced the rent to £1 a week, and that rent was duly registered on December 20, 1955, in the register kept by the local authority pursuant to section 3 of the Act.

The Gatens having left, the defendant, at the request of Alphonso de Jean and Margatte de Jean his wife, the plaintiffs, spent £70 on bettering the premises the subject of the tribunal's order, and then, on July 7, 1956, let them to the plaintiffs furnished at a rent of £3 a week. The plaintiffs' tenancy having been determined by notice to quit expiring on June 28, 1958, in these proceedings they claimed against the defendant £196 in respect of overpayments of rent from July 7, 1955, until May 24, 1958, being 98 weeks at £2 a week. They also claimed damages in respect of alleged trespasses and there were cross-claims for damages by the defendant. These latter claims do not call for report.

The county court judge gave judgment for the plaintiffs for £207, with a set-off in respect of the defendant's claim.

The defendant appealed.

The defendant appeared in person.

J. L. Elson Rees appeared for the plaintiffs.

The cases mentioned in argument are referred to in the judgments.

Lord Evershed M.R. This is an appeal upon one important, and not altogether easy, point, from His Honour Judge Daynes, sitting as deputy judge in the West London County Court. The judge felt impelled to decide against the defendant in the action, contrary to his own inclination, because (as he thought) certain authorities compelled him to do so.

The plaintiffs laid a claim under the Furnished Houses (Rent Control) Act, 1946, for a return of overpaid rent in the following circumstances: The premises (and they were clearly furnished premises) which were the subject of the letting by the defendant to the plaintiffs had previously been let to some other persons of the name of Gaten. The Gatens applied to the appropriate rent tribunal, namely, the Fulham and Hammersmith Rent Control Tribunal, for a reduction in the rent which the Gatens were paying by the terms of their contract with the defendant. That application was successful: the tribunal came to the conclusion that £1 a week, instead of the sum that the Gatens were paying, was the proper amount. In fact, £1 represented half what the Gatens were paying.

The necessary entry was made (and I am deliberately using a colourless phrase) on the register as a result of that determination by the tribunal; and it still is on the register. In due course, the Gatens departed, and the plaintiffs became tenants. But before they took possession, the defendant, at the request of the plaintiffs, or at any rate for their convenience, proceeded to spend an appreciable sum of money—about £70 altogether—in redecoration of part of the premises and improving the furnishings. Having so done, he felt that he was entitled to charge appreciably more than he had charged the Gatens. It may be that his first and his greatest mistake was to open his mouth too wide; he was not even content to go back to £2: he made it £3; but still the plaintiffs accepted it. There was a rent-book, the defendant told us, so there was no doubt that the plaintiffs made a bargain to pay £3 a week; and paid it.

Relations having become bad between the plaintiffs and the defendant, this claim was made in the action for a recovery of the difference between £3 a week and £1 a week, for the period of two years or thereabouts, a total claim of £207.

Speaking without knowledge of anything that went on between the two parties, on the face of it one's sympathies are with the defendant. The plaintiffs made this bargain, and they paid the rent, and, no doubt, had the advantage of living on the premises. Suddenly to be told that one has to pay back over £200 would come as a nasty shock to anybody, whether in the defendant's position or not. As against that, it can be said with force, that the defendant was a party to this determination by the tribunal: he knew perfectly well, or should have done, that this registration was there; and he cannot, according to the principles of our law, claim to be ignorant of the legal provisions which bind him:

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and he took the risk of charging a rent which was 200 per cent. more than that which was on the register.

Those are the relevant facts; and the question is: Did the determination upon the application made by the Gatens and the subsequent registration of its result, operate to limit the rent which could lawfully be charged for these premises to £1 a week unless and until, on further application, it was altered?

I shall refer to the necessary provisions of the Act; but I would like to say one thing by way of caveat. We have had, in the course of listening to Mr. Elson Rees's very careful and fair presentation of the matter, some discussion upon what might be comprehended by the word "premises" which occurs in certain of the relevant subsections. To take a simple example: if the subject-matter of the letting is a furnished house, then are the premises, for the purposes of this Act, the same if the house itself is the subject of a later letting, even though there may be some, and even substantial, alterations within it, or even additions to it? Again, putting it interrogatively: to what extent are the "premises," within the meaning of the Act, liable to be affected by substantial changes in the internal equipment, including furniture?

I do not propose to embark on any questions of that kind, since, for the purposes of this case, it can, I think, be taken that the subject-matter of the letting to the plaintiffs was the same, for all relevant purposes, as the subject-matter of the letting to the Gatens. There had been money spent on redecoration and improving the furniture; but it must be taken, on the facts before us, that the premises were the same in the two cases.

I now come to the Act itself. Section 2, in its first two subsections, appears to be dealing, and dealing only, with a particular contract of letting. "(1) Where a contract has . . . been "entered into whereby one person (hereinafter referred to as "the 'lessor') grants to another person (hereinafter referred to "as the 'lessee') the right to occupy as a residence a house or "part of a house situated in"—a relevant district—"in "consideration of a rent which includes payment for the use of "furniture . . . it shall be lawful for either party . . . or for the "local authority to refer the contract to the tribunal for the "district . . . ": and then there follow certain provisions which are of an administrative nature. Subsection (2) continues: "Where any contract . . . is referred to a tribunal, then . . . "the tribunal shall consider it and, after making . . . inquiry . . . "shall approve the rent payable under the contract or reduce it "to such sum as they may, in all the circumstances, think "reasonable, or may . . . dismiss the reference"; and the subsection ends, "and shall notify the parties and the local authority "of their decision in each case."

Now so far it cannot, I think, be in doubt that what these two subsections are doing is stating that either party to a contract of letting of a furnished house, or the local authority, may apply

to the relevant tribunal, which may, in the way indicated, vary the contract. In subsection (3) it will be seen at once that there is a change of emphasis, to put it no higher; for its opens, "Where "the rent payable for any premises has been entered in the "register in accordance with the provisions hereinafter con-"tained," then it is lawful for the lessor or the lessee or the local authority to refer the case for reconsideration (putting it quite briefly) on the ground of "change of circumstances."

I need not read any more of section 2. But the reference to the register, which is forecast in subsection (3), is explained in section 3, which provides that the local authority is to "prepare "and keep up to date a register for the purposes of this Act," which is to be open for inspection; and then in subsection (2) of section 3 it is provided thus: "The register shall be so prepared "and kept up to date as to contain, with regard to any contract "under which a rent is payable that has been approved, reduced "or increased under the last foregoing section . . . entries of" (among other things) "(*b*) a specification of the premises to which "the contract relates; and (*c*) the rent as approved, reduced or "increased by the tribunal, and, in a case in which the approval, ". . . is limited to rent payable in respect of a particular period, "a specification of that period."

To my mind, this section 3 does create difficulties. In the first place, as will be appreciated from my reading of subsection (2), it seems to go back in emphasis to the contract. Particularly does that appear from paragraph (*b*), which, it will be recalled, provides that the entry is to be the "specification of "the premises to which the contract relates"; and then (*c*) (and a point of difficulty does arise here, as I think), "the rent as "approved" (etc.) is to be entered; and there is a distinction made where the reduction (and so on) "is limited to rent payable "in respect of a particular period." It may be argued: Does that mean a particular period being something less than the contractual period; or is it a particular period without limitation? —as the words say, any period short of (or, of course, not greater than) the duration in operation of the Act itself?

I pass over for the moment these difficulties to go to section 4, which, to my mind undoubtedly, in point of emphasis, swings back, and swings back somewhat heavily, in the direction forecast by section 2 (3); for section 4 provides: "(1) Where the rent "payable for any premises is entered in the register . . . it shall "not be lawful to require or receive—(*a*) on account of rent for "those premises in respect of any period subsequent to the date "of such entry, (or, in a case in which a particular period is "specified, in respect of that period) payment of any sum in "excess of the rent so entered." Then (and I refer to this because I think it is helpful), as the Act originally ran there was (*b*) a provision, dealing with the grant of a new tenancy, prohibiting the demand of a premium in addition to the rent; and, finally, subsection (2): "Where any payment or consideration

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"has been made or received in contravention of the foregoing "subsection, the amount . . . shall be recoverable by the person "by whom it was made. . . ."

The only other sections to which I propose to allude are: first, section 8, which empowers the Minister to make regulations (and the certificate stating what was the effect of the registration in this case was issued in pursuance of those regulations); and section 9, which makes it an offence to require payment in contravention of section 4, and the offender is liable on summary conviction to a fine not exceeding £100—and he may also be ordered, be it observed, to repay any excess payment that he may have received.

The fact that disregard of the requirements of the Act involves penal consequences is beyond doubt a strong ground for saying that one must construe it fairly strictly; and I proceed so to do. But in the end of all (as I think) the question turns upon the true effect of section 4 as applied to this case, for, putting it in the form of a question, did the plaintiffs prove that, "the rent "payable for these premises" having been entered in the register, there had been a "requirement" or a "receiving" by the defendant of a payment in excess of the recoverable rent?

There is no doubt that "the rent payable for the premises," on the face of it, was entered in the register; and it seems to me that the plaintiffs must be entitled to succeed, unless it could be said that the effect of any registration was limited to the duration of the particular contract which was the subject of the tribunal's determination. If section 2 (1) and (2) stood alone, of course, there would be no doubt, I think, that the determination would be limited to the contract which was presented to the tribunal. But I have myself come, I confess, to a clear conclusion that when you look at section 2 (3), which speaks of a rent payable for the premises being entered on the register, and particularly to section 4, to which I have already referred, you cannot avoid the conclusion that the effect of the Act is that once, quoad any premises, a rent has been entered on the register, then that is the rent for those premises, until it is changed by some subsequent determination, or until the period for which the entry has been made expires; and I cannot think that it would be justifiable to read words in—particularly into section 4—so as to limit the rent payable to the rent payable during the currency of the particular contract. The Act does not say so; and, indeed, when one considers the obvious scope and purpose of the Act, it would make the thing rather nonsensical if all this business of registration ceased to have any effect whenever a contract ended. We all know that these contracts may be of quite short duration; and the requirements of registration and the notification of the local authority, and the register being open to the public, seem to me to lose nearly all their force if the registration is to have such a very ephemeral effect.

That view is (as I think) at least clearly borne out in the

decisions of the courts in which the question has been involved. It is quite true that there is no decision of this court which governs us, or covers this point. The only decision of this court, which here and below was referred to, was a decision known as *Lazarus-Barlow* v. *Regent Estates Co. Ltd.*[1] That was a case under the Rent Restrictions Acts, and the only relevant point in it was that, in the course of reading the judgment of Somervell L.J. and myself, I observed that there were some dangers in using the phrase "in rem" when one spoke of determinations under the Rent Acts. That obviously does not help very much in this case, though it has been referred to as perhaps having an analogy in cases under the Furnished Houses (Rent Control) Act, 1946.

But there has been before the Divisional Court and the Court of Criminal Appeal a number of cases, and I think this may quite clearly be said of all of them: that the answer, which I think is the right answer, and which was the answer reached by His Honour in the court below, is certainly assumed in all of them, save in those cases in which it was directly so decided. That sounds perhaps rather an involved way of putting it. In a number of cases, the point was a different one, but the assumption clearly was (as I think) that the registration continued to operate in the way I have stated, and was not limited to the duration of the particular contract.

I give one example of that—the case of *Gluchowska* v. *Tottenham Borough Council*.[2] In that case there had been registration in respect of particular premises—that is, a set of rooms—and at a later stage the landlord had let, not the whole of those rooms, but some of them, himself occupying the others. The question which was debated in the court was whether the premises were the same in the second letting. By a majority, the Divisional Court came to the conclusion that they were not, and, therefore, the provisions of section 4 did not apply. But, of course, there would have been nothing in the case at all if the right answer had been that the registration only lasted for the original contract: for, admittedly, that contract had come to an end some time before.

But the point was directly considered, and indeed determined, in *Rex* v. *Fulham, Hammersmith and Kensington Rent Tribunal, Ex parte Gormly*,[3] which was a case of the following kind. In 1949, on an application of the landlord, a rent tribunal fixed the rent of a furnished house at so much a week, which rent was registered under section 3 (2). Two years later, on the reference of a new tenant, the tribunal ordered a further reduction, no change of circumstances being alleged. As the judge in the court below pointed out, the case might have been perhaps sufficiently decided on the short point that, since there was no change of

[1] [1949] 2 K.B. 465; 65 T.L.R. 412; [1949] 2 All E.R. 118.
[2] [1954] 1 Q.B. 439; [1954] 2 W.L.R. 302; [1954] 1 All E.R. 408.
[3] [1952] 1 K.B. 179; [1951] 2 T.L.R. 1037; [1951] 2 All E.R. 1030.

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circumstances, no question of altering the rent downwards could arise. But beyond doubt the court (consisting of Lord Goddard C.J., Slade and Devlin JJ.), expressed their views upon this question of the duration of a registration. I think the conclusion is sufficiently stated in the headnote in the All England Reports as follows: " . . . the rent fixed by a rent tribunal under " section 2 (2) of the Act and registered under section 3 (2), " was the rent payable in respect of the premises, and not merely " the rent payable as between the particular parties who took the " case to the tribunal; that rent remained until, if it were fixed " for a period, the expiration of that period, or until it was altered " by the tribunal on an application made under section 2 (3) of " the Act . . . "; and to complete it with one citation from the Lord Chief Justice (with whom Devlin J. agreed), after stating that a register has to be kept, the Lord Chief Justice said[4]: " This " seems to me to point strongly to the intention that decisions of " tribunals should be registered for the information of the public, " and that the rent so registered should be the rent payable in " respect of the premises, and not merely the rent payable between " two particular parties who first took the case to the tribunal " . . . "—a passage reflected in the headnote, but also indicating a point I have earlier made: the sense and purpose of the legislation which to my mind seems clearly to emerge.

The last case that I propose to mention is one which is only reported in The Times newspaper—*Reg.* v. *Adamson*,[5] which came before the Court of Criminal Appeal. There the circumstances were closely similar to those which we have here. A landlord had had a reduction in the rent: she had then, by a later contract with the new tenant, charged a rent in excess of the registered rent: she was charged under section 9 with an offence, and convicted. In the short note of the judgment Lord Goddard C.J. said: " This was a case in which a landlord whose " power to charge rent was controlled by the Furnished Houses " (Rent Control) Act, 1946, had refurnished the rooms which " she intended to let and thought that she was thereby " entitled to increase her rent. It had been argued on behalf " of the appellant that the expression ' premises ' referred to in " section 4 of the Act of 1946, meant not merely the bare shell " of the rooms of the house in question but the rooms taken with " the furniture in them. . . . " But I need not, I think, pursue that aspect of it, because, as I have earlier said, I am expressing no view on that kind of point. The report ends: " His Lordship said that, although the conviction was right and " must stand, the case was a proper one for the grant of an " absolute discharge on the condition that Mrs. Adamson repaid " the excess rent which she had charged."

That case, on its facts, is obviously closely similar to this; and the sum of the matter seems to me to be this, that all these

[4] [1952] 1 K.B. 179, 186.

[5] The Times, July 16, 1957.

cases have for an appreciable period of time—the Act has now been in operation for twelve years—uniformly followed the view which the judge adopted, although he indicated that his own view, unaided by authority, would be the other way. With all respect to him, my own view, unaided, is in line with the authorities. I venture a criticism of the judge with diffidence; but he concentrated somewhat on the first two subsections of section 2 and did not (as I think) give sufficient weight to subsection (3) of section 2, and particularly to section 4. However, that is by the way. I have given my reasons for thinking that the conclusion reached by the judge was the right one.

As the case is a little important, I have dealt with it at some length. The defendant, as he frankly conceded, did not feel that he was altogether well qualified to debate in this court a problem which is a pure problem of construction of an Act of Parliament; and I feel some sympathy with him. But he has come to this court. He may, perhaps, have been encouraged by the judge's expression of what his own view was. Although we have not, in the necessity of the case, had the advantage of argument on this matter of law from the defendant, Mr. Elson Rees has drawn our attention scrupulously to all the cases on the point; and, having considered them to the best of my ability, I reach the conclusion that this appeal must fail and, therefore, should be dismissed.

Ormerod L.J. I am of the same opinion; and there is very little that I wish to add. The county court judge expressed the view that, had he not been bound by authority, he would have come to a different conclusion from the one to which in fact he did come, but that he was bound by the decisions in the Divisional Court to which the Master of the Rolls has referred.

The view which the county court judge would have liked to take, I think, is expressed in his judgment when he says that, on consideration of subsections (1) and (2) of section 2, the key word is "contract," and, in his view, he would regard that as the key word which should dominate the whole of the interpretation of the statute. As the Master of the Rolls has already pointed out—and I certainly agree with the view that he has expressed—if it were not for subsection (3) of section 2, and if it were not for section 4, it might be that there was something in the view expressed by the county court judge. But it does appear to me that the change of wording which takes place in subsection (3) of section 2 and in section 4 really puts beyond doubt that the view expressed by the Divisional Court in the various cases to which we have been referred is the proper one. In subsection (3) of section 2 the opening words are: "Where the rent "payable for any premises has been entered in the register . . ." Had the proper construction of the Act been that it would relate only to entries in the register in respect of an existing tenancy, the simple way to have done it would have been to say: "Where "the rent payable under any contract of tenancy" (or words

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to that effect) "has been entered in the register. . . ." Those words have not been used, and the change appears to be a deliberate one. I can only come to the conclusion that it has been made so that once the rent has been determined it should remain, irrespective of the duration of the tenancy, for so long as was provided by the order, or alternatively, of course, for the duration of the Act.

Again, in section 4 the wording is: "Where the rent payable "for any premises is entered in the register under the provisions "of this Act . . ."—not, "Where the rent payable under any "contract of tenancy is entered in the register under the pro-"visions of this Act. . . ." That again, I think, confirms the view that the proper interpretation is that the finding of the tribunal as to what the rent is should continue until it is altered by the tribunal, or until the time for which the order has been made has expired.

It may be unfortunate in this case that the defendant has to repay money which he has overcharged in respect of this tenancy. It may be—I am expressing no opinion on it—that, had he gone back to the tribunal, having regard to the improvements that he had made to the premises, there might have been some increase in the rent which the tribunal had determined. But that has not been done; and there is really no answer to the claim for the repayment of this money which he has overcharged to the plaintiffs.

I agree that this appeal must be dismissed.

Lloyd-Jacob J. I also agree.

Appeal dismissed.

Solicitor: *D. J. A. Griffiths.*

B. A. B.

[PRIVY COUNCIL.]

J. C.
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* PRACTICE DIRECTION (REFRESHER FEES TO COUNSEL).

Barrister—Fees—Refresher—Privy Council.
Privy Council—Costs—Barrister—Refresher fees.

The following direction is issued by the Privy Council Office:

The Registrar of the Judicial Committee of the Privy Council begs to notify parties in appeals to Her Majesty in Council that the practice of allowing upon taxation of costs only 10 guineas a day as refresher fees to both senior and junior counsel is to be discontinued. On taxation of costs of appeals set down for

hearing after May 8, 1959, the registrar may in his discretion allow refresher fees to counsel in excess of 10 guineas. On refreshers which are allowed the junior counsel will have the usual two-thirds of the senior's fee.

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PRACTICE DIRECTION (REFRESHER FEES TO COUNSEL).

[COURT OF APPEAL.]

* SHORDICHE-CHURCHWARD *v.* CORDLE.

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Morris, Pearce and Willmer L.JJ.

[1958 S. No. 2749.]

Practice and Procedure — Jury, civil action — Right to jury — Libel — Defence imputing libel—Whether defence a "claim in respect of "libel" — Administration of Justice (Miscellaneous Provisions) Act, 1933 (23 *&* 24 *Geo.* 5, *c.* 36), *s.* 6 (1) (*b*).

The defendant and the plaintiff had formerly been husband and wife. After the dissolution of the marriage, the parties executed a deed whereby the defendant covenanted to pay certain sums subject to the condition that such covenant "shall be discharged "and shall thenceforth become wholly void and of no effect . . . "if [the plaintiff] shall at any time hereafter . . . publish or "make any libellous or defamatory allegations to any person with "regard to [the defendant] . . ."

The plaintiff brought an action claiming a sum of money under the deed. By his defence the defendant alleged that the deed had become discharged and void because the plaintiff had published defamatory allegations about him; there was no counterclaim. By her reply the wife alleged that the publication in question had been made without her knowledge or consent or approval.

An application by the wife to have the action tried by a jury pursuant to section 6 (1) of the Administration of Justice (Miscellaneous Provisions) Act, 1933,[1] was dismissed by the master and the judge in chambers.

On appeal:—

Held, dismissing the appeal, that the defence was not a "claim "in respect of libel," within section 6 (1) (*b*) of the Act of 1933, so that there was no such claim "in issue" as would entitle the plaintiff to a hearing before a jury.

Per Pearce L.J.: "A claim" in section 6 (1) (*b*) means the assertion of a cause of action.

APPLICATION for leave to appeal from Hinchcliffe J. in chambers.

[1] Administration of Justice (Miscellaneous Provisions) Act, 1933, s. 6 (1): ". . . if, on the application of "any party to an action to be tried "in the King's Bench Division of the "High Court . . . the court or a "judge is satisfied that (*a*) a charge "of fraud against that party; or (*b*) "a claim in respect of libel, slander, "malicious prosecution, false imprisonment, seduction or breach of "promise of marriage, is in issue, the "action shall be ordered to be tried "with a jury . . ."

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On February 20, 1959, Hinchcliffe J. affirmed an order of Master Clayton dated February 6, 1959, refusing an application by the plaintiff that the action be tried with a jury.

The facts are stated in the judgment of Morris L.J.

Geoffrey H. Crispin for the plaintiff.
R. Graham Dow for the defendant.

No cases were cited in argument.

Morris L.J. This is an application by the plaintiff for leave to appeal against the refusal of the judge in chambers to give leave to appeal. The question that came before the judge, on appeal from the master, was whether there should be a trial with a jury.

Mr. Crispin submits that the case comes within section 6 of the Administration of Justice Act, 1933, and that he is, as of right, entitled to a jury. If he is not as of right entitled to a jury, he very frankly and properly agrees that the decision as to whether or not there should be a jury was one which rested upon the exercise of discretion and was one which in the circumstances he could not challenge in this court.

The point that is raised is a short one. The plaintiff and the defendant were formerly wife and husband. After certain divorce proceedings which ended in favour of the husband a deed was entered into between the parties. The husband covenanted to pay certain sums to his wife. There was a provision in the deed in these terms: "The covenant in clause 1 of this deed" —that is the covenant to pay the money—"shall be discharged "and shall thenceforth become wholly void and of no effect on "either of the following events, namely . . . (b) If Mrs. Shor-"diche-Churchward shall at any time hereafter molest or interfere "with Mr. Cordle or shall publish or make any libellous or "defamatory allegations to any person with regard to Mr. Cordle "whether or not such allegation was made in any of the pro-"ceedings for divorce which have now been concluded between "the parties hereto."

The wife brought an action claiming a sum of money under the deed. The husband by his defence admitted the deed, but said that the deed had been discharged and had become wholly void and of no effect because the wife had published or made libellous or defamatory allegations to a certain person: he alleged that the wife had published or caused to be published to a certain person defamatory allegations with regard to him, namely, the contents of the plaintiff's petition for the dissolution of the marriage between the plaintiff and the defendant. By her reply the wife said that the matters referred to were published to the person named by the plaintiff's present husband "who without "the knowledge or consent or approval and not acting as the "agent of the plaintiff showed" to the said person "the whole "of the pleadings."

The real issue, therefore, is whether the wife published libellous or defamatory allegations to some person.

[His Lordship read section 6 (1) and continued]: The question therefore arises whether there is in these proceedings "a claim in "respect of libel" which claim is "in issue." It is not without importance to note that the section uses the words "a charge "of fraud against that party" and in contrast the words "a "claim in respect of libel, slander, malicious prosecution, false "imprisonment, seduction or breach of promise of marriage." The point is really a neat one. Mr. Crispin submits that the husband is saying in his defence that he is excused from paying, and has put forward a claim that he is excused from paying because his wife has defamed him. There is no counterclaim by the husband. What the husband says is: "I am not liable "because the deed is now discharged and is wholly void and of "no effect and it has become so because my wife has published "libellous or defamatory allegations in regard to me." It seems to me that on those facts and those issues the husband is not making "a claim" in respect of libel. He is advancing a contention which involves an inquiry as to whether there has been a publication of libellous or defamatory allegations: but he makes no claim in respect of libel. If he succeeds in the action, the judgment will be one dismissing the claim of the wife and in all probability awarding him costs. He is making no claim in respect of libel.

Mr. Crispin has put the matter as well as it could be put for the plaintiff by his submission that the husband is advancing a claim to be relieved of his obligation under the deed and that such claim is in respect of libel and is "in issue." But if the words of the section are looked at it does not seem to me that it can fairly be said here that the husband is making a "claim" in respect of libel or that a claim in respect of libel is "in issue."

For these reasons, I consider that the judge was correct in refusing leave to appeal, and I do not, for my part, think that leave should be given.

PEARCE L.J. I agree. In my view, the allegation by the defendant that the covenant sued on is void owing to the libellous or defamatory allegations by the wife does not bring this action within the words of section 6 (1) (*b*). "A claim" in that subsection, to my mind, means the assertion of a cause of action. That is the normal use of the word in various passages in the Annual Practice. Even if section 6 (1) (*b*) stood alone I should consider that the word "claim" had that meaning here. But the wording of section 6 (1) (*a*), in my view, puts the matter beyond doubt. The words in subsection (1) (*a*) "a charge" are in contradistinction to the words in subsection (1) (*b*) "a claim." They are used in order that the party charged with fraud may have a jury even though there be not a claim in respect of fraud and the fraud charge is merely an issue in the action. Had the

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meaning for which the appellant contends been correct, there was no need to alter the words "a charge" in sub-clause (*a*) into the words "a claim" in sub-clause (*b*).

For these reasons, in my view, the appeal fails and should be dismissed.

Willmer L.J. I agree so entirely with what my Lords have said that I find it quite unnecessary to add anything further.

Application dismissed.

Solicitors: *S. Sydney Silverman; Joynson-Hicks & Co.*

F. R. D.

[COURT OF APPEAL.]

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Morris and Sellers L.JJ., Wynn-Parry J.

* LONDON COUNTY COUNCIL *v.* TOBIN.

[Ref./141/1955.]

Compulsory Purchase—Compensation—Goodwill, loss of—Method of assessment.

Costs—Lands Tribunal—Compensation for compulsory purchase—Legal and accountancy expenses incurred in preparation of claim—Whether recoverable as part of compensation—Lands Tribunal Act, 1949 (12 *&* 13 *Geo.* 6, *c.* 42), *s.* 3 (5), *Sch. I, Pt. II, para.* 5 (1) (2) (3)—*Lands Tribunal Rules,* 1956 (*S.I.* 1956, *No.* 1734), *r.* 49 (1) (2).

Compulsory Purchase—Compensation—Costs of claim—How far recoverable as part of compensation—Lands Tribunal.

On January 14, 1952, an acquiring authority served on an elderly optician in indifferent health a notice to treat in respect of the compulsory acquisition of his freehold business premises which he had occupied for 40 years. He prepared his claim for compensation in response to the notice to treat, incurring in the process legal and accountants' expenses as well as surveyors' and valuers' fees. On June 6, 1955, he moved to new leasehold premises a mile away, expended capital in converting them into a superior establishment, and continued his business with the added help of a qualified assistant.

The reference of his claim to the Lands Tribunal was not heard until February, 1957, by which date there were available for consideration by the tribunal the figures of the gross takings and net profits of the business in the new premises during the preceding one and a half years, which figures showed that the earnings in the new premises were substantially higher than those in the old, and were increasing. The particulars of claim included (*a*) a claim for damages to the goodwill of his business and (*b*) the item for legal and accountants' costs incurred in preparing his claim.

The tribunal found, inter alia, that the claimant had not at any material time any intention of selling his business; that there had been some loss of goodwill; and that the goodwill of a business increased in value the longer it was carried on at the same premises

or near thereto. The tribunal awarded £750 for damage to goodwill, the figure being arrived at by comparing the capital value of the business at the old premises (calculated by multiplying by three years' purchase the average net profits for the three years prior to the move) with the capital value of the business at the new premises (calculated by multiplying by one and a half years' purchase the average of the net profits for 1955/56 and the estimated net profit for 1956/57). The tribunal included the legal and accountants' expenses as part of the total compensation awarded.

On appeal by the acquiring authority against those items of the award:

Held (1) that the tribunal had not erred in law in the method applied for ascertaining the value of the lost goodwill; the loss of goodwill was the loss of a capital asset which could have been realised at any time, and the claimant was entitled to be compensated for that loss, irrespective of the fact that no sale had taken place or was in contemplation at the date of the hearing; the duty of the tribunal was to estimate the capital value of the business in the new premises immediately after the move; but they had rightly had regard to the known facts, including the increased rate of profit at the new address, which were available at the date of the hearing; and the question as to the multiplier to be adopted was essentially a question of fact for the tribunal, having regard to all the circumstances of the case.

Bwllfa & Merthyr Dare Steam Collieries (1891) *Ltd.* v. *Pontypridd Waterworks Co.* [1903] A.C. 426; 19 T.L.R. 673, applied.

(2) That the legal and accountancy costs, like surveyors' and valuers' fees, were incurred as a direct consequence of being dispossessed and were, accordingly, recoverable as part of the substantive compensation. Nothing in the provisions as to costs in section 3 (5) of the Lands Tribunal Act, 1949,[1] nor the wider words of rule 49 of the Lands Tribunal Rules, 1956,[2] justified taking those costs out of the only place where they could properly find room before a reference, namely, the claim itself, and making them part of the costs of a reference; nor was there any reason why a claimant should suffer by having them treated on the same basis as costs incurred before action brought and reduced on taxation; a fortiori, since such costs might be incurred in preparing a claim in compliance with a notice to treat, which claim might, in the event of agreement between the claimant and the acquiring authority, never become the subject of a reference to the tribunal.

Skinners' Company v. *Knight* [1891] 2 Q.B. 542 distinguished.

Appeal by case stated from a decision of the Lands Tribunal.

The facts proved or admitted at the hearing before the Lands Tribunal and set out in their decision, supplemented by further

[1] The Lands Tribunal Act, 1949, s. 3 (5): "Subject to the following "provisions of this section, the Lands "Tribunal may order that the costs "of any proceedings before it incurred "by any party shall be paid by any "other party and may tax or settle "the amount of any costs to be paid "under any such order or direct in "what manner they are to be taxed."

[2] The Lands Tribunal Rules, 1956, r. 49: "(1) Except in cases to "which the provisions of subsection "(1), (2) or (3) of section 5 of the "Act of 1919 apply, the costs of and "incidental to any proceedings shall "be in the discretion of the Tribunal. "(2) If the Tribunal directs that the "costs of a party to proceedings shall "be paid by any other party thereto, "the Tribunal may settle the amount "of costs by fixing a lump sum, "or it may direct that the costs shall "be taxed by the Registrar on a "specified scale of the scales of costs "prescribed by the Rules of the "Supreme Court or by the County "Court Rules as the case may be."

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additional facts set out in the case stated, were as follows: The claimant, Bertram Tobin, claimed compensation in respect of the compulsory acquisition by the acquiring authority, the London County Council, under the Stepney and Poplar Reconstruction Area (Ocean Street Extension) Compulsory Purchase Order, 1950, of the premises owned and occupied by him for the purposes of his business as an optician at 382, Mile End Road. Notice to treat was served on January 14, 1952, but the premises were not vacated by the claimant until June 6, 1955, when he moved his business into new premises at 129, Whitechapel Road. Notice of reference to the Lands Tribunal was given on December 30, 1955.

The premises at 382, Mile End Road were a three-storey building which had suffered from war damage and stood in an area which had been so considerably damaged by enemy action that it had been the subject of a declaratory order under the Town and Country Planning Act, 1947.

At the date of the notice to treat, the upper floors were disused and a temporary shop front had been installed. The premises had at one time been occupied by the claimant's father, who was a jeweller, but after the claimant (who was born at 382, Mile End Road, in 1890) had qualified as an optician in 1912 he had carried on his practice on the premises, at first in conjunction with his father's business but later and until the date of acquisition exclusively.

The premises provided on the ground floor a waiting room, a fitting room, a sight-testing room and office accommodation, and the claimant employed in his business his wife who, though not professionally qualified, was a skilled dispenser; a junior assistant who remained until he had qualified; and part-time clerical assistance.

The claimant had there a successful and long-established business which he managed without any qualified assistance, though in 1951 he suffered an attack of thrombosis which necessitated his obtaining a locum for a time; and he was warned by his doctor to take care and go easily.

During the period between the date of notice to treat and his removal the claimant, with the assistance of the acquiring authority, endeavoured to obtain an alternative site in proximity to the address at which he had been for so many years, but no suitable accommodation was available, and eventually he obtained a lease for 18 years at £400 per annum of 129, Whitechapel Road, just over a mile to the west of his original premises.

No. 129, Whitechapel Road was a four-storey building and stood in a row of shops. It had formerly been a wool warehouse and expenses were necessarily incurred in converting the ground floor into suitable premises for the claimant's business. A total sum of about £3,000 was spent by the claimant, which sum included a premium of £600, £500 on what were admitted by the acquiring authority to be necessary repairs and the remainder

on fitting out and equipping the premises. At these new premises there were, in addition to waiting and fitting rooms, two sight-testing rooms; and a qualified assistant was employed in place of the learner who had left.

The floors above the ground floor at 129, Whitechapel Road, which were agreed to have an annual value of £140, were not used by the claimant, who had endeavoured unsuccessfully to let them.

The amended particulars of claim which were the subject of reference to the tribunal were [so far as is relevant to the appeal] as follows:

"2. (*c*) Legal charges and surveyors' fees incurred in acquir-"ing new premises £64 0s. 0d.: (*d*) Damage of profits and "goodwill £3,000.

"3. Expenses of taking advice on and preparing claim—"lawyers', accountants' and surveyors' and other such expenses "in connection with the sale: *Particulars so far as available*: "Valuers' fees £108 3s. 0d.; Accountants' fees £63 0s. 0d."

The details of valuation in support of the claim to 2 (*d*) were as follows: "Value of business before acquisition:

"Profits before rent and rates	£1,575	
"Less rent and rates	£200	
	£1,375	
"Yearly Profit	3	
"say	£4,000	£4,000
"*Deduct value after removal*		
"Net profits after first year "as before	£1,575	
"Less rent and rates, including "amortisation of premium "and initial repairs	£500	
	£1,075	
"Yearly Profit	1	£1,000
"CLAIM		£3,000."

The gross receipts of the claimant's business in each of the years ending on March 31 were as follows:

At 382, Mile End Road	
1952/1953	£4,135
1953/1954	£4,203
1954/1955	£4,739
1955/1956 (two months)	£691
At 129, Whitechapel Road	
1955/1956 (ten months)	£5,262
1956/1957 (ten months)	£5,947.

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The tribunal found further that if the additional business which had been done at 129, Whitechapel Road, was to be done, the employment of a qualified assistant was necessary, but that the employment of such an assistant enabled the claimant to give effect to his doctor's advice; that the claimant had no intention at any material time of selling his business; and that the goodwill of a business, which was an asset which could be realised at any time, increased its value the longer the business was carried on at the same premises or near thereto.

On the claim under paragraph 2 (*c*) [supra] it was admitted by Mr. Stewart-Brown, for the acquiring authority, that having regard to the decision in *Harvey* v. *Crawley Development Corporation* [3] he could not resist that claim in so far as it represented £32 9s. 0d. legal fees and £18 7s. 6d. surveyor's fees in respect of the acquisition of 129, Whitechapel Road, or in respect of surveyor's fees amounting to £13 2s. 6d. for a survey of premises at 215, Whitechapel Road, which were rejected on the surveyor's report, if the tribunal were satisfied that it was reasonable to have incurred that expense; but he desired to reserve his rights in view of a possible appeal in the *Crawley* case. After hearing the evidence of the claimant and his surveyor in regard to this abortive survey, the tribunal were satisfied that it was an expense reasonably incurred, and awarded the sum of £64 claimed.

It was contended by Mr. Stewart-Brown, for the acquiring authority, that the expenses under paragraph 3 [supra] should be dealt with as part of the costs of the reference in the same way as instructions for writ in an action for damages. That argument appeared to the tribunal to be based on a false analogy. The defendant in an action did not invite the plaintiff to institute proceedings, while the acquiring authority in their notice to treat demanded "... from you and each and every of you the "particulars of your respective estates and interests in the lands "so required as aforesaid together with all charges and interests "to which the same are subject and of the claims made by you "and each of you in respect thereof which several particulars "should be stated in ONE of the accompanying forms of claim "and delivered to the solicitor of the council."

The tribunal held that nothing could be more reasonable on receipt of such a demand than to obtain professional advice and so incur expense which was the direct result of the service of notice to treat. Those expenses were incurred irrespective of whether the question of compensation was ever referred at all. Moreover, the claimant might on a reference not be awarded costs or might indeed be ordered to pay the costs of an acquiring authority if the amount awarded was less than the sealed offer, but no sealed offer would have been made unless a claim were first formulated. The tribunal were satisfied, therefore, that the costs incurred by a claimant in formulating his claim were proper

[3] [1957] 1 Q.B. 485; [1957] 2 W.L.R. 332; [1957] 1 All E.R. 504.

subjects of compensation. It was admitted by Mr. Scrivens for the claimant that the sums mentioned in the claim included charges in respect of matters subsequent to the reference and it was agreed between the parties that the appropriate fees would be legal £21, accountants £5 5s. 0d. and surveyors the appropriate scale fee on £800, the agreed value of the freehold, plus the amount awarded by the tribunal in respect of item 2 (*d*).

On the claim under paragraph 2 (*d*) [supra] the tribunal stated that that claim was alleged to represent the loss of goodwill consequent on the removal to the new premises. It was contended that an established one-man business in freehold premises would command three years' purchase of the average profits, whereas a new business in leasehold premises and a business which involved the employment of a qualified assistant would command only one year's purchase of the profits. The claimant's surveyor for the purpose of his valuation had assumed that the profits before deducting rent and rates would remain constant and that the difference in the new profits was therefore wholly attributable to the increased rent. That appeared to the tribunal to be really an attempt to compensate the claimant for his increased rent which it was clear from the authorities (see *per* Denning L.J. in *Harvey* v. *Crawley Development Corporation* [4]) could not be done. It had to be assumed that the increased rent was justified by the increased business capacity of the new premises, and indeed it was clear from the evidence that the average gross takings for the two years subsequent to removal were £6,725 while those for the two years prior to removal were £4,472.

However, the business which was being carried on at the new premises differed from that formerly carried on by the claimant in regard not only to the premises and their situation but also in the employment of a fully qualified assistant.

The tribunal found that a direct comparison was therefore impossible, and that what they had to attempt to evaluate was the loss which the claimant had suffered in the goodwill which was attached to the business carried on by him in his premises at 382, Mile End Road. Had he been able to acquire premises in its immediate vicinity it was obvious that the loss would have been negligible, while if he had been forced to re-establish himself in an entirely different part of London, little or none of the goodwill would have followed him to his new premises.

It was contended on behalf of the claimant that the correct method of assessing his loss was by comparing the capital value of the old business in the acquired premises, arrived at by taking three years' purchase of the average net profits for the last two years—viz., 1953–54 and 1954–55—with the capital value of the new business in the new premises, arrived at by taking one year's purchase of the average of the net profit for 1955–56 and the

[4] [1957] 1 Q.B. 485, 493–4.

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estimated net profit for 1956–57. The tribunal approved that method in principle, but its application necessitated their making a number of adjustments to the figures in the accounts in order to make a fair comparison between the net profits of the old business and those of the new one. In valuing the old business they decided that the correct method was to multiply the average net profit by three years' purchase, as contended for by the claimant, but they adopted the average profits for three years as contended for by the London County Council. In valuing the new business the tribunal were unable to accept the evidence of the claimant's advisers that it was unsaleable, or worth at most only one year's purchase. Having regard to their finding that a not inconsiderable part of the goodwill had remained, and to the fact that the net profits of the new business had been substantially higher than those of the old business and according to their calculations had been on the increase, they considered these views to be unduly pessimistic. They were also mindful of the fact that the surveyor for the claimant, in an earlier calculation which he discarded but which was communicated to the London County Council by Silkin & Silkin (the solicitors to the claimant) in a letter of February 16, 1956, valued the new business at two years' purchase of the net profit. In the light of all that evidence the tribunal came to the conclusion that one and a half years' purchase was the appropriate multiplier and they applied that figure. In the result, they calculated the loss sustained under that head of the claim at £750.

The sealed offer having been read and the amount thereof being less than the sum awarded, the tribunal ordered that the acquiring authority should pay to the claimant his costs to be agreed or in default of agreement taxed on the High Court scale.

The questions on which the decision of the court was desired were whether on the findings of fact the tribunal came to a correct decision in law in determining (i) that the legal expenses and accountants' fees incurred by the claimant in preparing a claim in response to the notice to treat formed a proper subject of compensation and were correctly included in their award; and (ii) that the claimant was entitled to the sum of £750 in respect of his claim for damage to the goodwill of his business consequent on the compulsory acquisition of his business premises.

R. D. Stewart-Brown Q.C. and *K. F. Goodfellow* for the London County Council.

William Scrivens for the claimant.

The following cases were cited during the course of argument: *Horn* v. *Sunderland Corporation*[5]; *Zitver* v. *Edmonton Corporation*[6]; *Société Anonyme Pêcheries Ostendaises* v. *Merchants' Marine Insurance Co.*[7]; *Skinners' Co.* v. *Knight*[8]; *Bwllfa &*

[5] [1941] 2 K.B. 26; 57 T.L.R. 404; [1941] 1 All E.R. 480.
[6] (1954) 4 P. & C.R. 365.
[7] [1928] 1 K.B. 750; 44 T.L.R. 270.
[8] [1891] 2 Q.B. 542.

Merthyr Dare Steam Collieries (1891) Ltd. v. *Pontypridd Waterworks Co.*[9]; *Tull's Personal Representatives* v. *Secretary of State for Air.*[10]

Cur. adv. vult.

March 2. The following judgments were read:

MORRIS L.J., saying that the facts which gave rise to the claim of the claimant were clearly recorded in the decision of the Lands Tribunal and in the case stated, and that he did not propose to recount them at length, continued:

The claimant's premises at 382, Mile End Road, which he owned and occupied for the purposes of his business as an optician, became subject to a compulsory acquisition order. A notice to treat was served on him on January 14, 1952, but he did not vacate until June 6, 1955, when he moved his business into new premises at 129, Whitechapel Road. Notice of reference to the Lands Tribunal was given on December 30, 1955. The hearing before the tribunal was in February, 1957, and the decision of the tribunal is dated June 14, 1957. The further amended particulars of claim, which were the subject of reference to the tribunal, included many items, but only two of these are now in question. There was one item under which £3,000 was claimed for "Damage of profits and goodwill." The claim was alleged to represent the loss of goodwill consequent on the removal to the new premises.

The Lands Tribunal dealt with the claim in their decision in the following words [His Lordship read that part of the decision (supra) dealing with paragraph 2 (*d*) of the claim for loss of goodwill and continued]: The question of law as stated by the Lands Tribunal is whether on their findings of fact they came to a correct decision in law in determining that the claimant was entitled to the sum of £750 in respect of his claim for damage to the goodwill of his business.

It is to be observed that the approach of the Lands Tribunal involved ascertaining the "capital value of the old business" in the premises which were acquired and comparing it with the "capital value of the new business in the new premises." In their context the phrases "capital value" clearly refer to the value of the goodwill and only to that. It does not seem to me that this is wrong in principle. The claimant was compelled to move. He was compelled to relinquish the capital asset, namely, the goodwill which had resulted from his having built up an established business in his own premises at 382, Mile End Road. If, because of his enforced uprooting, his new capital asset, namely, the value of the goodwill of his business in the new premises, has been diminished, then he has suffered a loss. It is said, however, that the method of approach of the Lands Tribunal is erroneous because it assumed a sale of the

[9] [1903] A.C. 426; 19 T.L.R. 673.

[10] [1957] 1 Q.B. 523; [1957] 2 W.L.R. 346; [1957] 1 All E.R. 480.

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goodwill of the business in the new premises at or about the date of the hearing before the Lands Tribunal, and it is said that as no sale had taken place or was in prospect the award compensated the claimant for a loss which he had not suffered nor was about to suffer. The Lands Tribunal have found that the goodwill of a business, which is an asset which can be realised at any time, increases in value the longer the business is carried on at the same premises or near thereto. But the Lands Tribunal could not peer into the future and could only make a reasonable comparison between what the claimant possessed when he was forced to leave his premises and what he later possessed. He had been at the old premises for over 40 years, and had had no intention of leaving them; his goodwill was valued on the basis of three years' purchase of his average net profits. The Lands Tribunal were comparing like with like when they endeavoured to assess the value of the goodwill in the new premises which again the claimant had no intention of leaving. Had the Lands Tribunal been dealing with the claim in December, 1955, at the time of the reference to them, their task would have been indeed difficult. As they were dealing with the claim in February and June, 1957, it was possible for the Lands Tribunal to have regard to the fact that the business had been continued and was continuing and to the known facts of performance and achievement at the new address; it was entirely proper for the Lands Tribunal to take these known facts into calculation (see *Bwllfa and Merthyr Dare Steam Collieries (1891) Ltd.* v. *Pontypridd Waterworks Co.*[1]). The difficult task of the tribunal was to decide the number of years' purchase to apply in the case of the business at its new address. After all the years at the old address three years' purchase was taken. It might have been that immediately after the hearing or after the decision of the tribunal the claimant might have died. What was the appropriate number of years' purchase? It seems to me that it is only accidental that at the date of the hearing the claimant had been in the new premises just over one and a half years and that the tribunal took one and a half years' purchase. It may be that the tribunal were of the opinion that there would have to be many more years of occupancy and trading activity before the goodwill could be sold on the basis of more than one and a half years' purchase. But the question as to the multiplier to be taken, namely, the number of years' purchase, was essentially a question of fact for the tribunal, and, unless they have erred in principle, then it is not for this court to say that the decision is wrong in law. It may be that a different multiplier could have been taken and that the resultant figure for loss of goodwill would have been less; but the difficult task of fixing the appropriate number of years to be taken was essentially a matter of judgment having regard to the facts,

[1] [1903] A.C. 426; 19 T.L.R. 673.

figures and features of the case. It is said that no sale had taken place at the date of the hearing and that none was in prospect. That is perfectly correct. But those facts were well known to the Lands Tribunal and must have been in their minds. In spite of the known facts as to the business, it had been argued that the goodwill was not saleable; but the tribunal rejected that view.

It is further said that, though it would have been reasonable to give compensation on the basis that there was a risk that the goodwill of the business in the new premises might have to be sold before it was sufficiently long established for the value of the goodwill thereof at least to equal the value of the goodwill of the business in the old premises at the date of the notice to treat, yet the award of £750 as calculated was erroneous (*a*) because it took no account of the likelihood or unlikelihood of such a sale and (*b*) because it took no account of the fact that the claimant was receiving greater profits from the business at the new premises than he had at the old and would continue to do so until a sale took place. But it does not seem to me that the Lands Tribunal neglected to take account of any of these matters. They set out in the special case that the claimant had, at all material times, no intention of selling his business. His net profits were higher than before and were on the increase. But it might nevertheless happen that at any time after the hearing before the tribunal the business would have to be sold. It would not be reasonable for the tribunal to make speculative calculations as to the future; they had to do the best they could at the time when the matter was before them. At that time the position was, as their decision shows, that "a not incon-"siderable part of the goodwill has remained." That involved that some goodwill had not remained. A consequence would be that there might be some loss of a capital asset as a result of the enforced move. If loss were caused to the claimant he ought not to be deprived of receiving proper compensation for it on the supposition that if he survived, and if he worked diligently to make up for what he had lost, then he could at some future time eliminate it. There is, I think, force in the view that it would not be correct simply to proceed on the basis of what the goodwill would fetch if there were a forced sale at the time of the hearing before the Lands Tribunal. Some reasonable consideration would have to be given to the hope or expectation that any sale would probably be deferred. But it would not follow that the time would speedily be reached when some higher multiplier than that fixed would be appropriate; it might take some years before two years' purchase would be appropriate to compare with the calculation of three years' purchase in reference to the business in its old location. It does not seem to me to be shown that a higher multiplier than one and a half would necessarily have been taken if the Lands Tribunal had attempted to speculate as to the capital value of the goodwill on various

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future dates in the not too distant future. The acquiring authority gained by reason of the fact that the reference was not heard until February, 1957, by which date it was known that the business was continuing, was thriving, and was on the upgrade. But it might have proved unfair to the claimant if the Lands Tribunal had only proceeded on the assumptions (i) that the claimant would go on living for some time, (ii) would go on building up his business, and (iii) that the business would become progressively remunerative. If all these things do happen, it may still take some time before the goodwill of the new business becomes equal in value with the goodwill of the old. The tribunal used the knowledge derived from ascertained experience, but they had to do their best without basing themselves on every conceivable assumption which, if not falsified by later events, might tend to diminish the measure of the claimant's loss. It is true that he was making larger net profits than before. But to some extent that was a result of the fact that he had invested new capital in the business after its move to new premises and to the fact that the business carried on at the new premises differed from that carried on at the old.

A point was taken that the Lands Tribunal should not have referred to the claimant's business at 129, Whitechapel Road, as a "new business." But the result has in no way depended upon any particular description or phrase but upon the facts themselves as set out in the decision and the special case. The claimant has continued his business, but as a result of the enforced move his business has certain changed features. Before, it was an established business in freehold premises. After the move the business was in leasehold premises. "A not inconsiderable part of the goodwill" remained; some was lost. But when the change took place some capital was expended in fitting out and equipping the new premises. Furthermore, a qualified assistant was employed. This circumstance did, however, bring the claimant a measure of relief which, for health reasons, was welcome to him. He was, however, fortunate in that in the new premises his net profits were substantially higher than they had been before he moved and they showed a progressive increase. It seems to me, however, that the increased profits must to some extent have resulted from his investment of capital. All these and other circumstances were weighed by the Lands Tribunal. There were features of the situation which were rather special; some of these tended to support a claim, while others tended to reduce or eliminate a claim. The claimant may or may not have been fortunate in the result, but I am not persuaded that it is shown that there was error in law in the method of approach.

The other item which is now in question is one of £26 5s. 0d. which, as to £21, related to the expense of taking legal advice in connection with the preparation of the claim for compensation after the receipt of the notice to treat, and as to £5 5s. 0d.

accountancy expenses similarly incurred. This matter was dealt with by the Lands Tribunal as follows [His Lordship read from the decision (supra) of the tribunal under paragraph 3, relating to the expenses under consideration, and continued]: It was submitted by Mr. Stewart-Brown that it was undesirable that legal costs incurred in preparing a claim should be regarded as forming part of the compensation to be awarded. He submitted that such costs could be recoverable as part of the costs of a reference, and as a matter of practical convenience he submitted that the Lands Tribunal was not a suitable tribunal to decide as to what costs had been properly incurred or as to what allowances should be made. He submitted that these questions could better be dealt with on a taxation of costs, and, further, that legal costs incurred in making a claim for compensation should not be regarded as capable of being a part of the compensation being claimed. He submitted that any costs properly incurred could be regarded as being costs of a reference, in the same way as costs incurred before an action is brought may be allowed if the taxing master in his discretion considers that they were necessary or proper for the attainment of justice (see *Société Anonyme Pêcheries Ostendaises* v. *Merchants' Marine Insurance Co.*[2]

It is provided by section 3 (5) of the Lands Tribunal Act, 1949, as follows: "Subject to the following provisions of this section, "the Lands Tribunal may order that the costs of any proceedings "before it incurred by any party shall be paid by any other "party and may tax or settle the amount of any costs to be paid "under any such order or direct in what manner they are to be "taxed." In Part II of the First Schedule to the Act, paragraph 5 (1) reads as follows: "Where the acquiring authority has made an "unconditional offer in writing of any sum as compensation to any "claimant and the sum awarded by the Lands Tribunal to that "claimant does not exceed the sum offered, the Lands Tribunal "shall, unless for special reasons the Lands Tribunal thinks "proper not to do so, order the claimant to bear his own costs and "to pay the costs of the acquiring authority so far as such costs "were incurred after the offer was made." Then sub-paragraph (2) is: "If the Lands Tribunal is satisfied that a claimant has "failed to deliver to the acquiring authority a notice in writing "of the amount claimed by him giving sufficient particulars and "in sufficient time to enable the acquiring authority to make a "proper offer, the foregoing provisions of this section shall apply "as if an unconditional offer had been made by the acquiring "authority at the time when in the opinion of the Lands Tribunal "sufficient particulars should have been furnished and the claim-"ant had been awarded a sum not exceeding the amount of such "offer. The notice of claim shall state the exact nature of the "interest in respect of which compensation is claimed, and give

[2] [1928] 1 K.B. 750; 44 T.L.R. 270.

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"details of the compensation claimed, distinguishing the amounts "under separate heads and showing how the amount claimed "under each head is calculated, and when such a notice of claim "has been delivered the acquiring authority may, at any time "within six weeks after the delivery thereof, withdraw any notice "to treat which has been served on the claimant or on any other "person interested in the land authorised to be acquired, but shall "be liable to pay compensation to any such claimant or other "person for any loss or expenses occasioned by the notice to treat "having been given to him and withdrawn and the amount of "such compensation shall, in default of agreement, be deter-"mined by the Lands Tribunal. (3) Where a claimant has made "an unconditional offer in writing to accept any sum as com-"pensation and has complied with the provisions of the last "preceding subsection, and the sum awarded is equal to or "exceeds that sum, the Lands Tribunal shall, unless for special "reasons the Lands Tribunal thinks proper not to do so, order "the acquiring authority to bear their own costs and to pay the "costs of the claimant so far as such costs were incurred after "the offer was made."

The question, therefore, arises whether, when compensation is being claimed, an amount to cover the legal costs of preparing the claim can be included. Whether in a particular case it is necessary to have legal assistance in preparing a claim or the services of an accountant, will be a matter for decision having regard to the circumstances of the particular case. But if such assistance and such services have properly and reasonably been obtained, then I see no reason why the expense incurred should not be included as part of the compensation claimed. After a notice to treat is served the acquiring authority wish to know what claims are made upon them. If they deem the claims to be reasonable they will meet such claims and no reference will be necessary. If legal or other assistance is necessary, and if, in consequence, expense is properly incurred, then, in my judgment, it is appropriate to include the expense as one item in the claim for compensation. If all items of a claim were agreed except an item for such expense, and if the acquiring authority disputed both the necessity for incurring it and also the amount of it, then it seems to me that the dispute could only be resolved by reference to the Lands Tribunal. So, also, if the acquiring authority after receiving a notice of claim decided (see paragraph 5 (2), which I have just read, of Part II of the First Schedule to the Lands Tribunal Act, 1949) to withdraw the notice to treat which it had served, the acquiring authority would be liable to pay compensation for any loss or expense occasioned by the notice to treat having been given and withdrawn. Such loss or expense might in some cases include expense properly incurred in seeking professional advice. In default of agreement there would have to be a reference to the Lands Tribunal.

It is provided in rule 49 (1) and (2) of the Lands Tribunal Rules, 1956, as follows: "(1) Except in cases to which the "provisions of subsections (1), (2) or (3) of section 5 of the "Act of 1919 apply, the costs of and incidental to any pro-"ceedings shall be in the discretion of the Tribunal. (2) If "the Tribunal directs that the costs of a party to proceedings "shall be paid by any other party thereto, the Tribunal may "settle the amount of costs by fixing a lump sum, or it may "direct that the costs shall be taxed by the Registrar on a "specified scale of the scales of costs prescribed by the Rules "of the Supreme Court or by the County Court Rules as the "case may be." It is said that the costs incurred in preparing a claim could be regarded as costs of and incidental to any proceedings. But when a claim is presented following on the request contained in a notice to treat, it may be the hope of both parties that there never will be "proceedings" before the Lands Tribunal. The reason why the acquiring authority ask for a claim to be presented is so that if possible they can amicably agree as to the amount of compensation and so settle all outstanding matters.

Mr. Stewart-Brown referred to the decision in *Skinners' Co.* v. *Knight*,[3] where it was decided that under the wording which was used in section 14 of the Conveyancing and Law of Property Act, 1881, the "compensation" for breach of covenant which a lessee was liable to pay did not include the cost incurred by the lessor in consulting and employing a solicitor and surveyor in respect of the preparation of the notice required by section 14. Fry L.J. said[4]: "With regard to the word 'compensation' we "incline to the view that the word 'damages' was not used "because that is most appropriate to the compensation for a "breach when ascertained by the verdict of a jury or the judg-"ment of a court; but that compensation under the section in "question is to be measured by the same rule as damages in "an action for the breach. But whether this be so or no, we "are clearly of opinion that the expenses in question are not "payable as compensation for the breach of the covenant. They "arise, not from the breach of the covenant, but solely from the "fetter which the wisdom of the legislature has imposed on the "enforcement of the cause of action arising from that breach."

In the present case the position is quite different. The acquiring authority wished to know what sums were claimed so that if they agreed to pay such sums there would be no outstanding claims. If a claimant could show that he had incurred expense in obtaining professional help, and that it was reasonable for him to have incurred it, and that the figure of his expense was reasonable, then the time for him to ask to be reimbursed was when he responded to the invitation contained in the notice to treat. The incurring of the expense would be a direct consequence of being dispossessed and of being asked to state the

[3] [1891] 2 Q.B. 542.

[4] Ibid. 545.

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amount of the compensation claimed on account of such dispossession. It is to be observed that no question is raised in regard to the fees of a valuer or surveyor. But if such fees, which include fees for assessing the loss of goodwill, are to be regarded as claimable as compensation, it seems difficult to understand why legal or accountancy fees (always provided they are deemed necessary and are properly incurred) should not similarly be regarded as items claimable as compensation.

In my judgment, the Lands Tribunal were in law entitled to hold that the legal expenses and accountants' fees incurred by the claimant formed a proper subject of compensation; accordingly, such fees were correctly included in their award.

Wynn-Parry J. Two questions arise for consideration. The first is whether, and, if so, to what extent, the claimant suffered damage to the goodwill of his business by reason of his having to move his business from 382, Mile End Road, as a result of the compulsory acquisition of those premises by the acquiring authority. The second question is whether the legal costs incurred by the claimant in putting forward his claim following the notice to treat should be treated as part of the compensation payable to him in respect of the compulsory acquisition of the old premises or should be treated as part of the costs of the reference to the Lands Tribunal.

As regards the first question, the Lands Tribunal found that, as a result of moving from 382, Mile End Road, the claimant lost part of the goodwill of his business. That is a finding of fact which we cannot disturb. I would add that, in my view, it is a conclusion which was virtually inevitable. The tribunal have quantified the loss at £750. They have set out in their decision the method by which they have arrived at this figure, and the real question is whether, in adopting this method, they have misdirected themselves. Only if they have done so can this court interfere with their finding.

The method applied by the tribunal involved first ascertaining the capital value of the business in the old premises immediately before the transfer; then ascertaining the capital value of the business in the new premises; and then comparing the two. In my judgment, that was a perfectly proper method to apply. As regards the capital value of the business in the old premises, this was ascertained by taking three years' purchase of the average net profits of the business for the last three years. With that I agree. The capital value of the business in the new premises was ascertained by taking one and a half years' purchase of the average of the net profit for 1955–56 and the estimated net profit for 1956–57. The tribunal properly took into account the difference in the nature of the two sets of premises, their respective situations, and the fact that at the new premises a fully qualified assistant is employed.

In the course of their reasoning which led up to the multiplier of one and a half being chosen, the tribunal in their decision said this: "In valuing the old business we have decided that the "correct method is to multiply the average net profit by three "years' purchase as contended for by the claimant, but we have "adopted the average profits for three years as contended for "by the London County Council. In valuing the new business "we are unable to accept the evidence of the claimant's advisers "that it was unsaleable, or worth at most only one year's pur-"chase. Having regard to our finding that a not inconsiderable "part of the goodwill has remained, and to the fact that the net "profits of the new business have been substantially higher than "those of the old business, and, according to our calculations, "have been on the increase, we consider these views to be unduly "pessimistic. We are also mindful of the fact that [the "claimant's surveyor], in an earlier calculation which he dis-"carded but which was communicated to the London County "Council by Silkin & Silkin in a letter of February 16, 1956, "valued the new business at two years' purchase of the net "profit." Then comes their conclusion expressed thus: "In the "light of all this evidence, we have come to the conclusion that "one and a half years' purchase is the appropriate multiplier and "this is the figure we have applied. In the result, we calculate "the loss sustained under this head of the claim at £750."

Now the duty of the tribunal was to estimate the capital value of the business in the new premises as at the point of time immediately after the move into those premises. Had they been hearing the case at that time any figure at which they arrived would necessarily have been wholly an estimated figure. In fact, they were sitting nearly two years after the move. In those circumstances they were bound to have regard to what had actually happened during the interval. That this is so appears clearly from the opinions of Lord Macnaghten and Lord Robertson in *Bwllfa and Merthyr Dare Steam Collieries (1891) Ltd.* v. *Pontypridd Waterworks Co.* Lord Macnaghten said this[5]: "If the "question goes to arbitration, the arbitrators' duty is to determine "the amount of compensation payable. In order to enable him "to come to a just and true conclusion it is his duty, I think, to "avail himself of all information at hand at the time of making "his award which may be laid before him. Why should he listen "to conjecture on a matter which has become an accomplished "fact? Why should he guess when he can calculate? With the "light before him, why should he shut his eyes and grope in the "dark?" Lord Robertson said[6]: "Any estimate of this profit "necessarily involves the question, 'How long would the coal in "'question take to work out?' if for no other reason than in "order to compute the cost of working. If the question thus pre-"sented has to be solved ab ante, the arbitrator, or whoever has

[5] [1903] A.C. 426, 431.

[6] Ibid. 432–3.

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"to deal with it, must form the best conjecture he can of probable "prices and probable wages during the period required to work "out the area in question. But these calculations are resorted "to merely in the absence of facts, and not because the time to "be considered is that moment of time when the notice of "October 15, 1898, was presented. And if, owing to the course "of the procedure, the period required for the working out of the "coal in question has come to be matter of history, then estimate "and conjecture are superseded by facts as the proper media "concludendi. I do not mean that the proper course in awarding "compensation is to wait for the expiry of the period required "for working out the coal. On the contrary, it is natural that "the compensation should be assessed once for all and by "estimate. But the point is that as in this instance facts are "available, they are not to be shut out."

As I read those passages, they do not mean that in making an estimate, such as the one which fell to be made in this case, one is necessarily to stop at the end of the period covering the known facts. If one considered alone the first passage from the decision, which I have quoted earlier, it might well be said that the tribunal had confined their consideration to what, at the date of the hearing, were events in the past; but when the decision is considered as a whole, I do not think that such a conclusion is justified. The period which they have considered as regards the calculation of the capital value of the business in the new premises is not only the financial year 1955–56, but the year 1956–57 in respect of which latter period the net profits were not known at the date of the hearing but had to be estimated for at least the last two months. Up to this point, therefore, I am unable to conclude that the tribunal have misdirected themselves.

The question then remains: Have they erred in principle in taking into account only a period of two years for the purpose of estimating the capital value of the business in the new premises, whereas they took a period of three years in estimating the capital value of the business in the old premises? In this regard it is to be noticed that in estimating the capital value of the business in the old premises the tribunal took the period of three years at the request of and, therefore, presumably in favour of the acquiring authority. Neither the case nor the decision inform us what the net profits for the year 1955–56 were in fact, nor what figures, if any, for the year 1956–57 beyond the figure of gross profits for ten months the tribunal had before them in deciding to adopt a two-year period; but, in the absence of such figures, I do not see what material this court has before it which would enable it to say that in choosing a two-year period rather than a longer one the tribunal has misdirected itself. Nor do I see that the case could properly be referred back to the tribunal with a view to this information being furnished. It follows, I think, from this that equally this court has no ground for holding that the adoption of the multiplier of one and a half amounted to a misdirection.

For these reasons, I am of opinion that the finding of the tribunal on the first point should not be disturbed.

The second question is posed by the tribunal in effect in this way: Whether on the findings of fact they came to a correct decision in law in determining that the legal expenses and accountants' fees incurred by the claimant in preparing his claim in response to the notice to treat formed a proper subject of compensation and were correctly included in their award? In my view, the tribunal were right. It can be said, of course, and it was said, that it is unsatisfactory that the legal costs of compiling the claim, and the legal costs incurred in prosecuting a reference, if there should be a reference, should be assessed, to use a mutual phrase, by different persons; the first set of legal expenses by the tribunal in investigating the claim, and the second set by the registrar of the tribunal or a taxing master. I have some sympathy for this view, but I do not see how it could prevail, short of some statutory modification of the Lands Tribunal Act, 1949, providing that legal costs incurred in compiling a claim should be subject to taxation whether or not the claim was followed by a reference. As matters stand at present, on notice to treat, the claimant and his advisers compile a claim. Let me assume a case in respect of which there is no subsequent reference. In compiling the claim the claimant has to incur legal costs. In order to arrive at a true figure of the loss which he has incurred, he is forced to include the amount of such legal costs; otherwise his claim is for less than the loss which he has suffered. On what principle can it be said that, if there should be a reference, the amount of his loss is to be reduced for the purposes of the reference by the whole of the amount of the legal costs which he has incurred? The Act, in section 3 (5), only deals with the costs of a reference; the rules made pursuant to the Act are wider in form, because rule 49 refers to costs of and incidental to the reference, but, assuming, without deciding, that rule 49 is intra vires, I cannot see how the words "incidental to" can take the costs out of the only place where they can find room prior to a reference, namely, the claim itself, and make them any part of the costs of the reference. In the result, I would dismiss this appeal.

Sellers L.J. I have read the judgments of both Morris, L.J. and Wynn-Parry J. I agree with them and have nothing I wish to add to them.

Appeal dismissed.
Leave to appeal to the House of Lords granted on terms.

Solicitors: *J. G. Barr; Silkin & Silkin.*

M. M. H.

[CHANCERY DIVISION.]

1959
Feb. 12.

Vaisey J.

* *In re* CHAPMAN'S SETTLEMENT TRUSTS (NO. 2). CHAPMAN *v.* CHAPMAN.

[1958 C. 3578.]

1959
Feb. 18.

Vaisey J.

* *In re* ROUSE'S WILL TRUSTS.

[1958 R. 2353.]

PRACTICE NOTE.

Trust and Trustee—Variation of trusts—Act of 1958*—Practice—Application for approval of variation of trust—Whether hearing should be in open court—Whether separate representation of all interests required—Variation of trust—Endorsement of order on probate or settlement—Variation of Trusts Act,* 1958 (6 *&* 7 *Eliz.* 2, *c.* 53), *s.* 1.

As a general rule applications under the Variation of Trusts Act, 1958,[1] for the approval by the court of a variation of a trust should be heard in open court so that there may be uniformity of practice, and all interests on whose behalf the approval is sought may be represented by counsel, it being desirable that the trustees and the next-of-kin or beneficiaries should be separately represented. If there is any particular reason why the hearing should not be in open court, application may be made for the case to be heard in chambers.

Where the court has approved a variation of a trust a note of the letter, number, short title and date of the order should be endorsed on the probate of the will or on the settlement for the purpose of reference.

In re CHAPMAN'S SETTLEMENT TRUSTS (No. 2); CHAPMAN *v.* CHAPMAN

February 12. ADJOURNED SUMMONS.

By a settlement dated March 15, 1944, the settlors, Col. Robert Chapman and his wife (now Sir Robert and Lady Chapman) settled certain funds on trust for the benefit of their grandchildren. Clauses 2, 3 and 4 of the settlement were as follows: "2. The trustees shall stand possessed of the trust premises "(subject to clauses 3 and 4 following) for all or any child or

[1] Variation of Trusts Act, 1958, s. 1: "(1) Where property, whether "real or personal, is held on trusts "arising, whether before or after the "passing of this Act, under any will, "settlement or other disposition, the "court may if it thinks fit by order "approve on behalf of—(*a*) any per-"son having, directly or indirectly, an "interest, whether vested or contin-"gent, under the trusts who by reason "of infancy or other incapacity is in-"capable of assenting, . . . (*c*) any "person unborn, . . . any arrange-"ment . . . varying or revoking all or "any of the trusts, or enlarging the "powers of the trustees of managing "or administering any of the property "subject to the trusts: Provided "that . . . the court shall not approve "an arrangement on behalf of any "person unless the carrying out there-"of would be for the benefit of that "person."

"children of the settlors' son Robert Macgowan Chapman who "shall attain the age of 21 years or die under that age leaving "issue if more than one in equal shares as tenants in common. "3. Provided always that until the youngest child of the said "Robert Macgowan Chapman shall have attained the age of 25 "years if that event shall happen within 21 years from the date "hereof or until the expiration of 21 years from the death of the "survivor of the settlors if the youngest surviving child . . . shall "not then have attained the age of 25 years the trustees shall "retain the trust premises and shall apply such part as they in "their discretion shall think fit of the income thereof for or "towards the common maintenance education or other benefits "of the children . . . of any one or more of them to the exclusion "of the other or others and shall . . . accumulate the surplus of "such income until the time for distribution by investing the same "and the resulting income thereof in any investments hereby "authorized in augmentation of the capital of the trust premises ". . . Provided always that after each child . . . has attained his "or her majority the surplus income of his share in the trust "premises not expended . . . shall not be accumulated but shall "be paid to such child."

By clause 4 of the settlement the trustees were given a discretionary power of advancement for the benefit of any child up to half but "not exceeding in the whole one half of the then "expectant or presumptive or vested share of any child whether "minor or adult . . ."

Owing to the age of the settlors' grandchildren the second limb only of clause 3 was material.

By settlements dated respectively February 8, 1950, and February 10, 1950, Lady Chapman settled certain funds, in the first case for the benefit of her grandchildren by her said son Robert and in the second case for the benefit of her grandchildren by her son Nicholas. Both these settlements contained clauses similar to clause 3 in the settlement of 1944.

By this summons under section 1 of the Variation of Trusts Act, 1958, the court was asked to approve on behalf of all persons beneficially interested under the settlement including infants and unborn infants an arrangement for the variation of the trusts of the settlement, whereby the funds in each settlement were no longer to be held subject to the provisions of clause 3.

Geoffrey Cross Q.C. and *J. A. Armstrong* for the trustees, who included the settlors. By this summons under the Variation of Trusts Act, 1958, the court is asked to do what it was held in *Chapman* v. *Chapman* [2] that it had no power to do under section 57 of the Trustee Act, 1957. The result of clause 3 is that the grandchildren cannot claim the capital of the settled funds until 21 years after the death of the settlors, and the property passes

[2] [1954] A.C. 429; [1954] 2 W.L.R. 723; [1954] 1 All E.R. 798.

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Chapman's Settlement Trusts (No. 2), *In re.*

notionally on those deaths for estate duty purposes. It is for the benefit of each grandchild to get rid of this discretionary trust and to have the capital on attaining the age of 21, and also to get rid of the liability to estate duty. The evidence is that the settlors had not appreciated the effect of clause 3 in relation to estate duty.

Under the Act the court now has power to approve this proposed arrangement on behalf of infants and unborn infants.

[Vaisey J. I think that it is important that all cases under this Act should be heard in open court so that there can be uniformity of practice, and so that all interests on which it is sought to bind and whose behalf the approval of the court is sought may be represented by counsel.]

John Bradburn (*J. A. Wolfe* with him) for the grandchildren and unborn grandchildren. The usual practice has been followed showing that counsel's opinion has been taken, and the opinion has been exhibited showing that the arrangement proposed is for the benefit of the grandchildren, in that there is a likely saving of death duties; and it is in the interest of each grandchild that the capital should vest in possession on his (or her) attaining 21.

Vaisey J. I am quite satisfied that this arrangement is for the benefit of the grandchildren. I think that the form of the order should be "the court doth order under the powers con-"ferred by the above-mentioned Act . . ."

Order accordingly.

Solicitors: *Blundell, Baker & Co. for Wheldon, Houlsby, Moore & Armstrongs and J. H. & H. F. Rennoldson, South Shields.*

I. G. R. M.

In re Rouse's Will Trusts

February 18. Adjourned summons.

The applicant, Miss Kathleen Dorothy Rouse, in the events which happened was entitled to a life interest in the income of trust funds arising under the wills of her parents, subject to a power of appointment by her will or codicil. She was desirous of resorting to part of the capital and in return was prepared to release her power of appointment over part of the funds in favour of the persons who, had she died at the date of the application, would be entitled in default of appointment as next-of-kin. She therefore applied to the court for an order under section 1 of the Variation of Trusts Act, 1958, approving the arrangement.

F. E. Skone James for the applicant.

G. C. Raffety for the trustees and those presumptively entitled.

Vaisey J. I am satisfied that this arrangement is for the benefit of the applicant's next-of-kin. The order of the court should do two things: it should approve the arrangement and direct the taxation of costs, and it should read "The court doth hereby

"approve the arrangement set out in the schedule hereto." A reference to the order should be endorsed on the probate of the will or on the settlement in the appropriate case for the purpose of reference, but it will be sufficient if the endorsement consists of a note of the letter, number, short title and date of the order.

I again wish to stress the importance of these cases being heard in open court. It is necessary for uniformity of practice, and the variation of trusts is a serious matter which ought not to be dealt with behind closed doors. Everybody, the trustees and the next-of-kin, should be separately represented by counsel. I am not suggesting that solicitors are not competent to represent persons with varying interests but it is desirable that counsel should appear in a critical mood so that the whole picture is before the court. To make an order in chambers with parties represented by solicitors is not the proper way to deal with a large trust estate. If there is any real reason, such as the avoidance of unnecessary or undesirable publicity, an application can always be made for the case to be heard in chambers.

Order accordingly.

Solicitors: *Lethbridges.*

[Reported by MARGARET THOMAS, Barrister-at-Law.]

[REPORTERS' NOTE. In *In re Byng's Trusts* (post, p. 381) Vaisey J. said that the judges of the Chancery Division had ruled that all applications for the variation of investment clauses, whether under section 57 of the Trustee Act, 1925, or under the Variation of Trusts Act, 1958, should be heard in open court unless there was some special reason that they should be heard in chambers.]

[CHANCERY DIVISION.]

* *In re* COATES' TRUSTS.

1959
Feb. 20.
Harman J.

[1957 C. Nos. 2715, 3564, 3565, 3566.]

* *In re* BYNG'S WILL TRUSTS.

1959
Feb. 24.
Vaisey J.

[1958 B. No. 3667.]

Trust and Trustee—Variation of trusts—Act of 1958*—Powers of investment—Application for enlargement of trustees' powers of investment—Whether application under section* 57 *of Trustee Act,* 1925, *or section* 1 *of Variation of Trusts Act,* 1958*—Variation of investment clause—Form of order—Trustee Act,* 1925 (15 *&* 16 *Geo.* 5, *c.* 19), *s.* 57*—Variation of Trusts Act,* 1958 (6 *&* 7 *Eliz.* 2, *c.* 53), *s.* 1.

1959

Coates' Trusts, *In re.*

In view of the wider powers given to the court by the Variation of Trusts Act, 1958, the better course for trustees who seek to enlarge or vary their powers of investment is to make application under section 1 of that Act rather than under section 57 of the Trustee Act, 1925.

Where the court has approved an arrangement under section 1 of the Variation of Trusts Act, 1958, the arrangement may be carried out either by revoking the original investment clause and substituting a new one, or by retaining the original clause and inserting in it words enlarging the powers of investment. A note showing the new powers of investment must be indorsed on the trust instrument.

In re Coates' Trusts.

Adjourned summonses.

By these four summonses the respective trustees of four interrelated trusts applied in each case, inter alia, under section 57 of the Trustee Act, 1925, or alternatively, under section 1 of the Variation of Trusts Act, 1958,[1] for an order authorising them to invest up to one-half in value of the trust funds as follows:

1. The stocks, funds, debentures or securities of any public authority in the United Kingdom.

2. The bonds, mortgages, obligations, debentures or debenture stock or preference or ordinary or common (but not deferred) stock or shares officially quoted, or in respect of which there is permission to deal on the London Stock Exchange, of any public company or corporation incorporated in the United Kingdom or elsewhere which at the time of investment shall have a paid up capital of or equivalent at the current rate of exchange to at least £350,000 sterling, and shall have paid a dividend on its ordinary stock or shares in each of the four years immediately prior to the date of investment at the rate of at least 5 per cent. per annum on the nominal value of its ordinary stock or shares, or in the case of stock or shares having no par value on the value of its capital and surplus for the year in question. Provided that no moneys shall be invested in partly paid shares or stock other than newly issued shares or stock on which the capital is by virtue of the terms of issue thereof to be paid by instalments of which the last is to be payable not later than one year from the date of issue.

3. The units of any authorised trust scheme.

The four summonses were heard together.

In *In re Coates' Will Trusts* a testatrix, Dame Edith Coates, by her will dated December 1, 1921, directed that her residuary estate be held (so far as is here material) upon trust for life for Sir Edward Clive Milnes-Coates and Dorothy Anne Coates, her son and daughter, equally.

[1] Variation of Trusts Act, 1958, s. 1: "(1) Where property, whether "real or personal, is held on trusts ". . . under any will, settlement or "other disposition, the court may if "it thinks fit by order approve . . . "any arrangement . . . varying or "revoking all or any of the trusts, or "enlarging the powers of the trus-"tees . . ."

The will contained the following power of investment: "I "also declare that all moneys liable to be invested under my "will may be invested in any stocks funds or securities for the "time being authorised by law for trust money or on mortgage "of any real or leasehold houses or land in England or Wales "held for any term having forty years to run at the time of the "investment."

The testatrix died on January 7, 1930, and probate was granted to her executors on May 17, 1930.

In *In re Coates' Will Trusts* (*No. 2*) and *In re Coates' Settlement Trusts*, Sir Edward Feetham Coates, the husband of Dame Edith Coates, by his will, dated August 10, 1921, gave to Dorothy Anne Coates his share of certain family trust funds upon condition that she settled it upon certain specified trusts. He died on August 14, 1921.

By an order of the court dated July 5, 1923, it was declared that upon the true construction of the will the settlement to be executed in pursuance of it might contain a provision authorising the trustees to retain at their absolute discretion any investments in which the fund to be settled might be invested, even although such investments might not be authorised by law.

By a deed dated April 25, 1924, Dorothy Anne Coates executed a settlement of the funds given by her father's will. The settlement restricted investment to those investments authorised by law with, additionally, a very narrow power to lend money on deposit to a bank; existing investments might be retained.

In *In re Coates' Settlement Trusts* (*No. 2*), Elizabeth Hermione Coates, by her marriage settlement dated July 14, 1937, assigned to the trustees a sum chargeable upon the trust funds and property subject to the marriage settlement of her parents, Sir Edward Clive and Lady Milnes-Coates, dated October 6, 1906, and a deed of appointment dated July 12, 1937, and raiseable on the death of the survivor of them.

Under this settlement the trustees were authorised to invest in the public stocks, funds or Government securities of the United Kingdom, India or or any colony, and of any foreign government and in any securities the interest of which was guaranteed by Parliament; in mortgages of freehold property in England and Wales; in Bank of England metropolitan stock and London county stock; in the debentures of any company incorporated by Act of Parliament or the legislature of any colony or by royal charter; in the stock or shares of certain named industrial companies; in municipal stocks; and in any other trustee investments authorised by law.

In each case the respective trustees sought new powers of investment as set out above, save that the trustees of the marriage settlement of Elizabeth Hermione Coates did not ask for

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Coates' Trusts, *In re.*

power to invest in the stocks, funds, debentures or securities of any public authority in the United Kingdom.

H. E. Francis for the trustees.
P. J. Millett for the adult beneficiaries.
John P. Brookes for the infant beneficiaries.

Harman J. The trusts in each of these four cases are not quite the same, but the beneficial interests, subject to a power of appointment in one case, will come either by appointment or in default of appointment, to the descendants of Sir Edward Clive Milnes-Coates. The investment clauses in three cases are very narrow and are virtually confined to trustee securities, while in the fourth, the marriage settlement, an eccentric range was inserted for a special purpose. The trustees, although not identical in each case, are closely linked and, having taken the advice of stockbrokers, wish to invest in equities. [His Lordship read the proposed new clause and continued:]

The court has in recent years exercised a jurisdiction similar to that which it is now sought to invoke where large charitable funds are concerned by way of scheme under the Charitable Trusts Acts: see the judgment of Vaisey J. in *In re Royal Society's Charitable Trusts.*[1] There has, however, always been a doubt whether the like could be done under section 57 of the Trustee Act, 1925, although there is no doubt that the court can authorise under that Act the sale of existing securities and investment in specified new ones. In *In re Shipwrecked Fishermen and Mariners' Royal Benevolent Society*[2] Danckwerts J. held that section 57 empowered the court to give trustees a general power of investment.

When application was first made to me I invited Mr. Francis to amend the summonses by entitling them also "In the "matter of the Variation of Trusts Act, 1958," and it seems to me to be a happy solution of the doubt, since the court has power under that Act, where trustees desire a change of investment, to approve an arrangement on behalf of persons under an incapacity, or unborn, or unascertained, or potentially interested under a discretionary trust.

In three of the present cases, that is, in the case of the wills of Dame Edith Coates and Sir Edward Feetham Coates, and the settlement made by Dorothy Anne Coates, it will be sufficient merely to enlarge the investment powers by authorising the trustees to invest within the limits specified. In the fourth case, that of the marriage settlement, it would be better to revoke the existing investment powers and to substitute the new clause, but without prejudice to the rights of the trustees to retain investments hitherto authorised.

[1] [1956] Ch. 87; [1955] 3 W.L.R. 342; [1955] 3 All E.R. 14.

[2] [1958] 3 W.L.R. 701; [1958] 3 All E.R. 465.

The orders in the three similar cases should read: "The "court in pursuance of the power conferred by the above-"mentioned Act doth hereby approve the arrangement set forth "in the schedule hereto. . . ."

In the case of the marriage settlement there will be a similar order, but it must state that the old clause has been revoked and the new clause substituted. In each case there will be a direction that the investments be reviewed by the trustees' stockbrokers at least once a year.

Orders accordingly.

Solicitors: *Hunters.*

[Reported by Margaret Thomas, Barrister-at-Law.]

In re Byng's Will Trusts.

Adjourned summons.

By his will, dated November 23, 1938, Ernest Gustav Byng directed his trustees to divide his residuary estate into two equal moieties, one to his son, Robert Byng, and one to his daughter, Jane Simpson, and to hold the income of each of such moieties on protective trusts for his said son and daughter respectively, with remainder in each case for their children or remoter issue as they might appoint, with remainder in default of appointment to such children. The will contained an ultimate trust of the residuary estate in favour of the testator's sister in the event of the default or failure of the foregoing trusts; she was now dead and her executors were the trustee plaintiffs on this summons.

The son was married and had two children, and the daughter was married and had one child, all of which children were infants. By a deed of appoinment dated July 12, 1955, the daughter, in exercise of the power conferred on her by the will, appointed to her husband, Christopher Robert Simpson, one-third of the income of her settled moiety of the testator's residuary estate.

The testator made three codicils to his will dated respectively February 6 and 19, 1940, and July 29, 1943, which were not here material. He died on February 18, 1944.

Clause 25 of the will contained the following powers of investment: "I declare that any moneys subject to the trusts of this "my will may be invested in or upon any of the public stocks "funds or Government securities of the United Kingdom of "India or any British Dominion Colony or Dependency or any "foreign Government or State or any securities the interest on "which is or shall be guaranteed by Parliament or upon mortgage "of freehold copyhold leasehold or chattel real securities in Great "Britain but not in Ireland (such leaseholds or chattels real "having not less than 60 years to run at the time of such invest-"ment being made) or on the security of any interest for a life "or lives or determinable on a life or lives in real or personal

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"property, together with a policy of assurance on such life or in "the purchase of freehold ground rents or in the purchase of "freehold copyhold or leasehold or chattel real property in Great "Britain but not in Ireland (such leasehold or chattel real "property having at least 60 years to run at the time of such "investment) or in stock of the Bank of England or the Bank of "Ireland or Metropolitan Stock or London County Stock or in "or upon the debentures debenture stock or rent charge guaran-"teed or preference stock or shares of any company incorporated "by special Act or by or under public General Act or Acts of "the Imperial Parliament or the legislature of any British "Dominion Colony or Dependency or Royal Charter or in or upon "the ordinary stock or shares of any such company a fixed or "minimum rate of interest or dividend on which is guaranteed by "the Government of the United Kingdom or India or any British "Dominion Colony or Dependency or any foreign Government or "State or in or upon the ordinary preferred stock or shares but "not in deferred stock or shares of any such company or in or "upon the debentures debenture stock obligations or securities "of any foreign railway company or in or upon the stocks funds "debentures or securities of any public municipal or local body "or authority in the United Kingdom or India or any British "Dominion Colony or Dependency or any foreign country and in "particular but without restricting in any way the generality of "the foregoing I expressly declare that any moneys subject to the "trusts of this my will may be invested in or upon the debentures "or debenture stock preference ordinary or deferred or other "shares or securities of and in any limited company in which "either of my said children may be actively interested or as a "loan to any such company or to any partnership business in "which either of my said children may be actively engaged as a "partner or otherwise upon such security as my trustees may "think fit without security upon such terms or conditions at such "rate of interest and for such period as my trustees may in their "absolute discretion think fit."

By this summons the trustees of the will asked the court for an order either under section 57 of the Trustee Act, 1925, or under section 1 of the Variation of Trusts Act, 1958, approving an arrangement by which the trustees, notwithstanding the absence of any power in the will or codicils in this behalf, might be authorised from time to time to invest moneys now subject to the trusts of the will, and from time to time requiring investment in ordinary or deferred shares or stock of any company quoted or dealt in on the Stock Exchange of London, New York, Montreal, Melbourne or Johannesburg, such company having an issued and paid up capital of not less than £500,000 or the equivalent thereof; alternatively, that the trustees might be authorised to invest not more than three-quarters of such moneys in or upon the purchase of ordinary or deferred shares or stock

in any such company as aforesaid, other than a company whose principal object was the ownership or working of minerals or the ownership of wasting assets, provided that such company shall have paid a dividend on its ordinary shares or stock of not less than 5 per cent. in each of the 10 years preceding such investment, and provided that not more than 5 per cent. of such moneys shall be invested in the ordinary or deferred stock or shares of any one such company.

On January 19, 1959, the summons came before Harman J. in chambers, who adjourned it into open court for argument as to whether the jurisdiction of the court should be exercised under section 57 of the Trustee Act, 1925, or under section 1 of the Variation of Trusts Act, 1958.

D. A. Thomas for the trustees. Although there is no practical difference in this case, in most cases of this nature it would be quicker and cheaper if the matter were dealt with in chambers under section 57 of the Trustee Act, 1925.

[VAISEY J. No, we have made a rule that all cases for the variation of investment clauses are to be heard in open court unless there be a special reason to avoid publicity.]

A direction is sought as to whether one should go under section 57 or under section 1; in *In re Royal Society's Charitable Trusts* [3] it was said that one could not proceed under section 57. [Reference was also made to *In re Shipwrecked Fishermen and Mariners' Royal Benevolent Society.*[4]]

[VAISEY J. That was because there was a charity in that case and section 57 could not apply. The position under the two Acts is rather different: under section 57 one has to say it is "expedient" to make the order, whereas, under the Act of 1958, it has to be "for the benefit . . ." It does not matter much under which Act you proceed, but it is safer to proceed under the Act of 1958.]

The trustees in this case want to enlarge the investment powers under the will, which do not permit investment in equities. The stockbrokers' report states that there is no difference now between ordinary and deferred shares, and recommends that the trustees should also have power to invest in countries outside the United Kingdom where there may be better opportunities.

[VAISEY J. It is always a criticism that trustees are never given a chance to take up new issues.]

Words should be added to include new issues, also shares of no par value.

[VAISEY J. What is wanted is a modern up-to-date investment clause, which should be indorsed on the will or probate.]

John Monckton for the beneficiaries interested in capital, the infant children of Robert Byng and Jane Simpson and of their

[3] [1956] Ch. 87; [1955] 3 W.L.R. 342; [1955] 3 All E.R. 121.

[4] [1958] 3 W.L.R. 701; [1958] 3 All E.R. 465.

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future children and remoter issue. The proposed variation of the investment clause is supported in substance on behalf of infants and unborn infants, but it is submitted that it should be subject to the restrictions set out in paragraph 2 of the summons. At the moment equities are a very popular investment, but it would be prudent to invest only up to three-quarters of the fund in equities and retain one-quarter in gilt-edged securities; such an arrangement would greatly extend the trustees' powers of investment without going too far.

Peter Curry for the beneficiaries interested in income, Robert Byng, Jane Simpson and Christopher Robert Simpson. The additional complication of having some investments in equities and some in gilt-edged would be of no assistance. The beneficiaries interested in income would prefer the variation of the investment clause on the wider basis of paragraph 1 of the summons.

Vaisey J. I wish it to be known that in applications of this sort to vary investment clauses, one of two possible courses may be followed. One is to add a few words to the existing clause, and the other is to redraft the whole investment clause embracing the existing clause but excluding all dead wood, and adding the new powers. I think that in the great majority of cases, of which this is one, the more convenient course is to produce a new clause containing the appropriate enlargement, and incorporating all that is worth saving of the existing range of choice. This case can be dealt with in that way because I should think it would be more helpful to the trustees to find their whole range of choice set out in one clause, in this case a new clause 25, which I declare can be approved on behalf of the infants and all children hereafter to be born who are interested in the capital of the trust fund. I need not send this matter back to chambers. It can be mentioned to me at any time, and it need not go back to the Master. I wish counsel to draw a minute incorporating the new clause, and to support it by a further affidavit by the stockbroker showing that the clause as it now stands meets with his approval. The order can then stand in the way which I have suggested. The entitlement under the Trustee Act, 1925, must be struck out and the order made under the Variation of Trusts Act, 1958.

[The minute of order so far as material was in the following form:

AND the respondents Robert Byng Christopher Robert Simpson and Jane Simpson by their counsel agreeing to the arrangement hereinafter mentioned

AND the Court being of opinion that such arrangement will be for the benefit of the infant respondents and all persons unborn who may hereafter become entitled (otherwise than under the protective trusts hereinafter mentioned) to a beneficial interest in the residuary estate of the above-named testator

THE COURT doth in pursuance of the powers conferred upon it by the Variation of Trusts Act 1958 approve the arrangement specified in the Schedule hereto on behalf of the infant respondents the said persons unborn and any person who is or may hereafter become entitled to any discretionary interest under the protective trusts upon which the life interests of the said respondents Robert Byng and Jane Simpson in the said residuary estate are held

AND it is ordered that the applicants do indorse a note or memorandum of this order on the Probate of the said will and codicils.

The Schedule

The powers of investment conferred on the applicants or other the trustees for the time being of the said will and codicils of the said testator by clause 25 of the said will in respect of his residuary estate are hereby revoked and in place thereof there shall be substituted the following:

25. Trust moneys may be invested

(1) In or upon any of the public stocks funds bonds mortgages or securities of or guaranted by the Government or any public municipal or local body or authority of the United Kingdom of Great Britain and Northern Ireland or any British state (which expression shall mean any country Republic Dominion Commonwealth Union Dependency or Colony forming part of the British Empire or Commonwealth of Nations or any province or state having a separate local legislature and forming part thereof respectively) or any foreign Government or state

(2) Upon mortgage of freehold leasehold or chattel real securities in Great Britain but not in Ireland (such leaseholds or chattels real having not less than 60 years to run at the time of such investment being made)

(3) In the purchase of freehold ground rents or in the purchase of freehold or leasehold or chattel real property in Great Britain but not in Ireland (such leasehold or chattel real property having at least 60 years to run at the time of such investment being made)

(4) On the security of any interest for a life or lives or determinable on a life or lives in real or personal property together with a policy or policies of assurance on such life or lives

(5) In or upon the debentures (as defined by the Companies Act 1948) or preferred or preference or ordinary or deferred shares or stock of any Company dealt in or quoted on the Stock Exchange of London New York Montreal Melbourne or Johannesburg such Company having a paid up capital of not less than £500,000 or its equivalent at the current rate of exchange and so that in the case of a Company having shares of no par value such paid up capital shall be deemed to include the capital sum (other than capital surplus) appearing in the Company's published accounts in respect of such shares

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(6) In or upon the debentures (as so defined) preference ordinary or deferred or other shares or securities of and in any limited Company in which either Robert Byng or Jane Simpson may be actively interested or as a loan to any such Company or to any partnership business in which either of them may be actively engaged as a partner or otherwise upon such security as the trustees for the time being of the said will and codicils may think fit or without security upon such terms or conditions at such rate of interest and for such period as the said trustees may in their absolute discretion think fit.]

Order accordingly.

Solicitors: *Denton, Hall & Burgin for Herbert, Simpson, Son & Bennett, Leicester.*

I. G. R. M.

[COURT OF APPEAL.]

C. A.

1959
Feb. 26.

Hodson, Morris and Willmer L.JJ.

* ALLOTT *v.* WAGON REPAIRERS LTD.

[Plaint No. 0254.]

* RUTHERFORD *v.* BRITISH OVERSEAS AIRWAYS CORPORATION.

[Plaint No. 0707.]

Costs—County court action—Action for "payment of money"—Claim for damages—Payment into court within eight days—Payment of fixed costs—Express denial of liability—Whether defendant liable for more than fixed costs—County Court Rules, 1936 (*S.R. & O.*, 1936, *No.* 626/*L.*17), *Appendix D—County Court* (*Amendment*) *Rules,* 1957 (*S.I.* 1957, *No.* 174 (*L.*1), *Ord.* 11, *r.* 1 (1) (*b*).

Where a defendant pays into the county court within eight days of the service of the summons on him a sum of money in satisfaction of a claim for the payment of money only, plus the amount of fixed costs marked on the summons, such payment into court being accompanied by a denial of liability, the defendant is not entitled to the benefit of the "fixed costs" rule under Order 11, r. 1,[1] of the

[1] County Court Rules, 1936, Ord. 11, r. 1 (as amended by the County Court (Amendment) Rules, 1957): "(1) Where the only relief claimed "in an action is the payment of "money, the defendant may, within "eight days of the service of the "summons on him inclusive of the "day of service, pay into court in "satisfaction of the claim—(*a*) the "whole amount of the claim and the "costs stated on the summons; or "(*b*) so much of the claim as he "admits to be due from him to the "plaintiff, together with the costs (in-"cluding court fees) which would be "entered on a summons for that "amount under Part I of Appendix "D. . . ."

Rule 2. "(1) A defendant in an "action may at any time before judg-"ment pay money into court—(*a*) in "satisfaction of the claim . . . (3) A "payment made under this rule shall "be deemed to be made with an "admission of liability, unless accom-"panied by a notice stating that "liability is denied. . . . 9. Where

County Court Rules, 1936 (as amended), but the costs must be taxed pursuant to Order 11, r. 9.

The language of Order 11, r. 1 (1) (*b*): "so much of the claim "as he [the defendant] admits," contemplates a payment in accompanied by an admission of liability, and the rule cannot apply to a case where liability is expressly denied.

Reid v. *Thomas Bolton & Sons Ltd.* [1958] 1 W.L.R. 266; [1958] 1 All E.R. 465 considered.

APPEAL from Judge Steel sitting at Ashton-under-Lyne County Court.

APPEAL from Judge Blagden, sitting at Westminster County Court.

These two appeals, which were heard together, arose from decisions as to costs in relation to payments into court of sums of money in satisfaction of claims for damages for personal injuries.

Both appeals raised the question of the true construction of Order 11, r. 1 (1) (*b*), of the County Court Rules, 1936 (as amended).

The facts are set out in the judgment of Hodson L.J.

John Thompson Q.C. and *D. Turner-Samuels* for the plaintiff in the first appeal, and for the defendants in the second appeal.

Stephen Chapman Q.C. and *R. I. Kidwell* for the defendants in the first appeal, and for the plaintiff in the second appeal.

The case cited in argument is referred to in the judgments.

HODSON L.J. These are two appeals from county court judges. The first is the appeal of the plaintiff, Allott, from the order of Judge Steel in the Ashton-under-Lyne County Court dated July 11, 1958, and the second appeal is of the defendants, British Overseas Airways Corporation, from the order of Judge Blagden sitting at Westminster County Court dated July 29, 1958. Both appeals raise the same point, and they have been heard together, the position being that in each case the plaintiff brought an action for damages in the county court against the defendants for personal injuries, and in each case the claim was for £400 damages. In one case it was stated to be for "£400 damages," and in the other the claim was stated to be "limited to £400," that being the limit of jurisdiction in the county court. In each

"in any case to which rule 1 (1) (*b*) "of this Order does not apply, the "amount paid into court is less than "the amount of the claim, or where "the whole amount of the claim is "paid into court but there is a claim "for some relief other than the pay-"ment of money, and the plaintiff "elects to accept the sum or any one "or more of specified sums paid into "court in satisfaction of his claim or "of the cause or causes of action to "which the specified sum or sums "relate, the following provisions shall "apply . . ."

Appendix D: "Fixed costs, Part I "Summonses. *Directions* 1. Tables I "to VI of this part of this Appendix "show the amount to be entered on "the summons in respect of solicitor's "charges—(*a*) in an action for the "recovery of a sum of money for the "purposes only of Order XI, Rule 1, "and Part II of this Appendix; . . ."

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case the defendants, in order to obtain the advantages which defendants achieve under Order 11, r. 1, of the County Court Rules, 1936, paid into court within eight days a sum of money, in each case £120, and in one case £7, and in the other £7 2s., which sums are called "fixed costs," Order 11, r. 1, being the fixed costs rule. This enables costs to be kept down to a very low figure, where the defendants close with their adversaries quickly and make an adequate payment into court which the plaintiff accepts. In each case the plaintiff here accepted the payment, and the only question which has arisen for this court's determination is whether the fixed costs rule applies, or, if it does not apply, whether Order 11, r. 2, applies, which also deals with payment into court. Under that rule "A defendant in an "action may at any time before judgment pay money into court— "(*a*) in satisfaction of the claim." By sub-rule (3) it is provided that any payment made under this rule "shall be deemed to "be made" with an admission of liability, unless accompanied by a notice that liability is denied. The defendants in each case paid in with a denial of liability. The contest between the parties is whether the plaintiffs are limited to the costs under the fixed costs rule, or whether, there being a denial of liability, the fixed costs rule does not apply and they are entitled to tax their costs under Order 11, r. 9.

[His Lordship read the relevant parts of Order 11, r. 9, and continued:] The effect of this provision is that the plaintiff is entitled to tax his bill of costs in the ordinary way and obtain a sum which the taxing officer deems to be reasonable.

The first point which should be mentioned in connection with these appeals is that it has been determined by this court in *Reid* v. *Thomas Bolton & Sons Ltd.*,[1] that Order 11, r. 1, which begins: "(1) Where the only relief claimed in an action is the "payment of money," applies not only to claims for liquidated sums of money, but also for claims of any unliquidated sums such as are claimed here.

This is a very short question of construction of Order 11, r. 1 (1) (*b*). [His Lordship read it and continued:] The contention of the defendants is that this is one of those cases where money has been paid into court representing "so much of the "claim as he admits to be due from him to the plaintiff," the £120 being part of the claim. The contention was answered very shortly in the second case under appeal by Judge Blagden in the Westminster County Court, who pointed out that the words "as "he admits" in the paragraph can hardly include an express denial, and he accepted the submission of counsel for the plaintiff on the construction of the rule that it contemplated an admission of liability and could not apply when the liability was expressly denied. I confess I find it rather difficult to elaborate upon that. It is "so much of the claim as he admits to be due," and when

[1] [1958] 1 W.L.R. 266; [1958] 1 All E.R. 465.

the notice of the particulars of summons is issued by the county court, the defendant is asked how much, if any, of the claim "he admits to be due," and it is only on that footing that a payment in is accepted by the court.

The argument to the contrary is to the effect that all that is involved here is an admission of a formal nature which is not an admission of liability at all, merely an admission that the defendants will pay a certain sum—say £120—for the purpose of disposing of the case.

I confess I have been unable in the course of reading the judgment of the county court judge at Ashton-under-Lyne, who accepted an argument which we heard in this court from Mr. Stephen Chapman, to follow the reasoning. The argument is designed to make a distinction between admitting a sum to be due and admitting liability. It is quite true, as Mr. Chapman pointed out, that neither the word "liability" nor the words "denial of liability or admission of liability" appear in the rule we are construing; but it does appear, for example, in Order 9, r. 1, which deals with admissions by defendants who wish to admit liability. But whether the word "liability" is present or not, an admission of a sum being due appears to me to be clearly an admission of liability.

In my opinion, the judgment of the county court judge at Westminster was plainly right and should be upheld with the consequence that in the first case, which has been considered at the same time, the judgment of the county court judge at Ashton-under-Lyne should be reversed.

There is another matter I should perhaps mention. Although Mr. Stephen Chapman took the point simply and solely under Order 11, r. 1 (1) (*b*), which he claimed to be a protection for his clients on this matter of costs, Mr. Kidwell did seek to advance a further argument based on Order 11, r. 1 (1) (*a*), which deals with "the whole amount of the claim." That argument is inconsistent with his leader's argument, and he has not raised this matter by cross-notice in the appeal to which it relates. But in my view (*a*) is inapplicable in any event. The only figure which one could appropriate to (*a*) would, I think, be the sum of £400, which, although put in merely for jurisdictional reasons, is the only figure which appears in an unliquidated claim in the county court; otherwise there is no ascertainable sum involved.

For these reasons, I would allow the appeal in the first case, and dismiss the appeal in the second case.

MORRIS L.J. I am entirely of the same opinion. In the course of the submissions made to us there has been some discussion as to the policy of the rules in question. Our task, however, is merely to construe the words of the rules and to apply them to the facts which are before us. The first question which arises in each case is whether there was a payment into

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court in satisfaction of the whole amount of the claim. It appears to me to be quite clear that there was not. The whole amount of the claim in each case was the sum of £400. There were claims for those amounts of money. In my judgment, therefore, Order 11, r. 1 (1) (*a*) did not here come into operation.

The question which has primarily been debated in the two cases is whether there were payments into court in satisfaction of so much of the claims as were admitted to be due. But in each case there was a denial of liability. It has been urged before us that we should not give a strictly limited meaning to the words in Order 11, r. 1 (1) (*b*). But our task is simply to give an ordinary meaning to the words as they are used in their context. The words "so much of the claim as he admits" point, in my judgment, quite clearly to an admission of a part of a claim. Where there is an express denial, it is very difficult to see that anybody can assert that there has been an admission of part of a claim. It was urged that we must judge by what the defendants did, and say that the defendants by making their payments into court in effect made admissions of parts of the plaintiffs' claims. But I find it impossible to construe an express denial as an implied admission. The defendants here can bring themselves within rule 2, but having regard to the words used in Order 11, r. 1 (1) (*b*), they do not, in my judgment, come within that part of the rule.

I therefore concur that the result is that in the one case the appeal succeeds, and in the other it fails.

Willmer L.J. I agree. It seems to me that one thing which the argument in these cases has brought to light is the fact that Order 11 of the County Court Rules does not deal very happily with claims for unliquidated damages. That is not a matter of concern to us, except in so far as it increases the difficulty of construction for us. The question whether some amendment of the rules might be desirable will no doubt be considered by the appropriate authority.

On the question which falls for decision here, I am left in no doubt, having heard the arguments on both sides, that Order 11, r. 1, applies, and can only apply, where there is an admission either in whole or in part. I should have thought that rule 1 (1) (*a*), as a matter of ordinary common sense, could only be applied to a case where the whole of the claim is admitted. This conclusion also seems to follow from the fact that paragraph (*a*) is immediately followed by paragraph (*b*), which deals with the case where only part of the claim is admitted. Clearly that is what paragraph (*b*) of sub-rule (1) is dealing with. In those circumstances, I share the difficulty expressed by my brethren of seeing how one can combine a denial of liability with the application of a rule which specifically deals with a case where so much of the claim is admitted. The two things seem to me to involve a contradiction in terms. In those circumstances,

therefore, my conclusion is that a defendant who seeks to deny liability is not entitled, as the rule stands at present, to rely on Order 11, r. 1.

I might perhaps add a further argument in support of that conclusion, which seems to me to arise from a consideration of the wording of Order 11, r. 2. In sub-rule (3) express reference is made to admission or denial of liability when payment in is made under the rule; and it is provided that such a payment is deemed to be made with an admission of liability, unless accompanied by a notice stating that liability is denied. The fact that no similar provision has been incorporated anywhere within rule 1 suggests to my mind that it was thought to go without saying that a payment in under that rule must necessarily involve an admission.

For these reasons, I agree with the conclusion stated by my Lords.

First appeal allowed.
Second appeal dismissed.

Solicitors in the first appeal: *W. H. Thompson; Hewitt, Woollacott & Chown for James Chapman & Co., Manchester.*

Solicitors in the second appeal: *Goldingham, Wellington & Co.: W. H. Thompson.*

J. A. G.

[PRIVY COUNCIL.]

J. C.†
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Mar. 19.

* COMMISSIONER FOR RAILWAYS . . APPELLANT;
AND
AVROM INVESTMENTS PROPRIETARY LTD. AND OTHERS . . . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES IN EQUITY.

Building—Contract—Lease—Construction—Approval of plans to be in lessor's "absolute discretion"—Alternative less costly plan submitted by lessee—Lessor's grounds of disapproval to be reasonable—Approval unreasonably withheld—Right of lessee to proceed with new plans.

Landlord and Tenant—Improvement—Consent to—Unreasonably withheld—Effect.

Election or Option—Election or selection—Building lease—Lessor's right to approve plans—Approval given—Whether he must consider further plans.

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† *Present*: VISCOUNT SIMONDS, LORD MORTON OF HENRYTON, LORD COHEN, LORD SOMERVELL OF HARROW and LORD DENNING.

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By clause 4 of a building lease relating to an important undeveloped site in Sydney it was provided, inter alia, that the lessee would, within two years from the date of the commencement of the lease, spend not less than £150,000 in erecting an hotel on the demised premises, "and the new building . . . shall at all times "be in accordance with such building design plan and specification "as the . . . lessor may in his absolute discretion approve . . . and "notwithstanding anything hereinbefore contained the building "design plan and specification of the said building shall be subject "to the reasonable requirements of the lessor . . ."

In 1954 plans for an hotel were submitted by the lessee corporation to the lessor, who approved them subject to modifications and conditions, but, the lowest tender being more than the lessee was prepared to spend, it intimated that for financial reasons it did not propose to build in accordance with the 1954 plans. Thereafter, in 1956, it submitted new plans, which were never approved by the lessor, for a building costing less, and shortly after it entered into a contract with a building contractor to construct a building in accordance with those plans. The present suit was thereupon begun by the lessor, claiming, inter alia, a declaration that the lessee was not entitled to erect a building on the demised premises other than in accordance with plans and specifications approved by the lessor, and an injunction to restrain it from so doing, and a declaration that the lessee was bound under the lease to erect the building approved by the lessor in 1954:—

Held, first, that in the circumstances there was no approval of the 1954 plans sufficient to justify the submission that the lessee became liable under the contract to erect a building in accordance with those plans and had no right to submit further plans for consideration. Nor was there anything in the contract which justified that submission, nor anything in the circumstances which would have entitled the lessor to refuse to consider the further plans.

Secondly, as the provision in clause 4 that the plans "shall be "subject to the reasonable requirements of the lessor" had to be given effect to "notwithstanding anything hereinbefore con-"tained," the lessor, notwithstanding the words "absolute dis-"cretion" used earlier in clause 4, if he disapproved, must have reasonable grounds for so doing, and in the present case there was ample evidence that approval of the 1956 plans was unreasonably withheld by the lessor—those plans had a number of advantages over those of 1954. Consent having been unreasonably withheld by the lessor to the alteration, it could in the circumstances have been made by the lessee without any further application to the lessor, and this was so although there were also certain public authorities whose approval of the plans was necessary.

Balls Brothers Ltd. v. *Sinclair* [1931] 2 Ch. 325 applied.

Judgment of the Supreme Court of New South Wales in Equity (McLelland J.) affirmed.

Appeal (No. 19 of 1958) from a judgment and decree of McLlelland J. sitting as the Supreme Court of New South Wales in Equity (February 11, 1958), dismissing a suit brought by the Commissioner for Railways of New South Wales against Avrom Investments Pty. Ltd., John Bonaventure Limerick and John Birkett Wakefield for an injunction and declarations. His Honour gave leave to appeal.

The following facts are taken from the judgment of the Judicial

Committee: The appeal turned on the construction of a lease and the application of its provisions to the facts which led up to the dispute. The lease was granted on June 26, 1941, to Rachel Gardiner and Permanent Trustee Company and was assigned to the defendant corporation on February 24, 1943.

The appellant, hereinafter called the plaintiff, was a body corporate charged with the duty of administering the railway system of the State of New South Wales. It owned an estate in fee simple in the land leased, which was in the city of Sydney. In 1927 an underground railway system was in course of construction, and one of its stations was to be constructed near the land. There were premises on the land for which the plaintiff had a liquor licence. The land went from George Street to Carrington Street, being divided by Wynyard Lane. Carrington Street was about two storeys higher than George Street. Beneath the surface of the land there were subways and passages to the station.

The plaintiff called for tenders for a lease of the land for a term of 60 years, the successful tenderer to build an hotel to cost at least £150,000. The prospective lessee was to have the licence vested in him. The successful tenderer was a Mr. Gardiner. He died in February, 1941, and the original lessees were his executors.

Protracted negotiations took place. The following facts are relevant for the purpose of understanding some of the provisions of the lease and how the dispute arose. Mr. Gardiner obtained a design for an hotel to be constructed on heavy steel columns. The hotel as then planned would have covered the site to the full building limit. It would have been carried over Wynyard Lane but at a height that would not impede traffic. The plaintiff was at that time doing its own excavations and work, and it was agreed that it should construct the steel columns and do excavation work necessary for the then contemplated building. The cost of that work done for the defendant's predecessor was to carry interest. The cost as agreed was set out in the lease in covenant 3 as £109,134 5s. 9d.

In 1938 the Minister of Transport intervened on the question of the extent of the licensed premises and liquor advertisements. There were further difficulties in 1939 with the licensing authorities as to the lack of accommodation, and on July 3, 1939, the licensing court refused to renew the licence. By that time Mr. Gardiner was claiming specific performance of an agreement for a lease. On June 27, 1940, an appeal from the licensing court's refusal to renew the licence was successful.

On November 18, 1940, building became controlled. There had been previous weekly tenancies for part of the land, and Mr. Gardiner, later his executors, were in possession of the licensed premises and the licence. The lease was executed on July 26, 1941. The licensing court renewed the licence on condition that bedroom and ancillary accommodation costing about £10,000 would be constructed by the licensee. That work was approved by the

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authorities and the plaintiff and completed by the defendant by November 30, 1942.

The lease was for a term of 60 years. For the first two years the rent was £9,000. For the following five years it was £15,000. From the eighth to the twelfth year it was £19,200. There was a proviso that if the profit to the lessees from the demised premises for those five years was less than 10 per cent. on the capital invested there were to be reductions in rent. Thereafter the rent was to be £19,200. The licensed premises, originally known as Café Francais, became known as The Plaza Hotel.

The appeal turned mainly on clause 4 of the lease, which read as follows: "THAT the lessee will within two (2) years from the "date of the commencement of this lease expend a sum of not "less than one hundred and fifty thousand pounds (£150,000/–/–) "in erecting constructing and completing in a workmanlike and "substantial manner in every respect complying with any provision "of any law statutory or otherwise having application thereto and "to the satisfaction of any civic licensing local public or statutory "authority (hereinafter called the said authority) and the lessor "a new building on in under over through or along the demised "premises (hereinafter included in the expression 'said building' "which expression shall include also the permanent improve-"ments erected or constructed or other constructional work which "has been carried out by the lessor on the land hereby leased) "and the said building shall be erected constructed and com-"pleted with external walls of stone brick concrete or other "approved material and shall at all times be in accordance with "such building design plan and specification as the said authority "or the lessor may in their absolute discretion approve and the "plan and specification shall be completely prepared and sub-"mitted by the lessee for the approval of the lessor within sixteen "weeks from the date of commencement of this lease and the "lessee will within a period of six months from the commence-"ment of this lease commence or cause to be commenced "the erection and construction of the said building and shall "thereafter diligently and continuously proceed with or cause to "be proceeded with such erection and construction so that at "the expiration of the said period of two (2) years from the date "of the commencement of this lease the lessee without cost to "the lessor shall have erected constructed and completed on in "under over through or along the demised premises the said "building hereinbefore mentioned and shall have expended there-"on the sum of not less than one hundred and fifty thousand "pounds (£150,000/–/–) within the time aforesaid and the said "building design plan and specification shall provide for the "complete safety of the lessor's passageway and the lessee will "only build subject to any requirement of the lessor concerning "the absolute stability safety and well being in every respect of "the lessor's passageway AND so that the space between the

"said building and the column known as Number 155 of the "lessor on the George Street level will be not less than six feet "(6′) AND there shall be no openings of any description onto "any splayed alignment of the said building on or near the "George Street frontage unless approved in writing by or on "behalf of the lessor AND the lessee will at any time or from "time to time produce and show to the lessor on demand any "book document paper bill account voucher and evidence relating "to any money expended as aforesaid for material labour or any "other item used or employed or upon which expenditure has "been made in and about the said building AND the said build-"ing shall be erected constructed and completed in a good "workmanlike and substantial manner in accordance with the "said building design plan and specification and in accordance "with any requirement and subject at every reasonable time to "inspection and approval of the said authority and the lessor and "in accordance with any provision of any law statutory or other-"wise having application to such erection construction and "completion AND the lessee will use no old or second-hand "material therein except such as shall be approved by the said "authority and the lessor AND the lessee will if the said building "be three or more storeys in height provide the same with ample "cut-off escapes to the requirement and satisfaction of the said "authority and the lessor AND the lessee will in case of any "shop and dwelling in combination so arrange them as to permit "of the two portions being absolutely cut off from one another "by a fire resisting wall floor and ceiling or other thing of separa-"tion or partition AND the lessee will erect or construct any "awning to be erected of the cantilever or suspended type in "accordance with a building design and plan and specification "approved by the said authority and the lessor AND the lessee "will use damp courses if any be required of material approved "by the said authority and the lessor AND the lessee will not "erect or construct a roof on the said building which contains "any corrugated iron excrescence or tank or any tower or other "cowl cupola dome cistern or thing unless treated ornamentally "and specially approved or permitted by the said authority and "the lessor AND the lessee will in the course of such erection "and construction as aforesaid make construct and complete any "necessary drain and other convenience of the like or a different "kind as may be required by the said authority and the lessor "and in accordance with any provision of any law statutory or "otherwise having application thereto AND notwithstanding "anything hereinbefore contained the building design plan and "specification of the said building shall be subject to the reason-"able requirements of the lessor AND if during the erection "construction and completion of the said building it shall in the "opinion of the said authority or the lessor be necessary for the

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"purpose of providing for the stability safety or well being thereof in any respect that any alteration or amendment should be made in or to the building design or plan or specification thereof then and on every such occasion the lessee at his own expense will immediately carry out such alteration or amendment as may be required by the said authority or the lessor."

On February 24, 1943, the then lessees, with the consent of the plaintiff, transferred and assigned the lease to the defendant corporation, which expressly covenanted with the plaintiff to observe the covenants in the lease. The individual defendants were nominees for the purpose of holding the licence.

Building control came to an end on September 30, 1952. The judge was satisfied that no application to erect a building as contemplated by clause 4 of the lease would have succeeded from the date of the lease until the end of control. The judge found the hotel as originally contemplated, which had been estimated to cost £600,000, would have cost approximately £1,500,000 at the date of the lease and probably several millions by 1954. As the figures showed, substantial profts were being made from the hotel and shops already in existence.

By section 40A (1) of the Liquor Act, 1912, as it then stood: "40A. (1) (a) Upon proof that public convenience requires additional accommodation in, or the renovation, structural alteration, or rebuilding of any premises in respect of which a publican's license is held, the licensing court may order the owner of the premises to carry out, within a reasonable time to be set out in the order, the work specified in the order. (b) Not less than thirty days' notice of intention to make application for any order under this subsection shall be given to the owner and to the occupier of the premises, and to the clerk of the licensing court for the licensing district. (c) The notice shall set out reasonable particulars of the work which it is proposed to ask the court to order to be done."

A power to revoke or vary the terms of an order made under subsection (1) (a) was conferred by an amending Act in 1954. Prior to 1954 certain work had been done by the defendant with the approval of the plaintiff and the licensing court for remodelling the southern bars.

On July 14, 1953, the Metropolitan Licensing Inspector gave notice of intention to apply under the above section for an order directing the construction, inter alia, of 200 bedrooms. The hearing was on November 9. On November 3 the solicitors for the defendant wrote to the solicitors for the plaintiff saying that their clients proposed to consent to an order for the construction of 100 bedrooms with ancillary sitting rooms and bath and toilet facilities, with plans to be submitted within six months and work to be carried out within 12 months. The letter went on to say that if the plans were approved by the licensing court they would be submitted to the plaintiff for his approval and then to the city

council for its approval. In the order the dates were varied. The plans were to be lodged by March 31, 1954, and the building to be completed by March 31, 1955. The order in accordance with the Act put the obligation to carry out the work on the owner. The date for lodging plans was later extended to April 30.

The plans were sent to the plaintiff on April 21. The building did not cover the whole site, but about two-thirds. One of the matters in issue was whether the plaintiff approved the plans. On May 21, 1954, the solicitors to the plaintiff wrote approving the plans subject to modifications and conditions, one of which at least was substantial. On May 26 the licensing court approved plans providing for 62 additional bedrooms with lounges and ancillary facilities. Those plans, with alterations subsequently made to them, were conveniently referred to by the judge as the 1954 plans. Discussions took place between the parties, and in a history of the matter prepared by the defendant for a later application to the court for extension of time it was stated that on October 5, 1954, the plaintiff agreed to modification of his demands—that was in relation to the 1954 plans.

It is unnecessary to detail the various matters which led up to the application referred to above, which was made on September 29, 1955. The licensing court apparently refused the application. An appeal to quarter sessions was lodged and not prosecuted.

The defendant had anticipated the cost of the building would be about £388,000. Tenders were called for, and the lowest was £525,881. That was more than the defendant was prepared to spend. It put forward various proposals, including a surrender of the licence, and extension of the lease or a less costly type of construction.

On May 25, 1956, the plaintiff's solicitors expressed the view that under clause 4 of the lease the defendant was bound to construct a building in accordance with the 1954 plans, those plans having been approved, it was said, by the plaintiff. The plaintiff required the defendant to construct such a building within 18 months or be treated as having broken his contract.

On May 29, 1956, the licensing court cancelled the licence as from June 21. At that hearing the defendant made it clear that for financial reasons it did not propose to build in accordance with the 1954 plans. The defendant appealed to quarter sessions.

Rent and interest were paid and accepted up to June 30, 1956. For subsequent periods rent was tendered but refused.

In June, 1956, the defendant retained a new architect, who produced new plans. Those were for a building of three storeys on the Carrington Street frontage with its back to Wynyard Lane. They made provision for 76 bedrooms with a public bar lounge and a coffee lounge, with a shopping court on either side of Wynyard Lane. Those were referred to as the 1956 plans. The cost was estimated at £420,000.

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On July 31, 1956, the plaintiff served a notice on the defendant under section 129 of the Conveyancing Act, 1919–1943, in respect of alleged breaches of the lease. It is unnecessary to set these out in detail. They were based on an alleged failure to put up the building as provided by clause 4, and failure to keep the licence in existence.

On August 1, 1956, the solicitors for the defendant wrote denying that they were in breach. They reiterated the defendant's financial inability to go on with the 1954 plans. They then referred to the new plans, which were enclosed. The plaintiff's approval was asked for. Details were given and it was stated that if the plaintiff's approval was given the appeal to quarter sessions was likely to succeed.

The letter in reply, dated August 14, was as follows: "Your "letter of 1st August instant is acknowledged. The allegations "therein and particularly in the sixth paragraph thereof are, on "my instructions, completely unfounded. The commissioner "takes the view that the lessee was bound to erect the building "which has been approved by him under the lease and which the "licensing court on May 31, 1953, ordered the lessee to build, "and the commissioner does not propose to diminish his rights "in this regard or to waive the breaches of covenant on the part "of the lessee."

A further letter from the plaintiff's solicitors, dated August 17, 1956, reiterated the position taken up in the earlier letter and added: "It is pointed out that the commissioner has spent "£109,134 at the request of the lessee in the erection of columns "and substructure (vide clause 3 of the lease) to support a "building which would occupy substantially the whole of the land "the subject of the lease, and the commissioner has, in his view, "always been entitled to have a building erected which would be "based upon the whole of such columns and substructure. It "was further pointed out that the expenditure of £109,134 was at "a time when currency was at its pre-war value, and that the "value of this expenditure today approximates £450,000.

"In 1953 when the plans for a building were submitted to the "commissioner by the lessee, the commissioner, in approving "such plans, made substantial concessions to the lessee in that "the building would only occupy approximately two-thirds of the "site. It is certainly not now proposed by the commissioner that "his rights in respect of such building should be jettisoned so "that, in lieu of such building, there will be erected by the lessee "a building which will occupy, at the most, no more than one-"third of the site.

"It is not agreed that the lessee's present proposal is in "accordance with the requirements of the notice of breach of "covenant herein, but, on the contrary, the lessee has indicated "in no uncertain manner that it does not propose to remedy the "breaches of covenant.

"The lessee is required at the hearing of the appeal to undertake to the court that it will forthwith commence the erection of the building approved by the commissioner and the licensing court in 1954, and to satisfy the court that it will complete such building with a minimum of delay."

On August 24, 1956, a contract was entered into between the defendant and a building contractor to construct a building in accordance with the 1956 plans. On that day the plans were approved by the Council of the City of Sydney and no objection had been raised by the Fire Board.

On August 28, 1956, quarter sessions set aside the order cancelling the licence on the defendant's undertaking to apply to the licensing court to vary the terms of the order of November 9, 1953, by ordering a building in accordance with the 1956 plans. The defendant further undertook to use its best endeavours to obtain the consent of all parties, including the plaintiff. The defendant applied on September 5 and the hearing was fixed for October 18.

On October 4 the plaintiff began the present suit by statement of claim, filing a notice on the following day for an interlocutory injunction. The judge refused an injunction. The plaintiff appealed to the High Court of Australia. On the judge fixing the hearing of the case for March 5, 1957, the plaintiff elected not to pursue his appeal. The application before the licensing court was adjourned.

The relief claimed was as under:

"1. That it may be declared that the defendants are not entitled to build a building on the demised premises other than in accordance with plans and specifications approved by the plaintiff.

"2. That it may be declared that the defendant Avrom Investments Proprietary Limited was and is bound under the said lease of the demised premises to build the building approved by the plaintiff on the twenty-first day of May, 1954, and by the licensing court on the twenty-sixth day of May, 1954.

"3. That it may be declared that an application by the defendant under section 40 or section 40A of the Liquor Act, 1912, to the licensing court for its approval of plans and specification which have not been approved by the plaintiff for a building to be erected on the subject land is inconsistent with the performance by the defendant of its covenants express and implied in the lease.

"4. That it may be declared that an application by the defendant to the licensing court for an order under section 40A of the Liquor Act, 1912, that the plaintiff build upon the subject land a building according to plans and specifications not approved by the plaintiff is inconsistent with the performance by the defendant of its covenants express and implied in the lease.

"5. That the defendants may be restrained from building a

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"building on the demised lands other than in accordance with "plans and specification approved by the plaintiff.

"6. That the defendant Avrom Investments Proprietary "Limited by itself or through any servant agent or person holding "a licence under the Liquor Act, 1912, as amended, in respect "of the demised land may be restrained from making or further "proceeding with an application to the licensing court of the "metropolitan district for variation of the order of that court "made on November 9, 1953, under section 40A of the Liquor "Act, 1912, as amended, in respect of additions to the demised "premises or for variation of the approval of that court of May 26, "1954, of certain plans for additions.

"7. That the defendant Avrom Investments Proprietary "Limited by itself or through any servant agent or person holding "a licence under the Liquor Act, 1912, as amended, in respect "of the demised land may be restrained from making or further "proceeding with an application to the licensing court of the "metropolitan district for approval of plans which have not been "approved by the plaintiff.

"8. That the defendant Avrom Investments Proprietary "Limited by itself or through any servant agent or person holding "a licence under the Liquor Act, 1912, as amended, in respect "of the demised land may be restrained from making or proceed-"ing with applications to the licensing court which are incon-"sistent with the plaintiff's rights under the irrevocable power of "attorney as set forth in the said lease.

"8A. That an inquiry may be held as to damages suffered by "the plaintiff and that the defendant Avrom Investments Pro-"prietary Limited may be ordered to pay the same to the "plaintiff.

"9. That the defendants may be ordered to pay the costs of "the plaintiff of this suit.

"10. That the plaintiff may have such further or other relief "as the nature of the case may require."

The pleadings were voluminous and many amendments were allowed in the course of the hearing, which lasted for 38 days. The judge dismissed the suit.

1959. January 13, 14, 15, 19, 20, 29; February 2, 3, 4. *R. O. Wilberforce Q.C.*, *M. Jenkyn Q.C.* (Australia) and *Hermann Jenkins* (Australia) for the appellant.

Gordon Wallace Q.C. and *R. W. Fox* (both of Australia) for the first respondent, Avrom Investments Pty. Ltd.

The following cases, in addition to those referred to in the judgment, were cited in argument: *Powell* v. *Hemsley* [1]; *Viscount Tredegar* v. *Harwood* [2]; *Gardner & Co. Ltd.* v. *Cone* [3]; *Dallman*

[1] [1909] 1 Ch. 680; 25 T.L.R. 363.
[2] [1929] A.C. 72; 44 T.L.R. 790.
[3] [1928] Ch. 955.

v. *King*[4]; *In re Northumberland Avenue Hotel Co., Fox and Braithwaite's Claim*[5]; *Stephens* v. *Junior Army and Navy Stores Ltd.*[6]; *Carr* v. *J. A. Berriman Pty. Ltd.*[7]; *Harvey* v. *Walker*[8]; *Shrimpton* v. *The Commonwealth*[9]; *Rex* v. *Connell, Ex parte Hetton Bellbird Collieries Ltd.*[10]; *Arthur Yates & Co. Pty. Ltd.* v. *Vegetable Seeds Committee*[11]; *Harmer* v. *Jumbil (Nigeria) Tin Areas Ltd.*[12]; *Huntoon Co.* v. *Kolynos (Incorporated)*[13]; *Dickinson* v. *St. Aubyn*[14]; *F. W. Woolworth & Co. Ltd.* v. *Lambert*[15]; *Tooheys Ltd.* v. *Valuer-General*[16]; *Doherty* v. *Allman*[17]; *Wynyard Investments Pty. Ltd.* v. *Commissioner for Railways (N.S.W.)*[18]; *London Bank of Australia Ltd.* v. *Kendall*[19]; *Stadhard* v. *Lee*[20]; *Dearman* v. *Dearman*[21]; *Craine* v. *Australian Deposit and Mortgage Bank Ltd.*[22]; *Federal Commissioner of Taxation* v. *Clarke*[23]; *Piro* v. *W. Foster & Co. Ltd.*[24]

March 19. The judgment of their Lordships was delivered by LORD SOMERVELL OF HARROW, who stated the facts set out above and continued: The issues which arise for decision on this appeal may be summarised: (1) Were the 1954 plans approved within the meaning of clause 4 of the lease? (2) If so, did the defendant thereupon become liable under the contract to build the building in accordance with these plans having no right to submit further plans for consideration?

If the plaintiff suceeds on these two points the question would then arise whether it was entitled in equity to the declarations asked for in paragraph 2 and paragraph 4 and to the injunction asked for in paragraphs 5 and 7.

If the plaintiff fails on these two points further questions arise. The plaintiff has clearly not approved the 1956 plans. Is the defendant entitled to proceed with its application to the licensing court to approve them and, if so approved, to construct a building in accordance with them? The judge decided that it was on the following grounds: (3) He decided that the plaintiff's refusal to approve must be reasonable. He relied on the terms of the contract and alternatively on section 133B of the Conveyancing Act, 1919–1943. (4) He also held that the plaintiff's refusal was unreasonable.

One other point can be disposed of first. The defendant submitted that the obligation to build had come to an end on

4 (1837) 4 Bing.N.C. 105.
5 (1887) 56 L.T. 833.
6 [1914] 2 Ch. 516; 30 T.L.R. 697.
7 (1953) 89 C.L.R. 327.
8 (1945) 46 N.S.W.S.R. 180.
9 (1945) 69 C.L.R. 613.
10 (1944) 69 C.L.R. 407.
11 (1945) 72 C.L.R. 37.
12 [1921] 1 Ch. 200; 37 T.L.R. 91.
13 [1930] 1 Ch. 528; 46 T.L.R. 253, 473.
14 [1944] K.B. 454; 60 T.L.R. 269; [1944] 1 All E.R. 370.
15 [1936] Ch. 415; 52 T.L.R. 318; [1936] 1 All E.R. 333.
16 [1925] A.C. 439.
17 (1878) 3 App.Cas. 709.
18 (1955) 93 C.L.R. 376.
19 (1920) 28 C.L.R. 405.
20 (1863) 3 B. & S. 364.
21 (1908) 7 C.L.R. 549.
22 (1912) 15 C.L.R. 389.
23 (1927) 40 C.L.R. 246.
24 (1943) 68 C.L.R. 313.

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principles analogous to those applied in frustration cases. This contract was entered into at a time when building restrictions made the contemplated building impossible. The original time limit for the building expired 15 or 16 years ago. Their Lordships are of opinion that both parties have proceeded on the basis that the times were extended and that at all relevant times the obligation to build remained. The question, therefore, whether frustration can ever apply to a lease does not arise (see *Cricklewood Property & Investment Trust Ltd.* v. *Leighton's Investment Trust Ltd.*[1]).

Their Lordships will now consider the first two points as set out above. It is plain that the plaintiff approved the general scheme of the 1954 plans. He insisted on modifications. It is clear from a document drawn up by the defendant in 1955 that the plaintiff's original demands were modified and in October, 1954, engineering and architectural plans and specifications were ordered "pursuant to the modified structural plan agreed upon "by the plaintiff."

On March 23, 1955, substituted plans were lodged with and approved by the licensing court. These plans did not differ in principle from the former ones. They may have been sent to the plaintiff but there is no evidence that they were approved either by it or the city council or other statutory bodies concerned. In these circumstances the judge held that there was no approval of the plans sufficient to justify the submission set out in (2) above, and their Lordships agree.

In any event, however, their Lordships do not accept the submission that under clause 4 there was no right in the defendant to ask the plaintiff to consider new plans. The plaintiff might have had a right to refuse on the ground of unreasonable delay, or on the ground that it had altered its position in some way which made it a breach of contract for the defendant not to proceed in accordance with the approved plans. The point taken in the letters and at the hearing was that the approval of plans in itself precluded the lessee from asking that the matter should be reconsidered. Their Lordships do not find anything in the contract which justifies this submission. Nor do their Lordships find anything in the circumstances which would have entitled the plaintiff to refuse to consider the plans.

The plaintiff then submits that it did not consider them; that it had an absolute discretion to approve or disapprove and that it disapproved. The defendant under the contract cannot build except in accordance with plans that have been approved and the plaintiff is therefore, it submits, entitled to the relief claimed under paragraphs 1, 3, 4, 5 and 7.

The plaintiff sought to support its submission that the defendant became bound to build in accordance with the 1954 plans by arguing that under clause 5 of the lease, the order made by

[1] [1945] A.C. 221, 234; 61 T.L.R. 202; [1945] 1 All E.R. 252.

the licensing court in relation to the 1954 plans became binding on the defendant under that clause. It reads as follows: "THAT "the lessee will during the said term well and sufficiently repair "maintain pave cleanse amend and keep the demised premises "and the said building with any appurtenance of either of them "and any fixture or thing or any fitting thereto belonging or "which at any time during the term shall be erected or con-"structed or made by the lessor or the lessee when where and "so often as need shall be in good clean and substantial repair "and condition in all respects and replace any such fixture or "thing or any fitting as is requisite and as shall during the "said term become useless or unsuitable for use because of being "worn out broken beyond repair damaged beyond repair obsolete "or out of date with a new and suitable one in keeping with "the premises approved by the lessor AND will also make and "carry out any cleansing and any amendment alteration repara-"tion or addition whether structural or otherwise which by virtue "of any provision of any law statutory or otherwise having "application thereto now or hereafter in force or by virtue of any "requirement of the said authority may be required to be made "or carried out by either the lessor or the lessee in or upon the "demised premises or the said building or any appurtenance of "either of them."

The judge held that the words of the clause were not intended to cover an order made under section 40A. In their Lordships' opinion neither the order made in relation to the 1954 plans nor an order, if made, in relation to the 1956 plans would come within the general words of clause 5 because their subject-matter is the building to be constructed under the special provisions of clause 4. Whether other orders, if made, would come under clause 5 must be left to be decided if and when a dispute on the point arises.

The words "absolute discretion" in lines 11 and 12 of clause 4 are rightly contrasted by the plaintiff with formulae to be found in several places in the lease where a right in the lessor is qualified by words negativing an absolute right. In clause 6, for example, it is provided that the lessor "shall not unreasonably "withhold permission" for extending the interval between paintings of the building. It is contended for the defendant that the words "absolute discretion" are qualified by the express words to be found towards the end of the clause: "And notwithstanding "anything hereinbefore contained the building, design plan and "specification of the said building shall be subject to the reason-"able requirements of the lessor." The plaintiff submitted that this refers to requirements after approval has been given. As the judge pointed out, it would have been simple so to provide if that had been meant. Further, it is, inter alia, the plan itself which is to be subject to the requirements, presumably before approval. In their Lordships' opinion the opening words clearly indicate the

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cutting down of a right "hereinbefore contained." It is then said that the words should be construed as applying only to the "requirements" expressly referred to earlier in the clause. The first of these deals with the lessor's passageway, the second "requirement" is in addition to the obligation to build in accordance with the said building design plan and specification. It seems impossible, therefore, to restrict the words to "requirements" as referred to expressly. As against that it is the "building design plan and specification" which in the words "hereinbefore contained" are to be subject to the lessor's approval in its absolute discretion. It would not probably be contemplated that plans would be rejected in toto. The lessor would "require" this or that modification or addition. As these later words have to be given effect to "notwithstanding anything "hereinbefore contained," their Lordships, agreeing with the judge, are of opinion that the lessor, if he disapproves plans, must have reasonable grounds for so doing.

Alternatively, the defendant relied on the principle that general words must, if necessary, be limited so as not to defeat the main object of the contract (*Glynn* v. *Margetson & Co.*[2]). It is not necessary to deal with this argument.

The judge found that section 133B of the Conveyancing Act applied. That section would import a provision that approval was not to be unreasonably withheld, if such a provision was not to be found in the contract. Counsel for the appellant was prepared to accept that the building in question might be "improvements" within the section. He also accepted that one did not have to find a covenant which was in form a covenant against making improvements. (*Balls Brothers Ltd.* v. *Sinclair.*[3]) He relied, however, on these words in support of a submission that it did not apply to "improvements" which under the lease the lessee had covenanted to make, although, of course, subject to consent as to plans. It did not, in other words, apply to leases under which the lessee undertakes to build. It is not necessary to determine this question, which is one of difficulty and importance.

Was the plaintiff reasonable in refusing to approve the 1956 plans? The judge held that the 1956 plans had the following advantages over the 1954 plans: (*a*) The design is better and more modern. (*b*) Provision is made for a greater number of bedrooms. (*c*) All the bedrooms have private bathrooms, whereas a considerable number in the 1954 plans have not. (*d*) The bedrooms are of better design. (*e*) There is more first-class accommodation. (*f*) They make provision for a coffee lounge suitable for the provision of light meals. The 1954 plans make no such provision. (*g*) They make greater use of the Carrington Street frontage which is more suitable for an entrance to an hotel than George Street, this frontage being more suitable for commercial development. (*h*) They make provision for a greater number of shops. (*j*) They

[2] [1893] A.C. 351; 9 T.L.R. 437. [3] [1931] 2 Ch. 325.

would permit of extensions to the building at less cost. (*k*) They would permit more flexibility so far as future development is concerned.

The judge also found that a building according to the 1956 plans was a very much better economic proposition than a building according to the 1954 plans.

The plaintiff submitted that under the contract the building had to cover the whole site. Their Lordships do not accept this. The building has to be on the demised premises and cost not less than £150,000. Both these conditions are fulfilled.

The reason put in the forefront by the plaintiff, namely, that the defendant had no right to ask for consideration of further plans was, for the reasons given, based on a misconstruction of the contract.

There were, of course, some disadvantages, as set out in the letters cited. The judge found that approval was unreasonably withheld by the plaintiff. There was ample evidence to support this conclusion, with which their Lordships agree.

In *Balls Brothers Ltd.* v. *Sinclair*[4] Luxmoore J. held that consent having been unreasonably withheld by the lessor to an alteration, the alteration could in the circumstances have been made by the lessee without any further application to the lessor. This applies here though there are authorities, including the licensing court, whose approval is necessary.

On the above findings it is unnecessary to deal with other points raised.

Their Lordships would like in this complicated case to express their indebtedness to the full and clear judgment of the judge.

Their Lordships will humbly advise Her Majesty that the appeal be dismissed with costs.

Solicitors: *Light & Fulton; Ashurst, Morris Crisp & Co.*

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[4] [1931] 2 Ch. 325.

[COURT OF APPEAL.]

* RYAN *v.* PILKINGTON AND ANOTHER.

[Plaint No. N. 51.]

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Feb. 27; *Mar.* 3, 4.
Hodson, Morris and Willmer L.JJ.

Agency—Estate agent—Deposit—Ostensible authority of agent to receive—Agent instructed to find a purchaser—Payment of deposit by prospective purchaser—Whether receipt of deposit within agent's ostensible authority.

P., an estate agent who was instructed by G. to find a purchaser for certain hotel property, introduced one R. as a prospective purchaser. R. entered into an agreement with G. to purchase the

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property for £8,800 "subject to contract." At the request of P., and unknown to G., R. paid to P. two sums of £100 by way of deposit. In respect of the first sum P. signed a receipt as "agent "for Mr. and Mrs. G.," and in respect of the second, which was indorsed on the same document, as "agent." Subsequently G. refused to complete the sale.

In an action by R. against P. and G. to recover the deposit, which P. failed to return although requested so to do by G.:—

Held, that P., in receiving the deposit, was acting within the ostensible scope of his authority as agent for his principal G., who, in the circumstances, was under a duty to repay it.

Navarro v. *Moregrand Ltd.* [1951] W.N. 335; [1951] 2 T.L.R. 674 applied.

Appeal from Judge Block sitting at the Mayor's and City of London Court.

In October, 1956, the plaintiff, Philip Ryan, agreed to purchase the lease and business of a private hotel, "Ferndale," 157, Queen's Drive, Finsbury Park, N.4, from the second defendant, Richard Gem, for the sum of £8,800 "subject to "contract." The plaintiff had been introduced to the second defendant by the first defendant, Leslie Pilkington, an estate agent practising at 11, Arundel Street, Strand, W.C.2, who had been instructed by the second defendant to find a purchaser for the property in question. At the request of the first defendant and unknown to the second defendant, the plaintiff on two occasions paid to the first defendant a sum of £100 by way of deposit. In respect of the first sum, the first defendant signed a receipt as "agent for Mr. and Mrs. Gem," and in respect of the second, which was indorsed on the same document, as "agent."

On or about November 15, 1956, the second defendant informed the first defendant that he was not prepared to proceed with the sale. The plaintiff first learned of this fact from the second defendant at a meeting on the premises about a week later when the plaintiff informed him of the existence of the deposit. The subsequent efforts of the plaintiff to recover the deposit from the first defendant were unavailing although the second defendant requested him to return it.

In proceedings brought against the first and second defendants for recovery of the deposit, the trial judge found that it was paid to the first defendant as agent for the second defendant and not as a stake-holder. The claim against the first defendant was accordingly dismissed and judgment given against the second defendant.

The second defendant appealed. The facts are more fully set out in the judgments.

A. G. De Montmorency for the second defendant.

R. N. Bibby-Trevor for the plaintiff.

The following cases, in addition to those contained in the judgments, were cited in argument: *Dove-Edwin* v. *Beauly's*[1]; *Wilder* v. *Pilkington*[2]; *Ellis* v. *Goulton*[3]; *Thuman* v. *Best*[4]; *Prior* v. *Moore*[5]; *Chadburn* v. *Moore*[6]; and *Poole* v. *Clarke*.[7]

HODSON L.J. This is an appeal by the second defendant, Richard Gem, from an order of Judge Block at the Mayor's and City of London Court, dated October 24, 1958.

In June, 1957, the plaintiff, who was the prospective purchaser from the second defendant of a property called "Fern-"dale," Queen's Drive, Finsbury Park, issued a writ against the first defendant, Pilkington, who was an estate agent, claiming the return of £200 deposited, as it was said, with Pilkington as stake-holder. In proceedings brought under R.S.C., Ord. XIV, the defendant Pilkington was refused leave to defend by the master, but subsequently the judge at chambers gave him leave to defend upon his affidavit that he was employed as agent of the second defendant. His contention was that he received the money deposited as the agent of Gem.

The action was remitted to the Mayor's and City of London Court and the plaintiff was given leave to add Gem as a co-defendant. The plaintiff's advisers became aware, after a study of the documents, that when these payments were made, they having been paid in two sums of £100 each, the second on November 1, 1956, and the first a little earlier, in October, 1956, a receipt had been given in these terms by Pilkington: "Received of P. F. Ryan £100 cash deposit on the private "hotel business and lease of Mr. and Mrs. Gem, 157, Queen's "Drive, Finsbury Park, N.4. Lease of approx. 964 years at "£10 per annum and furniture, etc. Sale price £9,000 all "at. Subject to contract." That is signed by L. Pilkington "as agent for Mr. and Mrs. Gem." The subsequent payment is acknowledged on the same piece of paper: "Received further "payment of £100 (by cheque) 1.11.56. L. Pilkington as agent." Then "P.T.O.," and on the back is written: "Purchase price "reduced to £8,800. L. Pilkington. 1.11.56."

The judge dismissed the claim against the first defendant, finding that he did not hold the £200 as claimed in the writ as stake-holder; there was no claim against the first defendant for breach of warranty of authority. The position of Pilkington is not very clear, but it was stated in the evidence that he had been convicted of the fraudulent conversion of deposits and we were told that he was a bankrupt. In this court the plaintiff has not sought to pursue his claim further against him.

With regard to the second defendant, the judge found in favour of the plaintiff, finding that the £200 had been received

[1] [1953] C.P.L. 147.
[2] [1956] J.P.L. 739.
[3] [1893] 1 Q.B. 350; 9 T.L.R. 223.
[4] (1907) 97 L.T. 239, 240.
[5] (1887) 3 T.L.R. 624.
[6] (1892) 61 L.J.Ch. 674.
[7] [1945] 2 All E.R. 445.

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by Pilkington as agent for his principal, Gem. It is against that finding that the second defendant has appealed. In my judgment the finding of fact that Pilkington had purported to receive this sum of money as agent is unassailable. That is exactly what he did. But, of course, that does not conclude the matter, because, in order to make a principal liable, the agent must have been acting within the scope of his ostensible authority.

The rule is stated in paragraph 82 of the 9th and 10th editions of Bowstead on Agency as quoted by Somervell L.J. in *Navarro* v. *Moregrand Ltd.*[1] and reads in this way: " ' Every " ' act done by an agent professedly on the principal's behalf " ' and within the scope of his actual authority, is binding on " ' the principal with respect to persons dealing with the agent " ' in good faith, even if the act be done fraudulently in further- " ' ance of the agent's own interests, and not in the interests " ' of the principal. Every act done by an agent in the course " ' of his employment on behalf of the principal, and within " ' the apparent scope of his authority, binds the principal, " ' unless the agent is in fact unauthorised to do the particular " ' act, and the person dealing with him has notice that in " ' doing such act he is exceeding his authority.' "

Gem, who was the vendor and legal owner of the property in question, had instructed Pilkington, who was, as I have said, an estate agent, to find a purchaser. That is the extent of Gem's evidence as to the arrangement which was made by him with Pilkington. No doubt it would follow from that arrangement that, if a purchaser were found and the necessary work was done by the agent so that he fulfilled the terms of his employment, he would be entitled to commission on the usual scale.

Before referring further to the facts of this case, it is relevant to bear in mind what was said by Lord Russell of Killowen in *Luxor (Eastbourne) Ltd.* v. *Cooper*,[2] which is often quoted in commission contract cases. " A few preliminary observations " occur to me. (1) Commission contracts are subject to no " peculiar rules or principles of their own; the law which governs " them is the law which governs all contracts and all questions " of agency. (2) No general rule can be laid down by which the " rights of the agent or the liability of the principal under com- " mission contracts are to be determined. In each case these " must depend upon the exact terms of the contract in question, " and upon the true construction of those terms. And (3) con- " tracts by which owners of property, desiring to dispose of it, " put it in the hands of agents on commission terms, are not (in " default of specific provisions) contracts of employment in the " ordinary meaning of those words. No obligation is imposed " on the agent to do anything. The contracts are merely

[1] [1951] W.N. 335, 336; [1951] 2 T.L.R. 674.

[2] [1941] A.C. 108, 124; 57 T.L.R. 213; [1941] 1 All E.R. 33.

"promises binding on the principal to pay a sum of money "upon the happening of a specified event, which involves the "rendering of some service by the agent. There is no real "analogy between such contracts, and contracts of employment "by which one party binds himself to do certain work, and the "other binds himself to pay remuneration for the doing of it."

It is to be observed that Pilkington was under no obligation to do anything, but, as I see it, once he set about finding a purchaser, as he did, he would do so as agent for his principal, Gem. The vital question in this case is whether he was acting within the scope of his apparent authority. The difficulty in this case has arisen because, as I read the judgment of the judge, he did not make any finding on that question. He contented himself by making reference to the document, which I have read, which contains the receipt for the two sums of £100, making £200, and relying upon the fact that Pilkington was indeed acting as agent. He did not go on to say that he found as a fact that he was acting as an agent within the apparent scope of his authority.

It is right to say that, since there are no specific findings as to this matter, and since the defendant, Gem, is the appellant here, the evidence ought to be taken in his favour and any doubts which may present themselves as to the effect of the evidence should be resolved in his favour also, because there are some passages in the evidence which might throw doubt on the accuracy of his recollection as to what in fact took place a long time ago. This trial took place in 1958 and the parties were being asked to remember events of 1956, so, in dealing with the facts, where there is a disagreement between Ryan and Gem, or between Pilkington and Gem, I have taken it that Gem's recollection was accurate. It is not in dispute that an advertisement appeared in a newspaper and that Ryan was interested in the subject-matter of the advertisement and that it was Pilkington who arranged an appointment with Gem. Ryan went to look at the property and saw Mr. and Mrs. Gem there. There was an agreement, it was said, to pay £8,800, in the first instance, but it is clear, now that the documents have been examined, that the agreement was originally for £9,000, which subsequently was reduced to £8,800. According to Gem, it was made perfectly clear to Ryan that he would sell "subject to contract" at £8,800. Then there is the evidence of Gem that he knew nothing about the deposits until Ryan told him much later about them. But one knows from the document—it is not suggested that it is a forgery—that these deposits were paid, and I do not think I need follow further the sequence of events. The only question is whether Pilkington, in taking that money as agent, was acting within the scope of his authority.

The way in which the case was put in this court by Mr. De Montmorency for the second defendant, Gem, was that, as a

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matter of law, an estate agent who takes money on deposit takes it as a stake-holder and in no other manner. He does not take it as an agent. The first answer to that is that he did take it as an agent. So far as Pilkington is concerned, that was the capacity in which he said he was to act. I cannot see how it can possibly be said that he took it as a stake-holder. He could not take it as a stake-holder unless he had agreed to be a stake-holder. The term "stake-holder" involves that a person falling into that capacity would act as agent for both parties and not solely as agent for one. Every estate agent in the course of his business of finding a purchaser would, it is conceded, be entitled to take deposits in his capacity as stake-holder.

It was sought to rely on a decision in an unreported case in the Court of Appeal when Denning L.J. presided and I also sat. It was an interlocutory appeal, so there was no other member of the court sitting. The case in question was *Brodard* v. *Pilkington*,[3] the defendant being the same person as is involved in the present case. That was an appeal against a refusal of leave to defend under R.S.C., Ord. 14, and the whole appeal turned on this. Pilkington wrote a letter agreeing to repay the deposit paid to him by Brodard and in face of that admission, which showed him to be acting as stake-holder, he was refused leave to defend. However, Denning L.J. did say in the course of his judgment, although I do not think it was in any way necessary for the decision of the case, that "in the ordinary way an estate agent "receiving a deposit does receive it as stake-holder unless the "contrary is said." The effect of Pilkington's letter was that in the *Brodard* case[4] there was no triable issue. There was an admission by the defendant that he held the money as stake-holder and not as agent for the vendor. Denning L.J. went on to say that the defendant Pilkington had made the admission that he did not receive it for the principal but received it as a stake-holder, and he said that was what the law would presume in the absence of any evidence to the contrary. I agreed with that judgment. As I understand it, the Lord Justice was saying in that passage what he understood to be the ordinary practice of estate agents, and he was not purporting to lay down any proposition of law inconsistent with what had been said by Lord Russell of Killowen in the *Luxor* case.[5]

It is true that in this case we have had no expert evidence concerning the practice of estate agents. The judge heard no such evidence, though no doubt he had heard many cases in which estate agents were involved, because they do figure largely in cases which come before the courts.

In this court we have been referred to a number of authorities where estate agents or persons in a like position were involved, where the terms of arrangement by which the agent was appointed made it clear that it was within the scope of the agent's authority

[3] Unreported. Bar Library Transcript: 1953 No. 147.

[4] Ibid.

[5] [1941] A.C. 708.

to take a deposit. I need not refer to those cases. But we have not seen any case—with the possible exception of *Brodard's* case [6]—where the arrangement between the vendor and the agent was merely an arrangement to find a purchaser without any provision for accepting deposits from any prospective purchasers. So that, so far as I understand it, the question of law whether the action of the agent here was within the scope of his authority is not directly covered by authority, and one has to apply first principles.

Those first principles to which I have adverted involve, in my judgment, that one looks at the matter through the eyes of the prospective purchaser who goes into an estate agent's office and is asked, in connection with the property which he wants to buy, for a deposit. What, in those circumstances, should be his attitude of mind? I think that is the approach to this problem made by Somervell L.J. in *Navarro's* case,[7] as appears from the paragraph in his judgment which follows the citation from Bowstead: "All that the plaintiff knew was that the agent was the "man who had charge of the letting, and the conclusion which "anybody in his position would have drawn was that the land-"lords were demanding a premium." That was a case in which the agent extracted what was in fact an illegal premium under the terms of the Rent Act, and the plaintiff was held entitled to recover that illegal premium from the landlord as the agent was acting with authority.

The distinction between that case and the present is that the agent's ostensible authority, as the judge there found, was to conduct the full business of letting the property in question. Mr. De Montmorency has pointed out that here all the agent was instructed to do as soon as his function as agent began was to find a purchaser, and on the facts of this case that meant finding a person able and willing to purchase "subject to contract." It is surely relevant to remember that ability to purchase is one of the qualities which one looks for in a purchaser. Accordingly, the requirement for the payment of a sum of money by way of deposit would seem to me permissible as evidence of some ability to purchase, some indication that the proposed purchaser was not a man of straw. Further, it is prima facie in the interests of the vendor that the proposed purchaser should give an earnest of his expressed intention to become owner of the property in question. In my judgment, looking at the matter through the eyes of a reasonable prospective purchaser, the act of the agent in taking a deposit is within the scope of the apparent authority which is given to the agent by his principal. Even though there are no express words here beyond the words "to find a "purchaser," I think the authority extends far enough to enable the agent to receive money as agent for his principal. The admission which, in the course of his argument, Mr. De Montmorency

[6] Unreported.

[7] [1951] W.N. 335, 336.

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felt compelled to make, seems to me to tend to support that conclusion, because if it can be inferred that it would be within the scope of the authority of the agent to accept money as stake-holder, that is to say, that as agent for both he is in a position to take money, I cannot see why in principle it should be outside the scope of that same authority to take money as agent for his vendor alone, even though nothing has been said by his principal about taking money at all. I rest my judgment on the view that he acted as he did within the scope of his authority, because by taking these deposits he is promoting the purchase which it was his function as agent to bring about. Accordingly, I would dismiss this appeal.

Morris L.J. I agree. Whatever be the result of this case, it is unfortunate either for Ryan or for Gem. Pilkington was undoubtedly asked by Gem to find a purchaser. Pilkington had therefore Gem's authority to bring the property to the knowledge of any intending purchaser. Gem's oral evidence was to the effect that in October, 1956, he instructed Pilkington to find a purchaser, and he said that, by telephone, he mentioned the price. The property was in the hands of one other agent. Gem said that he would confirm by letter. I think this must mean that he wrote a letter to Pilkington. We have not seen that letter. Whether it dealt only with the price or with the terms as between Pilkington and Gem we do not know. But we are not concerned in this case to decide or to express any opinion as to whether, in the events that happened, Pilkington became entitled to receive commission from Gem. Ryan did, in fact, pay £200 to Pilkington. At the times of the separate payments of £100 there was no contract between Ryan and Gem. The whole matter was "subject to contract." There never was a contract. No contract was ever made. It followed, therefore, that Ryan became entitled to have his £200 back. If Pilkington had received the £200 as a stake-holder, then Ryan would be entitled to the £200 from Pilkington. If Pilkington had received the £200 as agent for Gem, then Ryan would be entitled to receive the £200 from Gem. Pilkington purported to receive this money as agent for Mr. and Mrs. Gem. He so signed a receipt for the first £100. He signed a receipt for the second £100 "as agent." It seems to me that as Ryan had the receipt, as he presumably had it after the first £100 was paid, as he presumably produced it so as to have a record of the second £100 also made upon it, and as Ryan retained the document thereafter, he must be taken to have known that Pilkington was purporting to receive the £200 not as stake-holder but as agent. Therefore, it appears to me that Ryan cannot say that Pilkington received the money as stake-holder. Did Pilkington then receive the money as agent for Gem? Gem says: "He "never received it as my agent or on my behalf or with my "authority." The issue in the appeal is whether that is so or not.

There is no record of any express authority from Gem to

Pilkington to ask for or to receive a deposit. Was there, therefore, implied authority in Pilkington to receive the deposit? Was it within the scope of his authority to receive this £200? I have reached the conclusion that, on the facts of this case, it was within Pilkington's authority. The decided cases show what are normally the limitations upon the authority of estate agents. In *Wragg* v. *Lovett*,[8] Lord Greene M.R. said[9]: "The making of a "contract is no part of an estate agent's business, and, although, "on the facts of an individual case, the person who employs him "may authorise him to make a contract, such an authorisation is "not lightly to be inferred from vague or ambiguous language."

That case followed the decision in *Keen* v. *Mear*,[10] where Russell J., having referred to certain of the authorities, said: "The result of those cases is, in my opinion, this: that the mere "employment by an owner of an estate agent to dispose of a "house confers no authority to make a contract; the agent is "solely employed to find persons to negotiate with the owner; "but, if the agent is definitely instructed to sell at a defined "price, those instructions involve authority to make a binding "contract and to sign an agreement."

In *Navarro* v. *Moregrand Ltd.*,[11] there was a finding that the second defendant had ostensible authority from the defendant company, as landlords, to conduct the full business of letting the property in question. It seems to me that if there was authority to conduct the full business of letting the property in question, the landlords would be responsible for what the agent did even if he demanded a premium in defiance of some statutory provisions.

In the present case we have these circumstances. First, we do know that Gem instructed Pilkington to find a purchaser. It seems to me that Pilkington was entitled to do anything ordinarily incidental to what he was asked to do. Some of the facts may not be very precisely ascertained, but it appears that after Ryan was told that Gem's business was for sale Ryan went to visit the premises and saw Gem and had a discussion with him. It appears that thereafter Ryan went back and saw Pilkington and told Pilkington that he was interested and then paid Pilkington the first sum of £100. There followed a second visit to the property by Ryan: he saw Gem and there was a discussion between them in regard to price. Again after that visit Ryan returned and saw Pilkington, and it was on that occasion that a further £100 was paid by cheque. Thereafter Gem decided, for personal reasons, not to proceed with the matter. He decided not to sell. I think there is force in the point that has been put to us, that it is significant that what Gem then proceeded to do was to inform Pilkington so that Pilkington could inform Ryan. Actually Pilkington apparently delayed in so doing. Ryan later

[8] [1948] W.N. 455; [1948] 2 All E.R. 968.
[9] [1948] 2 All E.R. 968, 969.
[10] [1920] 2 Ch. 574, 579.
[11] [1951] W.N. 335.

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went on a third visit, not prearranged, to the Gem premises and was told by Gem that he was not going to sell. Gem expressed surprise that Pilkington had not acquainted Ryan with that fact.

It seems to me that this case depends, as every case in this branch of activity must do, upon its own facts and circumstances, but I have reached the conclusion that on the facts of this case it was reasonably incidental to what Pilkington was instructed to do that he should receive these two sums of £100.

Mr. De Montmorency relied strongly upon a letter written by Pilkington on December 4, 1956, in these terms: "Dear Mr. "Ryan, I understand from Mr. Bartlett that you have agreed to "purchase the above"—that is another hotel—"particulars of "which we brought to your notice some weeks ago, and I propose "to transfer the £200 which I hold to your account as a deposit "on the above." Those words are relied on because it is said that there Pilkington was saying that he held the £200 to Ryan's account. We do not know with certainty whether by that date, December 4, 1956, there had been any request by Gem to Pilkington to pay the £200 to Ryan. If Pilkington had received it as agent for Gem, of course Gem would be in a position to tell Pilkington what to do with the money. But this letter was really relied upon by Mr. De Montmorency in support of his first submission that Pilkington had received this money as stake-holder. For the reasons that I have given, I consider that that submission cannot be sustained. If Pilkington in fact received the money as agent for Gem, nothing in this letter as written can change the position or absolve Gem from the obligation to repay the money so received on his behalf. It seems to me that there was ostensible authority to receive it on his behalf, that it was so received, and Gem became obliged to repay it in the events that happened.

I therefore think that the appeal fails.

Willmer L.J. I agree that this appeal must be dismissed. The question before us depends on whether, when Pilkington received the two sums of £100 from Ryan, and signed the receipt for those two sums, in the first case "as agent for Mr. and Mrs. "Gem," and in the second case "as agent," he bound Gem by so doing.

As has been pointed out by Hodson L.J. the judge did not find it necessary, in the view which he took, to arrive at any very precise findings of fact. In those circumstances, I agree that it is only right, when Gem appeals to this court, that his case should be judged on the view of the facts most favourable to him, that is to say, on the basis of his own evidence.

Looking at Gem's own evidence in this case is not an uninteresting process. He starts by saying, as has been pointed out, that in October, 1956, he instructed Pilkington to find a purchaser. It seems to me that those instructions must be taken to

involve authorising Pilkington to do such acts as might be reasonably necessary to promote a contract with a purchaser. As incidental to that purpose, why, it may be asked, should not those very instructions carry with them authority to Pilkington to receive a deposit from a prospective purchaser as agent for Gem? Be that as it may, what seems to me to be the most important feature of Gem's evidence is this. He followed immediately after Pilkington. Pilkington had gone into the witness-box saying that he was at all times agent for a disclosed principal, Gem, and that the plaintiff ought to sue Gem and not him, Pilkington. Following immediately after that evidence, it might have been expected that the first thing Gem would do when he went into the witness-box would be to deny that he ever gave authority to Pilkington to receive any deposit on his behalf. But, so far as the notes of evidence of the judge go, there is no trace of Gem ever making such a denial. Moreover, later in his evidence, when he is dealing with the time after he had called the deal off and Ryan came to see him, he described how Ryan said to him: "I have given "Pilkington £200 and now he is asking for £600." It might be thought that that was the occasion when Gem, if he had never authorised Pilkington to receive any deposit on his behalf, would have said so to Ryan in no uncertain terms. But, apparently, on his own evidence, he never said any such thing. All he did was to advise Ryan to go to Pilkington and get the £200 back. That is how the case stands on the evidence of Mr. Gem himself.

Nevertheless, it has been forcefully argued on his behalf that an estate agent in Pilkington's position has no authority whatsoever from the vendor for whom he is acting to receive a deposit except in the capacity of stake-holder, that is to say, as agent for both parties rather than as agent for the vendor only. On the facts of this case, it seems to me that there are difficulties in alleging that Pilkington took this £200 deposit as stake-holder. For one thing that would be quite inconsistent with the terms of the receipt which Pilkington signed. For, if Pilkington is to be held a stake-holder, that would involve a finding that he was acting as agent for both parties, that is to say, that both the vendor and purchaser had authorised him to receive these sums of money. But any suggestion that authority was given by Ryan, the purchaser, to Pilkington to hold money on his behalf, seems to me to break down on the terms of the receipt which he accepted from Pilkington.

As has already been pointed out, reliance has been placed by Mr. De Montmorency on the long line of cases terminating in *Wragg* v. *Lovett*,[12] which establish that in the ordinary way an estate agent has no authority to make contracts on behalf of the vendor. Those cases do not seem to me to touch the point which has arisen in this case, namely, whether an

[12] [1948] W.N. 455.

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estate agent in the position of Pilkington has ostensible authority to receive and hold a deposit on behalf of the vendor. It may be said that, if what is said to be deducible from these cases is taken literally, they would equally go to show that no estate agent has authority even to act as stake-holder.

But the sheet anchor of the second defendant's case is the decision of this court in *Brodard* v. *Pilkington*.[13] I do not propose to deal with that case in any detail, since it has already been referred to by my Lords. Reliance has been placed principally upon the dicta of Denning L.J. to which Hodson L.J. has already referred. I, like my Lord, take the view that in that case Denning L.J. must not be taken as intending to lay down any rule of law governing the status and authority of estate agents. The case in the event turned upon an admission in a letter by the agent, Pilkington, to the effect that he was holding the money on behalf of the purchaser. On that admission, in R.S.C., Ord. XIV proceedings, the court came to the conclusion that there was no triable issue which would justify giving leave to defend. If it were really true, as contended, that there is a presumption of law that an estate agent can only receive a deposit as a stake-holder, the question whether or not the agent in that case had made an admission would have been quite irrelevant. No doubt the court would have said straight away: "Of course, the estate agent is liable "to repay the deposit because he can be no other than a stake-"holder." In fact, however, the court held that, but for the admission made by Pilkington, there would have been a triable issue. In those circumstances, it seems to me that that case can only be used as authority for the proposition that one must ascertain the particular facts in each case and consider what inferences may fairly be drawn therefrom.

The fact is that in the present case Gem appointed Pilkington, the estate agent, to find him a purchaser. It is perfectly true, as has been pointed out by Hodson L.J., that that did not oblige Pilkington to take any action at all. But if he did, I apprehend that he must be taken to act as agent for Gem. I ask myself, in those circumstances, why, if in the course of acting as agent for Gem he seeks to obtain a deposit from a prospective purchaser on behalf of Gem, he is not acting within his ostensible or apparent authority. Certainly it seems to me to be something which is reasonably incidental to the task of promoting a contract with a prospective purchaser. Is it within the apparent authority of the estate agent in circumstances such as these? I think one may profitably ask oneself the question, What is meant by "apparent authority"? Apparent to whom? The answer to that can only be, I think, apparent to the third party with whom the agent is purporting to deal on behalf of the principal, that is to say, in this case "apparent" to Ryan or to any person in the position of Ryan.

[13] Unreported.

If I may refer once again to the case which has already been cited by my Lords, namely, *Navarro* v. *Moregrand Ltd.*,[14] the view I am expressing seems to be exactly in accordance with the view expressed by Somervell L.J. I do not cite the case as in any way governing this case, but merely as illustrative of the proper approach. Somervell L.J. took the view that, when examining the question of ostensible authority, one must examine it from the point of view of the person with whom the agent is dealing. The question, therefore, is, What would a reasonable man in Ryan's position think when the estate agent appointed by Gem asks him in the course of the negotiations for a deposit? Surely any reasonable man in such a position would assume it was within the scope of the agent's authority to receive it on behalf of the principal, all the more so when the agent furnishes him with a receipt signed by himself as agent for the named principal.

In those circumstances, although it must be confessed that we are not exactly following the reasoning of the judge, I am unable to say that he came to a wrong decision, and, therefore, I agree that the appeal must be dismissed.

HODSON L.J. I agree with what has fallen from my Lords about the line of cases, to which I omitted to refer, including *Wragg* v. *Lovett*,[15] beginning with *Hamer* v. *Sharp*[16] (the effect of which was summarised in the passage read by Morris L.J.), which I think are not of assistance in determining the question before us.

Appeal dismissed.

Solicitors: *J. Tickle & Co.; E. E. Pugh & Co.*

J. A. G.

[14] [1951] W.N. 335.
[15] [1948] W.N. 455.
[16] (1874) L.R. 19 Eq. 108.

[COURT OF APPEAL.]

* PERRY *v.* STOPHER.

[Plaint No. O. 717.]

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Arbitration—Costs—Discretion of arbitrator—Successful party normally entitled—Costs awarded against party succeeding in part—Whether any duty in arbitrator to give reasons for award of costs made—County Courts Act, 1934 (24 *&* 25 *Geo.* 5, *c.* 53), *s.* 89.

Arbitration—County court—Powers of—Application to set aside part of award—Whether jurisdiction to set aside part only—County Courts Act, 1934 (24 *&* 25 *Geo.* 5, *c.* 53), *s.* 89 (3), *proviso.*

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A builder claimed £54, the balance of his account for work and labour done and materials supplied to the defendant. The defendant disputed the claim, and particularised his grounds of dispute under 16 heads. The dispute was referred under section 89 of the County Courts Act, 1934,[1] to an arbitrator, who gave his findings in a written award. He dismissed seven of the defendant's points of dispute, considered two together, and on the remaining points found on six in favour of the defendant and on two in favour of the plaintiff. He awarded the plaintiff £11 14s. 2d. on his claim for £54 and awarded the defendant costs on scale 3.

The plaintiff applied under the proviso to section 89 (3) to have the award as to costs set aside on the ground that the arbitrator had not exercised his discretion as to costs judicially in awarding them against the successful party in the absence of some reason connected with the case. The county court judge dismissed the application. On appeal:—

Held, (1) that there was no duty in a judge or an arbitrator to give reasons for departing from the usual rule that costs follow the event.

Donald Campbell & Co. Ltd. v. *Pollak* [1927] A.C. 732; 43 T.L.R. 495 applied.

Dicta of Diplock J. in *Heaven & Kesterton Ltd.* v. *Sven Widaeus A/B* [1958] 1 W.L.R. 248; [1958] 1 All E.R. 420 approved.

Dictum of Lord Goddard C.J. in *Lewis* v. *Haverfordwest Rural District Council* [1953] 1 W.L.R. 1486; [1953] 2 All E.R. 1599 explained.

(2) That on the face of this award there was doubt as to which was the successful party and, therefore, doubt as to whether the order as to costs was unusual.

Meyer v. *Leanse* [1958] 2 Q.B. 371; [1958] 3 W.L.R. 518; [1958] 3 All E.R. 213 considered.

Quaere, whether there is power under the proviso to section 89 (3) of the Act of 1934 to set aside part of an award of an arbitrator.

Appeal from Judge Rice-Jones, sitting at Croydon County Court.

A builder, Edwin Henry Ernest Perry, claimed £58 0s. 5d., the balance of his account for work and labour done and materials supplied to and for the defendant, R. C. Stopher, in respect of a house at Mitcham. The builder valued the total work done at £455 15s. 5d. The defendant disputed the claim, alleging that the work was in part badly done and incomplete, and not in

[1] County Courts Act, 1934, s. 89: "(1) The judge may, with the consent of the parties to any proceedings, order the proceedings to be referred to arbitration (whether with or without other matters within the jurisdiction of the court in dispute between the parties) to such person or persons and in such manner and on such terms as he thinks just and reasonable. (2) No such reference shall be revocable by any party except with the consent of the judge. (3) On any such reference the award of the arbitrator, arbitrators or umpire shall be entered as the judgment in the proceedings and shall be as binding and effectual to all intents as if given by the judge: Provided that the judge may, if he thinks fit, on application made to him at the first court held after the expiration of one week after the entry of the award, set aside the award, or may, with the consent of the parties, revoke the reference or order another reference to be made in the manner aforesaid."

accord with instructions. He claimed that he had already paid the builder £397 15s., which was more than the value of the work done. Further particulars of the defence set out 16 respects in which the work was either badly done, not done, or not done to his order. On June 13, 1958, the registrar to the Croydon County Court ordered, with the consent of all parties, that the proceedings be referred to arbitration under section 89 of the County Courts Act, 1934,[1] and that the award of the arbitrator should be entered as the judgment in the action.

At the hearing leave was given to amend the pleadings reducing the builder's claim from £58 0s. 5d. to £54 0s. 5d. On July 9, 1958, the arbitrator gave his written award, the parties having left to him the question of costs. The award, so far as relevant, was as follows: "No estimate was given. The work was charged for "on a time and material basis when finished, plus profit to the "plaintiff." On the 16 points of dispute the arbitrator dismissed seven, dealt with two others together, and made the following findings: "No. 1. I find that the kitchen floor has been badly "laid and is half an inch above the hall floor, forming a half-inch "step under the door connecting the kitchen with the hall. I do "not consider the tiling worthless to the defendant, but he will "suffer permanent inconvenience by reason of this step coupled "with its unsightly appearance. In my award I have taken this "into consideration. No. 2. I find nothing seriously wrong with "the wall tiling. . . . No. 4. The defendant has now altered the "flow and return pipes to enter the boiler on the left side. . . . I "am satisfied that the plaintiff should have done that in the first "instance. No. 6. The service pipe to the basin has been altered, "but the plaintiff admitted that he fixed it on top of the floor and "gave his reasons. As the pipe has now been hidden the plain-"tiff's reasons are not very sound. No. 7. This pipe has also been "altered by defendant. Fixed across the bath (as the plaintiff "admits he did) it would be very unsightly and the defendant is "entitled to the cost of the alteration. No. 8. These pipes have "been altered, but . . . there is no reason why plaintiff should "not have fixed them as they are now in the first place. No. 9. "The immersion heater cannot be withdrawn without discon-"necting the hot water tank. . . . This is contrary to good "practice, as an immersion heater must be accessible for "servicing. It could quite easily have been fixed in the bottom "of the tank, as indeed it must, and this means that a new hot "water tank will be required. No. 10. I am satisfied that this "tap was installed purely as a garden tap and was not intended "as a general draw-off tap for the house water system.

"The defendant also claimed that the plaintiff's charges for "cement and labour are excessive. I find that the charge for "cement is two cwt. in excess of that required, but that the "charge for labour is not excessive. Award: I award the plaintiff

[1] For footnote 1 see p. 416.

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"£11 14s. 2d. in respect of his claim. I award the defendant "costs on scale 3."

The plaintiff applied to the county court for an order that the award as to costs be set aside, and that he be awarded costs on scale 2, claiming that the discretion of the arbitrator as to the award of costs had not been exercised judicially in that they had been awarded against the successful party in the absence of some reason connected with the case.

The county court judge on July 31, 1958, dismissed the application. In his judgment he referred to the speech of Lord Atkinson in *Donald Campbell & Co.* v. *Pollak*,[2] and to the judgment of Diplock J. in *Heaven & Kesterton Ltd.* v. *Sven Widaeus A/B*,[3] and said that it was clear that this award was not bad merely because the plaintiff, who had succeeded in recovering £11 14s. 2d., had been ordered to pay the defendant's costs. In *Heaven's* case[3] Diplock J. had said that if nothing had been said by the umpire as to his reasons for making the award he had made there would not be any grounds on which the court could interfere with it. In this present case the arbitrator had given no reasons for his award as to costs, nor was he bound to do so. It might have been that he thought the claim was exaggerated; but the court could not speculate as to what his reasons were and still less assume that they were unjudicial. Nor could it be said that this award showed on its face that the arbitrator must have acted unjudicially. The application must be dismissed. Leave to appeal was granted to the plaintiff.

R. A. R. Stroyan for the plaintiff.
Michael R. Hoare for the defendant.

The following cases were referred to in the course of argument: *Heaven & Kesterton Ltd.* v. *Sven Widaeus A/B*[3]; *Donald Campbell & Co. Ltd.* v. *Pollak*[4]; *Wootton* v. *Central Land Board*[5]; *Baylis Baxter Ltd.* v. *Sabath*[6]; *Smeaton Hanscomb & Co. Ltd.* v. *Sassoon I. Setty, Son & Co. (No. 2)*[7]; *Lewis* v. *Haverfordwest Rural District Council*[8]; *Lloyd Del Pacifico* v. *Board of Trade*[9]; *Civil Service Co-operative Society* v. *General Steam Navigation Co.*[10]; *Meyer* v. *Leanse*[11]; *Nicholson* v. *Little*.[12]

Hodson L.J. read section 89 (1) and (3) of the County Courts Act, 1934, and continued: This was an application to the judge, not to set aside the whole of the award, but only that part of the

[2] [1927] A.C. 732, 814; 43 T.L.R. 495.
[3] [1958] 1 W.L.R. 248, 253; [1958] 1 All E.R. 420.
[4] [1927] A.C. 732; 43 T.L.R. 495.
[5] [1957] 1 W.L.R. 424; [1957] 1 All E.R. 441.
[6] [1958] 1 W.L.R. 529; [1958] 2 All E.R. 209.
[7] [1953] 1 W.L.R. 1481; [1953] 2 All E.R. 1588.
[8] [1953] 1 W.L.R. 1486; [1953] 2 All E.R. 1599.
[9] (1930) 46 T.L.R. 476.
[10] [1903] 2 K.B. 756.
[11] [1958] 2 Q.B. 371; [1958] 3 W.L.R. 518; [1958] 3 All E.R. 213.
[12] [1956] 1 W.L.R. 829; [1956] 2 All E.R. 699.

award which dealt with costs, and it is to be observed in passing that the section under which these proceedings were taken only provides for setting aside an award and does not add "or any part "thereof"; but the only question which we need consider is whether the judge was right in law in taking the course he did take in refusing to set aside an award containing a judicial exercise of discretion about costs.

[His Lordship stated the facts set out above, and continued:] With regard to some of these matters in dispute the plaintiff succeeded, and with regard to others he failed and, although we know the number of matters on which the plaintiff succeeded and on which he failed, we do not know how much time was spent over that part of the dispute on which the plaintiff failed, and how much over that part on which he succeeded. The findings of the arbitrator are set out in detail, showing expressly what he found in this itemised claim, and at the conclusion, he awarded the plaintiff £11 14s. 2d. as against the £54 claimed; and then he did that which has provoked disagreement: he awarded the defendant costs on scale 3.

The discretion of the arbitrator as to costs is to be exercised judicially in the same way as any other exercise of discretion. The proposition is stated in Russell on Arbitration (16th ed., p. 252): "The discretion must be exercised judicially and it will "be reviewed by the court to the same extent as the judge's order "as to costs would be reviewed upon an appeal." In all cases where the exercise of discretion as to costs is concerned, the relevant authority is *Donald Campbell* v. *Pollak*,[1] where one of the matters emphasised by the House was that the discretion "must be exercised judicially and the judge ought not to exercise "his discretion against a successful party on grounds wholly "unconnected with the cause of action"; but so far as matters connected with the cause of action are concerned, the tribunal has a discretion which is unfettered.

The submission in this case is, to me, the novel one that the order for costs being an unusual one, in the sense that the plaintiff having not wholly failed but partly succeeded, was ordered to pay the defendant's costs, the arbitrator should have stated a reason for so finding. I say at once that, in my judgment, there is no authority for such a submission at all.

I begin with *Donald Campbell* v. *Pollak*[2] and the speech of Lord Atkinson, on which the plaintiff sought to rely, because I think the words of Lord Sterndale M.R. in *Ritter* v. *Godfrey*,[3] quoted by Lord Atkinson in *Donald Campbell* v. *Pollak*,[4] must have been very much in the mind of Lord Goddard C.J. in a case to which I shall refer later—the case principally relied on by the plaintiff here. Lord Sterndale M.R. in *Ritter* v. *Godfrey* said[5]: "But there is such a settled practice of the

[1] [1927] A.C. 732; 43 T.L.R. 495.
[2] [1927] A.C. 732, 814.
[3] [1920] 2 K.B. 47.
[4] [1927] A.C. 732, 814.
[5] [1920] 2 K.B. 47, 52–53.

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"courts that in the absence of special circumstances a successful "litigant should receive his costs, that it is necessary to show "some ground for exercising discretion by refusing an order "which would give them to him. The discretion must be "judicially exercised, and therefore there must be some ground "for its exercise, for a discretion exercised on no ground cannot "be judicial. If, however, there be any grounds, the question "of whether they are sufficient is entirely for the judge at the "trial, and this court cannot interfere with his discretion." Lord Atkinson, after that citation, said [6]: "My Lords, I think "this judgment of Lord Sterndale contains a clear, condensed "and accurate statement of the law and of the prevailing practice "on the points with which it deals."

Later, after the House of Lords in *Donald Campbell* v. *Pollak* [7] had overruled the actual conclusion in *Ritter* v. *Godfrey*,[8] but had affirmed Lord Sterndale's expression of opinion as to costs, Lord Sterndale said, in *Pitkin* v. *Sanders & Forster Ltd.*[9]: "In this case, therefore, we have to see if the judge had any "grounds for the exercise which he made of his discretion; and "if there were any grounds on which he could exercise his "discretion in the way in which he did, we cannot interfere."

So far I do not think there is any language to be found in the cases which indicates that the tribunal is required, before it exercises its discretion in a particular way, to state its reasons for so doing, even when it makes an unusual order as to costs, or an order as to costs which may appear to be unusual.

So far as the facts of this case are concerned, it is not such a clear case as one in which a plaintiff wholly succeeds or wholly fails. It is a case of an itemised claim where, in the event, it can be said the plaintiff has succeeded to a far less extent than the defendant; but even assuming that it is a case in which an unexpected order was made, there is no justification, in my opinion, for the contention that it is necessary, in departing from the rule, for a judge or an arbitrator to say: "I am departing "from the rule for this, that or the other reason." The cases show that where in departing from the rule the tribunal gives a reason which is wrong in law, or where it is shown on the face of the record that there was an error of law in the exercise of the discretion, an appellate court can interfere.

The case on which Mr. Stroyan in the end almost solely relied in support of his contention is *Lewis* v. *Haverfordwest Rural District Council.*[10] The report in the Weekly Law Reports appears to have been revised and, perhaps, I should read from that, because the wording is slightly different. In that case, as one would expect, *Donald Campbell* v. *Pollak* [11] was applied. It was a special case stated by an arbitrator. The arbitrator made

[6] [1927] A.C. 732, 814.
[7] [1927] A.C. 732.
[8] [1920] 2 K.B. 47.
[9] (1923) 128 L.T. 789, 790.
[10] [1953] 1 W.L.R. 1486; [1953] 2 All E.R. 1599.
[11] [1953] 1 W.L.R. 1481; [1953] 2 All E.R. 1585.

an award assessing the compensation payable to an applicant, the tenant and occupier of a small holding at Haverfordwest, at £156, and awarded, further, that each party should bear its own costs; and the applicant moved for an order for the award, in so far as it related to costs, to be set aside, and that the council should pay the applicant's costs.

Lord Goddard C.J. referred to a decision of Devlin J. in *Smeaton Hanscomb & Co. Ltd.* v. *Sassoon I. Setty, Son & Co. (No. 2)*,[11] and followed *Donald Campbell* v. *Pollak*,[12] which reaffirmed what had been said in the Court of Appeal in *Ritter* v. *Godfrey*[13] to the effect "that there is a settled practice of the "courts that in the absence of special circumstances a successful "litigant should receive his costs, and that it is necessary to show "some grounds for exercising the discretion of refusing an order "which would give them to him, and the discretion must be "judicially exercised." Lord Goddard went on[14]: "Those words "'judicially exercised' are always somewhat difficult to apply, "but they mean that the arbitrator must not act capriciously and "must, if he is going to exercise his discretion, show a reason "connected with the case and one which the court can see is a "proper reason."

Those are the particular words which are relied upon, but I must read more of Lord Goddard's judgment. He went on[14]: "In the present case the arbitrator, when asked why he made "this order as to costs, answered: 'I had several reasons for "'awarding that each party should bear its own costs, and one "'of those was that I had no evidence that during the long time "'between the event and the date of the arbitration any serious "'effort had been made by either party to settle the question.'" On that Lord Goddard said[15]: "The question had to be settled "at some time. Why, therefore, if the council did not take steps "to settle or to make a tender, are they to be in a better position "than they might otherwise have been? They made no effort "to settle and the applicant, having now brought proceedings, is "entitled to recover the compensation which the statute gives "him the right to receive and which the council had apparently "made no effort to pay. I do not think that it is a 'judicial "'exercise' of discretion to say that 'because neither party did "'anything, therefore I am not going to award the successful "'party the costs.' That seems to me to be going against what "was said in *Donald Campbell & Co.* v. *Pollak*,[16] namely, that "it is the settled practice of the court that 'in the absence of "'special circumstances a successful litigant should receive his "'costs.' I cannot find that that is a special circumstance, and "therefore, I think the arbitrator was wrong in not awarding the "successful applicant his costs."

Lord Goddard was there clearly applying himself to the reason

[11] [1953] 1 W.L.R. 1481.
[12] [1927] A.C. 732.
[13] [1920] 2 K.B. 47.
[14] [1953] 1 W.L.R. 1486, 1487.
[15] Ibid. 1487–1488.
[16] [1927] A.C. 732.

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which had been stated in that case, the reason stated by the arbitrator in answer to the inquiry made by him; he was not, in my opinion, purporting to do that which seems to me to be directly contrary to what had been said in all the authorities about costs with which he was, indeed, not only familiar, but always mindful, having, as we all know, a most remarkable and retentive memory. It seems incredible to me to suppose that he could have been intending to go outside that line of authority to which he expressly referred in his judgment. It is quite true that if you take out of their context the words "if he is going to exercise his "discretion he must show a reason connected with the case," they might, as Mr. Stroyan argues, involve that that must be done independently of the circumstances of the case. But if the words can be read separately and outside their context—which I do not think is right—they would, in my judgment, be against the current of authority. I am satisfied in my own mind that Lord Goddard did not intend to say anything of the kind, and all that he was doing was pointing to the reason which had been shown in that case and, in that context, saying that the arbitrator must show a reason which was connected with the case, and one that the court can see is a proper reason. That, in my opinion, really disposes of this appeal in favour of the defendant.

The subsidiary ground put forward by Mr. Stroyan was that there was nothing shown on the face of the award, no material for an exercise of discretion in the way in which the arbitrator exercised it. I cannot accept that submission. It was clear on the face of the award that the claim was very much exaggerated in relation to the amount actually awarded, and it was also clear that on the important issues there had been failure on the part of the plaintiff. Thus it is not a case where, on the face of the award, it can be said that nothing is shown which justifies anyone exercising his discretion by making an order such as the arbitrator did.

This particular section of the County Courts Act, 1934, with reference to arbitrations thereunder was considered by this court recently in *Meyer* v. *Leanse*,[17] where a county court judge had set aside an award of an arbitrator, taking the view that he had a wider discretion than has the High Court when setting aside an award. This court pointed out that that was wrong, and that he must act on the same principles as the High Court in setting aside an award. The only relevance of that case to this, apart from the fact that it has some similarity of facts, is that the question of costs was considered. The arbitrator had awarded the plaintiff a third of his costs, taking the view that the claim was exaggerated and had, with regard to one head of the plaintiff's claim, failed. Thus, it has no bearing on Mr. Stroyan's point that it is necessary to show a reason, because there the reason was shown; but the court, the judgment of which was

[17] [1958] 2 Q.B. 371; [1958] 3 W.L.R. 518; [1958] 3 All E.R. 213.

given by Parker L.J., did refer, in language with which one is familiar, to the question of costs, as follows[18]: "I, again like "the judge, am quite satisfied that whatever view one might have "taken oneself in regard to the award of costs, it certainly cannot "be said that in doing what he did the arbitrator erred in law." I say that in order to emphasise that, in dismissing this appeal I am not in any way seeking to say that the exercise of the discretion as to costs was necessarily exercised in the way in which some other equally right-minded person might exercise the discretion in this case. All I am concerned to say is that there is no ground of appeal in law because it has not been shown that the arbitrator erred in that respect, nor on the special point made on behalf of the plaintiff, because it is unnecessary for an arbitrator, in exercising his discretion as to costs, to state in terms the reason for which he departs from what may be regarded as the usual course. I would dismiss this appeal.

MORRIS L.J. I agree. After the award of the arbitrator in this case the plaintiff made an application to the county court judge to set aside the award, and he stated his grounds in the following words: "That the discretion of the arbitrator as to "the award of costs has not been exercised judicially in that costs "were awarded against the successful party in the absence of "some reason connected with the case." The words "the "successful party" there used at once raise an inquiry as to who was the successful party in this arbitration.

Mr. Stroyan has developed two main submissions. His first was that in this arbitration, under section 89 of the County Courts Act, 1934, the arbitrator, having regard to his award, should have set out his reasons for making the order as to costs that he made. The final words of the award were as follows: "Award the plain-"tiff £11 14s. 2d. in respect of his claim. I award the defendant "costs on scale 3." The authority on which Mr. Stroyan relied for the submission or proposition that the arbitrator was under an obligation to state his reasons was *Lewis* v. *Haverfordwest Rural District Council*,[19] and in particular these words used by Lord Goddard C.J.: "It has been laid down by the House of "Lords . . . that there is a settled practice of the courts that "in the absence of special circumstances a successful litigant "should receive his costs, and that it is necessary to show some "grounds for exercising the discretion of refusing an order which "would give them to him, and the discretion must be judicially "exercised. Those words 'judicially exercised' are always some-"what difficult to apply, but they mean that the arbitrator must "not act capriciously and must, if he is going to exercise his "discretion, show a reason connected with the case and one "which the court can see is a proper reason."

Mr. Stroyan, relying on those words, says that the only way in

[18] [1958] 2 Q.B. 371.

[19] [1953] 1 W.L.R. 1486, 1487.

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which a court can see whether there is a proper reason is if a reason appears on the face of the award. But it seems to me that those words of Lord Goddard must be considered in the light of the circumstance that in that particular case the arbitrator was asked why he had made the order as to costs that he made, that the arbitrator gave his reasons in response to that request, and that those reasons were then available and open for examination by the court. It does not seem to me that Lord Goddard was considering at all the question whether an arbitrator must state his reasons, and I do not think that he was laying down any such proposition.

The present situation differs from that in *Heaven & Kesterton Ltd.* v. *Sven Widaeus A/B*,[20] a decision of Diplock J. There the umpire filed an affidavit in which he stated his reasons for making the order he made as to costs, and Diplock J. said[21]: "If, in reply to this notice of motion, nothing had been said "by the umpire, who is of course not a party to these pro-"ceedings, as to the reasons why he had made an order of "that kind, I do not think that there are any grounds on which "I could have interfered with his award." Later Diplock J. said[22]: "While, therefore, it may be that had the umpire in the "present case put in no affidavit and given no reasons, the appli-"cants would have had little that they could say to me, as he "has in fact given his reasons for doing so, I am entitled to look "at those reasons and see whether he has exercised his discretion "judicially."

I think it is also right to observe that the language used by Lord Goddard was used immediately after he had mentioned *Donald Campbell & Co.* v. *Pollak*,[23] reaffirming *Ritter* v. *Godfrey*,[24] and his language bears a resemblance to the words used in *Ritter* v. *Godfrey*[24] in regard to a case tried before a judge alone.

It does not seem to me that Mr. Stroyan has made out his proposition that the arbitrator was obliged to set out the reasons which had guided him in making the order as to costs that he made.

The second and remaining submission of Mr. Stroyan was that it does not appear in this case that there was material on which the arbitrator could properly have made any such order as he made. We have the whole of the award before us. It shows, very clearly, that the arbitrator had a number of items to consider, and that he found, as to the majority of those items, in favour of the defendant. He found that the defendant was, or had been, under an obligation to incur expense in putting right some of the work defectively done by the plaintiff. Just by way of illustration, one item of complaint was that the service for the water-closet flush was taken across the bath; and the award deals with this item as follows: "This pipe has also been altered by "defendant. Fixed across the bath (as the plaintiff admits he

[20] [1958] 1 W.L.R. 248; [1958] 1 All E.R. 420.
[21] [1958] 1 W.L.R. 248, 253.
[22] Ibid. 254.
[23] [1927] A.C. 732.
[24] [1920] 2 K.B. 47, 52–53.

"did) it would be very unsightly and the defendant is entitled to "the cost of the alteration."

It would appear from the face of the award that there might be grounds for thinking that the defendant could be regarded as having been the successful party in this case before the arbitrator. The plaintiff succeeded in recovering £11 after having claimed a much larger sum. It is to be remembered, however, that we are not in any way called on to express any opinion as to what order we think we might have made if we had been in the arbitrator's position.

It may be useful, in this connection, to refer to one other sentence from Diplock J.'s judgment in the case I have cited, where he said[25]: "That to fail upon one important issue in a case "is a matter which can and should be taken into consideration "in dealing with costs needs no authority; that to put forward "an exaggerated claim on which the claimant succeeds on only "a small part is a matter which can result in his being ordered "to pay the costs, despite his success as to a small part, again, I "think, needs no authority, but, if authority be needed it is to "be found as long ago as 1879 in *Harris* v. *Petherick.*[26]"

On this part of the case it seems to me that Mr. Stroyan cannot show that it appears from the face of the award that this was an order that should not have been made. I think the appeal fails.

WILLMER L.J. I agree that the appeal fails. I find myself at one with my brethren in thinking that Lord Goddard, by his dictum in *Lewis* v. *Haverfordwest Rural District Council,*[27] cannot have intended to lay down any rule of universal application. If he did intend to lay down any such rule, he would, in my judgment, have been flying in the face of what was said by the House of Lords in *Donald Campbell & Co. Ltd.* v. *Pollak.*[28] It is significant that the dictum of Lord Goddard referred to follows very shortly after a reference to that House of Lords decision, which seems to indicate that Lord Goddard had it very much in mind.

In those circumstances I do not think he can be taken as intending to lay down any rule of universal application. Be it noted that in the particular case with which he was dealing the arbitrator had, in fact, given a reason, but a reason which did not commend itself to the court. In the present case the arbitrator has given no reason for the conclusion as to costs at which he arrived.

It seems to me, if it is proper to refer to authority on a matter which is so eminently one of discretion, I could not do better than adopt what was said by Diplock J. in *Heaven & Kesterton Ltd.* v. *Sven Widaeus A/B,*[29] in a passage which has so far not been read, and which was referred to by the judge in the present case in his judgment as follows: "I have no doubt that the umpire in

[25] [1958] 1 W.L.R. 248, 255.
[26] (1879) 4 Q.B.D. 611.
[27] [1953] 1 W.L.R. 1486, 1487.
[28] [1927] A.C. 732.
[29] [1958] 1 W.L.R. 248, 253.

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"an arbitration of this kind has power to deprive a successful "claimant of his costs and, indeed, to order a successful claimant "to pay the costs of the other side in appropriate circumstances. "The mere fact, therefore, that on the face of the award the "buyers have succeeded as to the sum of £73 but have neverthe-"less been ordered to pay the costs of the sellers would, in my "view, of itself be no ground for setting aside the award." That seems to me to be a perfectly correct statement with regard to the discretion of the umpire.

It should, however, be remembered that the whole of the argument on behalf of the plaintiff here has been based on the hypothesis that the arbitrator in this case made an "unusual" award, in the sense that he directed that the successful party should pay the costs of the unsuccessful party. That hypothesis is one which deserves a little detailed examination, because, unless it is established, Mr. Stroyan does not ever get to the proposition for which he contended, and in support of which the dictum of Lord Goddard was cited. One may well ask: "Who was the "successful party in this case?" As my Lord has pointed out, the plaintiff may be said to have been successful so far as £11 is concerned, but equally it may be said that the defendant has been successful as far as some £40 odd is concerned. One wonders what the plaintiff would have said if, just as he had finished reading the award of the arbitrator, some friends of his had come up to him and warmly congratulated him on the "success" he had achieved in his case. I apprehend that the plaintiff would have regarded himself as having substantially failed in his claim. If so, the plaintiff having substantially failed in his claim, but the defendant not having wholly succeeded in defeating the claim, it was open to the arbitrator to take almost any course with regard to the costs in the exercise of his discretion, and we have not got the information which would justify us in criticising the course which he did take. We do not know, for instance, exactly what he thought of the plaintiff's claim. He may have thought it was very grossly inflated. For all we know he may have thought the costs incurred in the arbitration were very largely caused by the plaintiff's unsuccessful attempt to justify his exorbitant charges. We just do not know.

In these circumstances it is quite impossible for us to say that in a case of this sort—which, as I have emphasised, is a case where the discretion as to costs was very much at large—the arbitrator has failed to exercise his discretion either judicially or properly. Accordingly, the county court judge came to a perfectly correct conclusion in refusing to interfere, and I agree that this appeal should be dismissed.

Appeal dismissed.

Solicitors: *W. Timothy Donovan; A. Rawlence.*

M. M. H.

[NORWICH CONSISTORY COURT.]

* *In re* PARISH OF SOUTH CREAKE.

1958
July 28;
Sept. 22;
Dec. 12.

Ellison Ch.

Ecclesiastical Law—Faculty—Prayers for the departed—Erection of stained glass window bearing inscription "Pray for the soul of "Elizabeth Smith."

The vicar and churchwardens petitioned for a faculty to erect a stained glass window bearing the inscription "Pray for the soul "of Elizabeth Smith." On the question whether such an inscription is permissible in law and if so whether in the exercise of the Chancellor's discretion it would be proper to grant such a faculty:—

Held, (1) that the words "Pray for the soul of Elizabeth "Smith" did not necessarily denote the Romish doctrine of purgatory and were not improper or unlawful.

(2) That, in view of the traditions of the particular parish concerned, this was a proper case for a favourable exercise of discretion.

Dupuis v. *Parishioners of Ogbourne St. George* [1941] P. 119 distinguished.

PETITION FOR FACULTY.

The Reverend Leonard Hugh Michael Smith, Vicar of South Creake, together with the churchwardens, petitioned for a faculty authorising them to erect in the south aisle of the church a stained glass window bearing the inscription "Pray for the soul "of Elizabeth Smith." Elizabeth Smith was the mother of the incumbent petitioner. The petition was unopposed, and the diocesan advisory committee had recommended on artistic and aesthetic grounds that the design of the proposed window was unexceptionable.

Peter Winckworth (solicitor) for the petitioners.

H. S. Ruttle appeared as amicus curiae.

All the cases cited in argument were referred to in the judgment.

ELLISON CH. stated the facts and continued: The sole question which I have to decide is whether this particular inscription is permissible in law and if so whether in the exercise of my discretion it can be approved in this case, and perhaps more generally whether similar words which in substance constitute an exhortation to pray for the soul of a named deceased person ought to be inscribed upon a sacred edifice comprising part of the fabric and permanent structure of this church.

There must first be mentioned one or two matters of background. When the papers were brought into the registry I referred myself to the case law on this subject and my reaction

[Reported by M. B. KELLY, Barrister-at-Law.]

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at that stage was that the courts had held that such inscriptions were not necessarily unlawful provided that no notion of the Romish doctrine of purgatory was implicit in the words or circumstances, but it was to be observed that in every reported case for one or another variety of reasons faculties had always been refused. I was much impressed by the strong views adverse to the user of such words expressed by Sir Philip Baker Wilbraham, Dean of Arches, in *Dupuis* v. *Parishioners of Ogbourne St. George.*[1] At the same time I was aware that more recently faculties permitting such inscriptions had on a few occasions been granted by certain chancellors, and indeed during the hearing the promovents produced originals or copies of four such examples (and referred to a fifth case pending) and relied upon these as precedents. But they are unreported cases and I have no knowledge of the circumstances, or whether the cases were heard in open court or whether the faculties were decreed in chambers.

As in this present age of Church life it is not always desired or essential to pursue such legal questions to their utmost limits, the promovents were requested to consult the diocesan advisory committee in case there could be worked out some suitable alternative and unexceptionable words of inscription, but although some were discussed nothing resulted which was commendable or otherwise acceptable. Subsequently I offered to see the incumbent petitioner and members of his family in chambers, but for reasons of their own that invitation was declined, and there the matter stood for several weeks until the promovents' solicitors applied for the case to be set down for hearing in the open court list. Thereupon citation duly issued but no one entered appearance to oppose.

The evidence was heard in Norwich on July 28, 1958, and the legal arguments were concluded on September 22, 1958, on which occasion for convenience and with the consent of the promovents the court sat in the Royal Courts of Justice in London. Although this suit is unopposed, because questions of importance and difficulty were involved I invited Mr. H. S. Ruttle of counsel to attend as amicus curiae in order to assist the court on questions of both law and discretion. There is recent precedent for the ecclesiastical court taking this course in an unopposed case: *In re St. Mark's Church, Lincoln.*[2] I am much indebted to Mr. Ruttle for his valuable services. Both his lucid arguments and those of Mr. Winckworth who appeared for the promovents have enabled me to reach the conclusions at which I have arrived.

The facts proved in the case may be stated shortly. The present incumbent has been vicar of South Creake since 1944 and his mother to whom the memorial is to be erected lived and died there. Although the churchwardens are co-petitioners, the vicar is the moving spirit behind what is very much a family

[1] [1941] P. 119.

[2] [1956] P. 166; [1956] 3 W.L.R. 147; [1956] 2 All E.R. 579.

memorial. He is supported by his brother and three sisters, who do not actually live in this diocese, and he is finding the major part of the money to pay for the execution of the works. The proposed inscription will be quite small and the intention is to place this at the lower left hand corner of what will be a three light window in the south aisle of the church. During his evidence the vicar told me that an inscription in such terms as "In loving memory of . . ." or "Remember before God . . ." would not be unacceptable, but subsequently his advocate expressly withdrew any such alternative for reasons which I do not know, but later conceded that the longer form "Pray for the "repose of the soul of Elizabeth Smith" would be accepted if the court thought that preferable. The parochial church council are unanimous in their approval, as also are the diocesan advisory committee who have recommended the proposals for faculty. The reaction in the parish is important on another aspect of the case to which I shall refer later. I have borne in mind the warning contained in *Dupuis* v. *Parishioners of Ogbourne St. George* [3] that it is often difficult for the parochial church council of a small country parish to stand out on such a matter. That is also my own experience and a feature much in point where a vicar after some years' incumbency desires to install his own family memorial. One has to look deeper behind a bare resolution of assent and a lack of appearance to the citation. But this particular matter has been under consideration and common knowledge for a long while and no element of disquiet on the part of any parishioner has become manifest or reached my ears through the registry, the archdeacon or from any other source. I have visited the church, which is excellently cared for. The services of worship and the ornamentation appeared to follow what is commonly known as a strong Anglo-Catholic tradition.

Mr. Winckworth's first submission was designed to show that prayers for the souls of the departed are in conformity with the doctrines and constitutions of the Church of England, and although they may be used in the Church of Rome, such prayers are not necessarily referable to the Roman Catholic doctrine of purgatory. I was referred to Bingham's "Antiquities of the "Christian Church," where the subject is treated in Chapter III of Book XV, Vol. V, of the 1834 revised edition. In that part concerned with the Oblation and Consecration Prayers the author investigates the various grounds upon which the ancient Church offered prayers for the departed. I do not propose to lengthen this judgment by any detailed examination of that treatise. Suffice it is to say that Bingham, an author, recognised for his consummate learning, arrives at six conclusions and reasons, some of which are based upon the content and tenor of the public offices of the Church where she prayed for saints, prophets, holy men and even the Virgin Mary herself, and some are based upon

[3] [1941] P. 119.

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the prayers and authorship of St. Ambrose, St. Cyprian, St. Crysostom, Dionysius and many others. He argues that they are general reasons for praying for the departed without the least intimation of their souls being tormented in the temporary pains of purgatory. The emphasis is on the belief that the soul is in but an imperfect state of happiness until the resurrection when man shall be established in an endless state of consummate happiness and glory, and the Church pays particular respect to praying that the soul shall rest in peace until there is attained that blessed estate of a glorious resurrection. Bearing in mind the facts of the present case, one is reminded of St. Augustine's discourse in respect of his mother Monicka and his prayer "Let "her therefore rest in peace with her husband; and do then, "my Lord God, inspire all those thy servants that read this, to "remember thy handmaid Monicka at thy altar. . . ." That prayer is quite inconsistent with any notion of purgatory, and Bingham's conclusion seems indeed to overthrow that doctrine. This is a submission based on the theology. It is, of course, no part of this court's duty to examine the doctrine of purgatory from a theological aspect and say whether or no the same is supported by scripture because the Twenty-second Article of Religion expressly states that it is not grounded upon any warranty of scripture but is repugnant to the word of God and by that law I am bound to govern myself. In this, one of the Queen's courts, I have to decide the question before me in the light of the law applicable and not upon the merits of what may be rival or controversial theological opinions. I must exclude from my mind personal views or what may be my own churchmanship or that of the bishop of the diocese and other irrelevant matters. It is salutary to remember those apt words of Chadwyck-Healey Ch. in *St. John the Evangelist, Clevedon* (*Vicar and Churchwardens*) v. *All Having Interest*[4]: "I wish it to be "quite understood that I am not importing into the questions "at issue any personal views or feelings of my own. I have no "right at all to do that. I have simply to decide according to "law, to interpret to the best of my ability the authorities that "are binding upon me, and to consider the decisions of courts "of co-ordinate jurisdiction which, though not binding upon me, "are entitled to the respect which one court properly pays to the "decisions of another. I say this because it is very frequently "thought that the personal opinions of a chancellor of a diocese "may to some extent be permitted to influence his decision. "This is a great mistake. He who occupies the position of a "judge is obliged to proceed judicially and to disregard any "personal views."

The first leading case is *Breeks* v. *Woolfrey*,[5] where the words "Pray for the soul of J. Woolfrey," with the added reminder "It is a holy and wholesome thought to pray for the dead (2

[4] [1909] P. 6, 9.

[5] (1838) 1 Curt. 880.

"Maccabies XII, verse 46)," were inscribed on a tombstone in the parish churchyard of Carisbrooke, the same being erected by the widow of Joseph Woolfrey, who was a lady of the Roman Catholic faith. It was a criminal suit tried at first instance in the Court of Arches pursuant to letters of request from the chancellor of the diocese of Winchester. As such the onus of proof lay upon the promoter, who was the incumbent, to prove the principal ingredient in the alleged offence cited, namely, that the widow had ". . . unlawfully . . . caused to be erected a certain "tombstone . . . and a certain inscription . . . thereon contrary "to the articles, canons and constitutions or to the doctrines "and discipline of the Church of England." The whole question in the case, which was fully argued at Doctors' Commons by some of the most eminent learned counsel of the time, was whether it was proved that such words comprising a prayer for the departed were necessarily unlawful. In a lengthy reserved judgment Sir Herbert Jenner, Dean of Arches, dealt in turn with the three arguments put forward by the promoter. First, it was said that such prayers are so necessarily connected with the doctrine of purgatory as to form part of it and they must therefore violate the Twenty-second Article of Religion which expressly condemns that doctrine. But as to this the learned dean was satisfied that prayers for the departed were offered up by the primitive Church long antecedent to the doctrine of purgatory being received by the Church of Rome, even assuming, as some authors indicated, that the notion of purgatory was first introduced about the fifth or sixth century although it does not appear to have been declared as doctrine until the General Council of Florence in 1438. The primitive Church prayed for the dead certainly from the third century, and at a later period the Church of England had taken no different view of the subject than was held by the primitive Church, and accordingly it was impossible to say that such prayers inextricably formed part of the Romish doctrine. Secondly, it was said that because prayers for the departed had formerly been contained in the Primer of Henry VIII in the burial and communion services and also in the first prayer book of Edward VI, but were subsequently omitted from the revised second prayer book of Edward VI, it followed that by being so expunged they became inconsistent with the doctrines of the reformed Church. The first of those prayer books was established by the first Act of Uniformity of Service and Administration of Sacraments throughout the Realm,[6] the preamble to which obliged the appointed compilers to draw up one uniform convenient and meet order of Common Prayer, amongst other things, ". . . having respect . . . to pure Christian Religion and "to the usages in the primitive church." The second and revised prayer book which omitted such prayers was established by the second Act of Uniformity,[7] and the learned Dean held that

[6] 2 & 3 Edw. 6, c. 1.

[7] 5 & 6 Edw. 6, c. 1.

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the apparent changes in the liturgy then introduced were not because anything in the former prayer book offended against the doctrines of the Church of England but by reason of those events which are referred to in the preamble to the second Act of Uniformity, which preamble no doubt reflected the experiences and sentiments of the legislature. It states that there had " . . . " arisen in the use and exercise of the aforesaid common service " in the church heretofore set forth " (that is to say, in the first prayer book), " divers doubts for the fashion and manner of the " ministration of the same rather by the curiosity of ministers " and mistakers than of any other worthy cause: therefore, as " well for the more plain and manifest explanation thereof as for " the more perfection of the said order of common services in " some places, where it is necessary to make the same prayers " and fashion of services more earnest and fit to stir Christian " people to the true honouring of Almighty God." The second prayer book contained no express prohibition nor any notion that such prayers implied a necessary belief in the doctrine of purgatory: it merely omitted prayers for the departed and is silent on the subject. Sir Herbert Jenner's opinion was that the purpose of the omission was simply to avoid confusion by reason of the Roman Catholic religion having come to use prayers for the dead in support of their doctrine of purgatory. A similar view is expressed in Palmer's " Origines Liturgicae," namely, that the probable reason for omission was in case such prayers " might " be abused, to the prejudice of the uneducated classes to the " support of the Roman Catholic doctrine of purgatory." The third contention was that such prayers for the dead were contrary to the Thirty-Fifth Article of Religion, which Article declares as follows: " The Second Book of Homilies, the several titles " whereof we have joined under this Article does contain a goodly " and wholesome doctrine and necessary for the times, etc." Among the titles is that " Of prayer," the third part of which concludes with these words: " Let these and other such places " be sufficient to take away the gross errors of purgatory out of " our heads, neither let us dream any more that the souls of " the dead are anything at all holpen by our prayers." That Article does not state that praying for the dead is unlawful but merely that it is useless; that prayers for the departed could have no effect in altering their condition, and that in the Word of God we have no commandment so to do. It discourages the practice. The learned Dean's conclusion was that there is no prohibition against such prayers. Had it been the opinion of the framers of the Articles and Canons of the Church that such prayers were opposed to the Scriptures they could have expressly declared their illegality. Certainly, they had every opportunity but did not do so. The authorities went no further than to show that the Church discourages the practice. Same insofar as that decision may later have been explained or qualified by the Court of Arches it is, of course, binding upon me in this court and provides the legal basis

upon which I have to proceed. For the purposes of this judgment it is not necessary for me to refer to the other several issues raised in that case.

Breeks v. *Woolfrey*[8] was considered nearly 60 years later in *Egerton* v. *All of Odd Rode*,[9] an unopposed faculty suit promoted by an incumbent who desired to erect in the parish church a memorial window coupled with a Latin inscription to this effect: "Of your charity pray for the soul of H. F. deceased and for the "soul of J. H. C. deceased." Nothing is said in the report as to the opinion of the vestry in regard to the proposal. The headnote reads: "Held, that the Ordinary ought not in his discretion "to sanction the introduction into the church of any inscription "of which the above words would form part. . . ." In the first place, at the beginning of his judgment, Espinell Espin Ch. said that the inscription seemed to go beyond the one in *Breeks* v. *Woolfrey*, but I am unable to see why he took that view. The only difference was the prefix "Of your charity," but he did not make any reference to that in the rest of the judgment. Next he pointed out that in *Breeks* v. *Woolfrey* the court did not sanction the inscription but only refused to order the tombstone which bore it to be removed. That is, of course, quite true, but it is equally true that the reason was that such words were not unlawful but merely to be discouraged. Espin Ch. made the third point that not only had prayers for the dead not been restored in the second prayer book of Edward VI, but they had remained omitted from the further revisions in 1603 and 1661, and he was not prepared to sanction such prayers on an inscription when the Church formularies had not specifically authorised them and when they were so closely associated with the doctrine of purgatory. Because of what I have to say hereafter it is as well if I quote the latter part of the judgment verbatim[10]: "Some devout persons have earnestly hoped that such inter-"cessions for the departed should be re-inserted in the liturgy "as are found in the Prayer Book of 1549 in the following words: "'We commend unto Thy Mercy (O Lord), all other thy servants "'which are departed hence from us with the sign of faith, and "'now do rest in the sleep of peace: grant unto them, we "'beseech thee, thy mercy and everlasting peace; and that at the "'day of the general resurrection we and all they which be of "'the mystical body of Thy Son may be altogether set on His "'right hand: etc.' But this re-insertion has not yet taken "place and the reason for caution is clear. Out of the ancient "prayers for the departed grew the notion that they need to be "succoured by the prayers of the living; hence, that they are "undergoing sufferings and even torments, from which the prayers "of survivors might assist to relieve them, and so by rapid steps "we reach the Romish doctrine condemned by the Twenty-"Second Article. Prayers for the dead are unquestionably

[8] 1 Curt. 880.
[9] [1894] P. 15.
[10] Ibid. 21.

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"associated in the popular mind with the later exaggerations "referred to in that Article, and it may be added that a bequest "made for such prayers being offered would be void by the "common law of the realm as superstitious. And therefore, "though in private such prayers may be offered, as con-"formable to the ways of the primitive Church, certainly "from the second century and downwards; and however "deeply we may sympathise with sentiments of affectionate "respect in the bereaved . . . it does not seem to belong to a "court of first instance to do what the formularies of the church "have abstained from doing; it is not for me here to authorise "directly the setting up in a place of public worship of an inscrip-"tion demanding the prayers of the worshippers for the souls of "certain persons who have departed this life." It seems to me that Espin Ch. was not exercising his discretion in the light of any particular facts and circumstances of the case as the head-note of the report would lead one to believe, but was refusing a faculty for reasons of principle which would seemingly apply whenever such words of inscription were proposed. Speaking for myself, I do not find those principles easily reconcilable with the ratio decidendi in *Breeks* v. *Woolfrey*.[11] To say that a faculty ought not to be granted because prayers for the dead had not been expressly authorised in the current liturgy imports a restraint much stronger than Sir Herbert Jenner was prepared to infer from the history of the compilation of those liturgies when he observed that Parliament had every opportunity to impose an absolute prohibition but had not done so. I take the view that the decision in *Egerton* v. *All of Odd Rode* [12] goes further than *Breeks* v. *Woolfrey* [13] A decision of the Consistory Court of Chester is, of course, not binding on me in this court, but I must at least bear in mind that one eminent learned Chancellor was prepared to take that strong line against the use of any such words of inscription to be placed within a church.

The next case to which I must refer is *Pearson* v. *Stead*,[14] a decision of Tristram Ch. in Ripon Consistory Court. Before him were cross-petitions relating to a tombstone recently erected in the parish churchyard of Spofforth bearing an inscription "Of "your charity pray for the repose of the souls of . . .' and then naming two sons of George and Ann Stead, followed by this sentence: "on whose souls sweet Jesus have mercy." Having reviewed the evidence and referred to both *Breeks* v. *Woolfrey* [15] and *Egerton* v. *All of Odd Rode*,[16] Tristram Ch. held that the rector had established that the tombstone had been placed in the churchyard without his previous consent, and nor had the inscription been submitted to him and he had, therefore, made out a good case for the granting of a faculty authorising him to remove the tombstone from the churchyard. The court would

[11] 1 Curt. 880.
[12] [1894] P. 15.
[13] 1 Curt. 880.
[14] [1903] P. 66.
[15] 1 Curt. 880.
[16] [1894] P. 15.

only be justified in granting a confirmatory faculty for it to remain if it were satisfied that the inscription was in all respects unobjectionable, and the burden of proof in faculty proceedings lay upon Stead to satisfy the court that this was so. The principle upon which the learned Chancellor approached the question, and I will again quote the passage verbatim because Dr. Ruttle urged upon me that it is the correct approach in faculty proceedings and that which I ought to follow in the present case, is as follows [17]: "The court, before granting a . . . faculty should be "satisfied upon the evidence before it that beyond all doubt the "inscription was composed and placed on the tombstone with "the sole intention (as was the practice amongst the early "Christians long prior to the introduction of purgatory) of "soliciting prayers that the souls of the deceased persons named "on the tombstone might have rest and quiet in the interval "between death and resurrection, and that at the last day they "might receive the perfect consummation of bliss, and that the "inscription was so expressed and intended to be expressed as "not to include or appear to include an invitation for prayers for "the relief of the souls of the deceased persons named from the "pains of purgatory. . . ." The chancellor, on the particular facts of the case, refused to grant a confirmatory faculty and ordered the tombstone to be removed out of the churchyard. It was proved that the Stead family were all of the Roman Catholic faith; the inscription had been specially composed by Stead's mother; it was admitted that it was the usual inscription placed on tombstones erected to members of their faith, and they intended it as a Roman Catholic inscription. An added feature in the case was the existence of considerable differences of opinion in the parish. Indeed, at a special vestry meeting attended by 23 parishioners, 12 persons had voted for a resolution supporting the rector's application to secure the removal of the tombstone and 11 had voted against, nine of whom were Roman Catholics. Put shortly, it was a memorial which directly involved purgatory.

In 1927 the subject-matter came before the Court of Arches once again, this time under the faculty jurisdiction in *Capel St. Mary, Suffolk* (*Rectors and Churchwardens*) v. *Packard*,[18] an appeal from the decision of North Ch. in St. Edmundsbury and Ipswich Consistory Court. It was but one of the many questions which arose in that complicated case and concerned exhortations to pray for the souls of certain named departed displayed on notices affixed in the church porch, and illegality was claimed very much part and parcel of another allegation that the rector taught purgatory. The Dean of Arches, Sir Lewis Dibdin, decided that part of the case on the short ground that the question of the rector's teaching was a matter of disciplinary action by the bishop if, indeed, he taught purgatory (and the rector strongly denied

[17] [1903] P. 66, 73.

[18] [1927] P. 289; [1928] P. 69.

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this) and, moreover, such notices were not an appropriate subject for faculty at all. His further observations,[19] though not strictly necessary for his decision are of interest in indicating a changing outlook and emphasis. Following *Breeks* v. *Woolfrey*,[20] he pointed out that nowhere does the Church of England forbid prayers for the departed, although hitherto such prayers had not of recent times been included in the public services; but even that would not be the case in future if the Revised Prayer Book—then in 1927 known as the Deposited Prayer Book—should receive the sanction of law. I shall have something more to say about that aspect.

The most recent of the reported decisions, *Dupuis* v. *Ogbourne St. George Parishioners*,[21] was an appeal in an unopposed case from a decision of Webb Ch. in Salisbury Consistory Court. The subject-matter comprised a memorial tablet which the widow, the promovent, desired to erect on the chancel wall of the parish church bearing an inscription "Of your charity pray for the soul "of Charles George Dupuis C.B.E. . . . sometime churchwarden "of this parish." The chancellor's judgment is not in the reports, but Mr. Winkworth referred me to a copy which he had obtained from the Salisbury diocesan registry. The parochial church council had unanimously approved the erection of the tablet and so had the diocesan advisory committee in respect of the design, but they had questioned the wording of the inscription. Holding that prayers for the departed are not contrary to the doctrine and discipline of the Church of England, the chancellor nevertheless, in the exercise of his discretion, refused a faculty on the ground that such words of inscription are closely associated in the minds of many devout and intelligent members of the Anglican Communion with the doctrine of purgatory, and might well convey to such persons a suggestion of that doctrine and thus be a cause of distress and offence. He appears to have adopted the same line of reasoning as did Espin Ch. in *Egerton* v. *All of Odd Rode*.[22] On appeal it is to be observed that counsel argued that *Egerton's* case [22] was wrongly decided, and that the court should concern itself more with the views of parishioners rather than devout Christians generally. Sir Philip Baker-Wilbraham, Dean of Arches, treating the question as purely one of discretion and expressing his agreement with much of the arguments put forward, nevertheless declined to interfere because the appellants in a discretion case had to show that the chancellor had erred in principle, and had exercised his discretion upon an entirely wrong basis before any appeal could succeed, and this they had failed to do. Regarding the facts of the case the Dean of Arches drew attention to a letter written by the then Archdeacon of Wilts saying: "This form (of words) will not be approved by the "diocesan advisory committee. I think the reason is that such

[19] [1927] P. 289, 306.
[20] 1 Curt. 880.
[21] [1941] P. 119.
[22] [1894] P. 15.

" a form has long been out of use, and is no longer natural to " English folk. . . ." But what he described as the governing consideration was that the case involved the erection of a wall tablet which is never a matter of right but always one of privilege, and a privilege which should be sparingly conceded, because it behoved those who ask for such a privilege to be careful to see that there is nothing in what they propose which might cause offence to others.

All these authorities clearly show that prayers for the departed are not contrary to law unless they necessarily involve the doctrine of purgatory, which doctrine is expressly prohibited by the Church of England. Such prayers may therefore have one of two objects. On the one hand their purpose may be to relieve the souls of the departed from the pains of purgatory according to Romish teaching, in which event they are to be forbidden. On the other hand, they may comprise prayers that the souls of the departed may rest in peace until the time of resurrection, following the teaching of the early Church and primitive Christians. Which is the object in any case is a question of fact to be determined from the nature of the particular words themselves, and the inferences to be drawn from all the surrounding circumstances relating to their proposed user. In the present case I am quite satisfied that those seven words " Pray for the soul of Elizabeth Smith " do not necessarily denote that her soul is suffering the torments of purgatory, and nor do any of the promovents have in mind notions of purgatory or intend to teach or publish directly or indirectly that Romish doctrine.

Having come to that first conclusion it then follows that this court has a discretion in the matter, and the next question is whether I should exercise that discretion so as to enable this particular inscription to be used in present circumstances. The older authorities emphasise that, although no notion of purgatory may be involved, nevertheless such prayers ought to be discouraged, and certainly the courts seem to have actively discouraged their use in inscriptions, both within the church itself and on tombstones situated in the churchyard. Mr. Winkworth submitted that the jurisdiction is to some extent pastoral, and discretion should be exercised in the light of two elements, first, the evidence in the particular case, and secondly, the knowledge of the situation as it exists in the Church of England at the time. In *Egerton's* case [23] it will be remembered that one of the reasons for not granting a faculty in that case was that prayers for the souls of the departed were closely and unquestionably associated with the doctrine of purgatory in the popular mind. Similarly, in *Dupuis'* case,[24] Webb Ch. refused the faculty on the sole ground that the words were, in his opinion, closely associated with that doctrine in the minds of many devout and intelligent members

[23] [1894] P. 15. [24] [1941] P. 119.

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of the Anglican Communion, and might well convey some notion of purgatory to such persons and cause them distress. It is further to be remembered that in neither case was there any opposition or difficulty raised in the parish, and the promovents were respectively an incumbent of a parish and the widow of a churchwarden. On the other hand, in *Pearson* v. *Stead*,[25] Tristram Ch. does not appear to have concerned himself unduly with the popular mind or the possible reaction of either the so-called uneducated classes or intelligent persons generally, but his test was simply whether the promovent could prove—and the onus of proof is not light—that the sole intention was to solicit prayers that the soul of the person named might rest in peace until resurrection, and the prayer was expressed in words accordingly. In so far as there is a distinction between these two approaches, I unhesitatingly prefer to follow *Pearson* v. *Stead*.[25] In my opinion, the argument that a certain form of prayer used by the ancient Church, and not unlawful in the eyes of the Church of England, should nevertheless not be permitted upon an inscription solely because the same might possibly offend the feelings of some unascertained persons is one which requires some limitation, otherwise one might arrive by stages at the extreme position of the susceptibilities of part of the populace determining what part of the Church's teaching and prayer is acceptable. If, as I think is apparent, the appeal in *Dupuis'* case[26] was dismissed on the short ground that the lower court had not erred in principle, and the appellate court was not prepared to substitute its own discretion for that of the court of first instance, it would seem that some of the other observations of Sir Philip Baker-Wilbraham were not strictly necessary for his decision. Be that as it may, I think the present case is also distinguishable. There, the diocesan advisory committee had indicated their disapproval of the inscription but the present members of the Norwich diocesan advisory committee have not tendered me any such advice; on the contrary, they have recommended the whole of what is proposed for faculty. Also, it is very true that different considerations apply to memorial tablets. Indeed, in the diocese of Norwich, like that of Salisbury, restrictions are necessarily much more rigid than where an inscription is but ancillary to a gift such as a window, which is of lasting benefit to the Christian community and which beautifies the church.

The other aspect, namely, knowledge of the situation as it exists in the Church of England at the time, is closely linked with the question of discouragement against soliciting prayers for the departed. That is very much a matter of degree, and both the method and amount of discouragement which is considered desirable will inevitably vary according to the situation in any particular diocese or in the Church as a whole at any one point of time. It is my belief that the average churchman today

[25] [1903] P. 66.

[26] [1941] P. 119.

approaches the subject-matter under consideration with much less intensity than did his forebears. I do not think that is because of lack of interest, so much as by reason of a shifting emphasis on what is really important in Church life and worship, and what is but of secondary importance. The Church's fundamental teaching and the Bible from which God's message flows stand firm throughout the ages, but the importance and emphasis to be placed on particular prayers or words will vary from one generation to another. It is quite understandable why, during a period closer to the Reformation and at the time of the sixteenth-century revisions of the Prayer Book, controversy could range around prayers for the departed or, for that matter, over anything which might inadvertently be confused with Romish doctrine. *Breeks* v. *Woolfrey* [27] preceded the passing of the Church Discipline Act, 1840, by two years, and between then and the decision in *Egerton's* case,[28] further fervent controversy had occupied the time of the courts in connection with the ornaments rubrics and the precise methods and manners of celebration of the Holy Communion: for example, *Martin* v. *Maconochie.*[29] It is equally understandable that in the second half of the twentieth century, standing as they do on the threshold of an atomic age with all its vast unknowns, churchmen should have a very different approach, and it is hardly surprising if inscriptions comprising prayers for the departed do not generate the same anxieties and disquiet in their minds as formerly was the case. The present is, perhaps, an age of greater toleration and liberalism in both thought and worship.

I have referred to the observations of Sir Lewis Dibdin in *Capel St. Mary, Suffolk* (*Rector and Churchwardens*) v. *Packard* [30] in connection with the then Deposited Prayer Book, and it surprised me that during the course of this case so little reference was made to the Revised Prayer Book of 1928. Mr. Winckworth read one short passage but, to my mind, much more pertinent is the "Intercession and prayers for the whole state of Christ's Church" in the alternative Order of the Communion, which is comparable to the "Prayer for the whole state of Christ's Church militant here in earth" contained in the established Prayer Book of 1662. In the 1928 form, one finds these words inserted: "And we commend to Thy gracious keeping, O Lord, all they servants departed this life in Thy faith and fear, beseeching Thee to grant them everlasting light and peace." The history of that Prayer Book of 1928, and its approval by substantial majorities in the Convocations of Canterbury and York, and in the House of Lords, but its rejection by the House of Commons, is too well known to need discourse here. It seems to me that had that Prayer Book received the Royal Assent the full circle would have been completed, and a prayer similar to that originally contained

[27] 1 Curt. 880.
[28] [1894] P. 15.
[29] (1868) L.R. 2 A. & E. 116; (1874) L.R. 4 A. & E. 279.
[30] [1927] P. 287; [1928] P. 69.

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in the first Prayer Book of Edward VI of 1549 (and referred to by Espin Ch.) but thereafter omitted, would once again have been restored into an established liturgy. In *In re Lapford (Devon) Parish Church* [31] Sir Philip Baker-Wilbraham discussed the effect of the 1928 Prayer Book, although in connection with quite a different matter, namely, the reservation of the Sacrament, a practice held to be illegal by reason of the terms of the rubrics of the established Prayer Book, but one which was made possible by the rubrics contained in the 1828 alternative Order for the Communion of the Sick, and subject to certain limitation was to be permitted at the discretion of the diocesan bishop. Although the 1928 rubrics have never become strictly part of the law, the outlook of the clergy was quickly revealed by the resolution of the Convocations of 1929, since when reservation of the Sacrament has frequently been authorised by the bishops to meet present-day needs, and is practised with impunity. I have digressed on to this topic purely as an example illustrative of how the Prayer Book of 1928 throws the most valuable light on the existing situation in the Church of England and present-day outlook and thought directly relevant to the degree of discouragement which a court ought to apply in today's circumstances.

Furthermore, during the course of this case there was held the Lambeth Conference, the theme of whose message was reconciliation. That sub-committee consisting of some 34 bishops of the Anglican Communion, which was specially charged with considering the Book of Common Prayer, saw fit to include in their report a separate section relating to prayers for the departed. After pointing out that no Prayer Book, not even that of 1662, can be kept unchanged for ever as a safeguard of established doctrine, they drew attention to the two points of view. On the one hand, the more conservative evangelical tradition was content to think of the faithful departed as having immediately entered into joy and felicity, and viewed any idea of growth, purification or spiritual progress after death with misgiving. On the other hand, the vast majority of people in the Anglican Communion (and I draw special attention to their use of the adjective "vast"), whilst rejecting all conceptions of purgatory, are quite sure that the fact of death does not remove the need for, and the appropriateness of, praying for the departed that God will fulfil His perfect will in them, and that such prayer is both natural and right. For this reason, the Church formularies deliberately left room for both points of view with varying degrees of emphasis and varying forms of expression, and they recommended that in any future Prayer Book revision it would be wise to provide that prayer for the departed should be made permissive. Such are the conclusions of the Lambeth Conference, representative of the whole Anglican Communion.

After examining this subject in much detail I have come to

[31] [1955] P. 205; [1954] 3 W.L.R. 748; [1954] 3 All E.R. 484.

the conclusion that I can approach the question of discretion here much more liberally in this part of the twentieth century than was considered desirable by some chancellors in times past. In my judgment, it is no longer necessary to apply the faculty jurisdiction in a way which actively discourages the use of an inscription advocating prayers for the soul of the departed to the same degree as was apparently thought fit formerly. Circumstances are very different now than then, and the courts were no doubt wise in their generation to move cautiously. The older decisions of the nineteenth century must be examined in the context of the conditions on which they were reached. Nowhere is that more clearly stated than by Sir Lewis Dibdin, the Dean of Arches, in *Vincent* v. *St. Magnus the Martyr* (*Rector and Churchwardens*),[32] and Garth Moore Ch. adopted and based his decision in *In re St. Peter, St. Helier, Morden*; *In re St. Olave, Mitcham*,[33] on the same principles. I am by no means saying that in this court a faculty will always be granted permitting such words of inscription as in the present case. Each case must be judged upon its own particular merits in the light of all the circumstances, and the tradition of a particular church and parish has an important bearing. Moderation is as essential where this type of inscription is proposed as in every sort of faculty matter. The faculty jurisdiction is the safeguard against any excesses.

Weighing everything up as best I can, I am satisfied that the present is a case where I am able to grant the faculty sought, and I think the proper form of decree is for a faculty absolutely in respect of the window and a faculty until further order in respect of the inscription to be placed thereon. As regards the precise wording of that inscription, the promovents were prepared to accept as an alternative the longer form, including the words "the repose of" if I thought that was desirable. I think that that longer form would indeed be preferable as it makes it more apparent that the purpose is what is said, namely, that the soul of Elizabeth Smith may rest in peace. But I shall not insist on this, and am prepared to leave it to the choice of the incumbent, and the faculty can pass the seal as soon as he has decided and informed the registry which of the two forms of words he would like the inscription to take.

Faculty accordingly.

Solicitors: *Trollope & Winckworth.*

[32] [1925] P. 1.

[33] [1951] P. 303; [1951] 2 All E.R. 53.

[RESTRICTIVE PRACTICES COURT.]

R. P. Ct.† (E. & W.)

1959 *Feb.* 22, 23, 24, 25, 26; *Mar.* 23.

* *In re* BLANKET MANUFACTURERS' AGREEMENT.

[1957 No. 22 (E. & W.).]

Restrictive Practices—Registration—Agreements registrable—Sanctity of contract agreement — Recommendation to manufacturers not to accept variation or cancellation of contracts without approval of trade association—Whether Restrictive Trade Practices Act, 1956, *applies to agreement under which recommendation accepted — Restrictive Trade Practices Act,* 1956 (4 *&* 5 *Eliz.* 2, *c.* 68), *s.* 6 (1) (*a*) (*b*) (*c*).

Restrictive Practices—Restriction—Whether contrary to public interest —Price restriction—Stop-loss price—Blanket industry—Minimum price for "specified" blankets—Specified blankets small proportion of total blanket production—No detriment to public—Restrictions designed to standardise conditions of sale — Conditions fair and reasonable to buyer and seller—Whether benefits or advantages conferred on public—Restrictive Trade Practices Act, 1956 (4 *&* 5 *Eliz.* 2, *c.* 68), *s.* 21 (1) (*b*).

Section 6 (1) of the Restrictive Trade Practices Act, 1956, provides: " . . . this Part of this Act applies to any agreement "between two or more persons carrying on business . . . in the "production or supply of goods, . . . under which restrictions are "accepted by two or more parties in respect of the following "matters, . . . (*a*) the prices to be charged, quoted or paid for "goods supplied, offered or acquired, . . . (*b*) the terms or con- "ditions on or subject to which goods are to be supplied . . . "(*c*) the quantities or descriptions of goods to be produced, supplied "or acquired. . . ."

The Blanket Manufacturers' Association, a trade association, passed a resolution, accepted by the members as binding, that "No manufacturer shall agree to the breaking of any contract "by reduction of price or other procedure. Should any attempt "be made to break or vary the contract the manufacturer shall "refuse to accept cancellation or variation and endeavour to obtain "completion of the contract. . . . If a manufacturer has good "reason to agree a request for the cancellation or variation of a "contract he shall not so agree until approval is given by the "reference committee." On the association's contention that the resolution did not amount to the acceptance of a restriction within section 6 (1) of the Act of 1956:—

Held that, as a matter of construction and giving the words used in the subsection their natural and ordinary meaning, the resolution was not a restriction in respect of any of the matters set out in section 6 (1) and that, therefore, the court had no jurisdiction to consider it.

In May, 1949, the Blanket Manufacturers' Association recommended to its members a minimum price for "specified blankets" —white all wool raised blankets. The minimum price was an approximation to a stop-loss price; it was calculated from quarterly

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† Devlin J. (President), Upjohn J., Sir Stanford Cooper, Mr. W. L. Heywood, Mr. W. Wallace and Mr. W. G. Campbell.

returns made by each member of his conversion costs together with the raw wool cost of the blend used for making his cheapest blanket and the accountants, after making certain adjustments, declared to a meeting of the members the six lowest costs, the lowest of the six being the minimum price. The calculations and declarations were made at least four times a year. From 1955 to 1958 sales of blankets at the minimum price, which the members regarded as extremely low and even uneconomic, had been negligible. At all material times the blanket industry was very competitive both in quality and price; there was no unreasonable excess capacity amongst members and their profits were reasonable. To some extent the minimum price did tend to keep down the price of specified blankets. The association had some 20 members who produced (in 1957) 70 per cent. of the total United Kingdom production of blankets; from 1955 to 1958 specified blankets were 15 per cent. of the total of woven woollen blankets produced by members. The association sought to justify the recommendation under paragraph (*b*) of section 21 (1) of the Act contending, inter alia, that in times of prosperity the existence of the minimum price promoted confidence which led to modernisation and tended to keep prices down and to improve quality; and that without the scheme in times of deep depression there would be a serious debasement of the quality and weight of blankets. No detriment was alleged to result from the minimum price scheme and its effect on the public had been negligible.

The association also recommended that its members would not make pastel coloured or white blankets of a specification thinner in substance than was represented by a blanket 60 × 80 2½ lbs. and other sizes in proportion. It was possible to make a lighter woven woollen fabric which would be unsatisfactory both as regards warmth and durability; it was also possible, by using cheap wool, to make an unsatisfactory blanket of heavier weight, but the specification provided a good practical though by no means conclusive test of minimum quality to be desired in the types of blanket covered by it.

The association made a number of other general recommendations designed, inter alia, to implement the Report of the Wool Working Party in 1947 that it was most desirable that terms of trade in the wool and textile industry be standardised. These recommendations related, inter alia, to the making of a charge for the supply of more than a certain quantity of patterns, charges for carriage and packing on small parcels, the restriction of discount terms, the making of charges for transparent wrapping and stripes and borders, the booking of orders at a firm price, and the refusal to supply blankets on sale or return. The association also sought to justify these recommendations under paragraph (*b*) of section 21 (1) contending (in effect) that they helped to establish orderly conditions of trade and assisted manufacturers to discourage unreasonable demands by customers which, if acceded to, would increase the basic costs of blankets and thereby increase the price which the public would have to pay. All the recommendations were accepted as binding by the members.

Held, that it was not sufficient for the association to prove that a restriction was harmless or might do good for the court had to be satisfied that it passed the test laid down by paragraph (*b*) of section 21 (1), and that whether or not a restriction did pass that test was essentially a question of degree to be determined in the light of all the evidence and argument presented to the court; each case must depend upon its particular facts, and, on the particular facts:

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(1) the benefits and advantages alleged to be derived by the public from the minimum price scheme were neither specific nor substantial within the meaning of paragraph (*b*). The real difficulties in the way of the association were those flowing from the fact that it applied to so small a proportion of the total blanket production, and that of establishing any likelihood of a recession sufficiently severe to bring the scheme into effective operation;

(2) the minimum substance recommendation did confer specific and substantial benefits upon the public which benefits to the general public outweighed any detriment to the public in finding lighter weight blankets at cheaper prices either not available or not so readily available in the shops;

(3) the remaining general recommendations, although reasonable and fair both to seller and buyer, did not result in specific and substantial benefits to the public.

Accordingly, only the minimum substance recommendation passed the test of paragraph (*b*) and the other recommendations must be declared contrary to the public interest.

Reference.

The Registrar of Restrictive Trading Agreements, pursuant to section 20 (2) (*a*) of the Restrictive Trade Practices Act, 1956, referred to the court an agreement made between the members of the Blanket Manufacturers' Association, numbered 801 on the register of agreements, consisting of an agreement dated January 8, 1946, the list of members of the association and all resolutions, decisions and minutes of the association or its committees which were as such binding on the members as if they were in or formed part of the agreement or were otherwise expressly or impliedly deemed for the purpose of the Act to be binding upon them. By a representation order made under rule 11 of the Restrictive Practices Court Rules, 1957, the association was made sole respondent to the proceedings on behalf of all its members.

The association, a trade association as defined in section 6 (8) of the Act, was formed in 1946. From 1949 onwards, at general meetings of the association, resolutions, expressed either as recommendations or as agreements between the members, were passed which related to a minimum price for white all wool raised blankets, "specified blankets"; the minimum substance of pastel coloured or white blankets; a charge for the supply of more than 2,000 square inches of patterns; charges for carriage on parcels weighing under 30 lbs. and for packing on parcels weighing under 15 lbs.; the limiting of discount terms to 2½ per cent. of the gross price for payment on or before the 10th of the month immediately succeeding consignment; a minimum charge for transparent wrappings; the booking of orders at a firm price; a charge for stripes and block headings, and the supply of goods on sale or return. There was also a recommendation or agreement as to "sanctity of contracts," that "no manufacturer shall "agree to the breaking of any contract by reduction of price or "other procedure. Should any attempt be made to break or "vary the contract the manufacturer shall refuse to accept

"cancellation or variation and endeavour to obtain completion. "... If a manufacturer has good reason to agree a request for "the cancellation or variation of a contract he shall not so agree "until approval is given by the reference committee. ..."

The association relied on paragraph (*b*) of section 21 (1) [1] of the Act in justification of the restrictions to be implied from all the recommendations or agreements; it also relied on paragraph (*g*) of that subsection in support of the resolutions as to carriage and packing, discount terms, post dating of invoices and charges for transparent wrapping and borders and stripes on the ground that they were reasonably required for purposes connected with the maintenance of the minimum price for specified blankets. The association further contended that the resolution relating to sanctity of contracts was not a restriction within the meaning of section 6 (1) [1] of the Act.

The resolutions are fully set out and the facts stated in the judgment of the court.

B. J. M. MacKenna Q.C. and *Walter Gumbel* for the association.

John Megaw Q.C. and *Arthur Bagnall* for the registrar.

[1] Restrictive Trade Practices Act, 1956, s. 6: "(1) ... this Part of "this Act applies to any agreement "between two or more persons ... "under which restrictions are accepted "... in respect of the following "matters ... (*a*) the prices to "be charged, quoted or paid for goods "supplied, offered or acquired ... "(*b*) the terms or conditions on or "subject to which goods are to be "supplied ... (*c*) the quantities or "descriptions of goods to be produced, "supplied or acquired ... (*e*) the "persons or classes of persons to, "for or from whom, ... goods are "to be supplied or acquired. ... (3) "In this Part of this Act 'agreement' "includes any agreement or arrange-"ment, whether or not it is or is "intended to be enforceable ... by "legal proceedings ... and 'restric-"tion' includes any negative obliga-"tion, whether express or implied, and "whether absolute or not. ... "(7) Where specific recommendations "(whether express or implied) are "made by ... a trade association "to its members ... as to the action "to be taken or not taken by them "in relation to any particular class "of goods ... in respect of any "matter described in ... subsection "(1), this Part of this Act shall apply "in relation to the agreement for "the constitution of the association "... as if it contained a term by "which each such member ... "agreed to comply with those recom-"mendations and any subsequent "recommendations made to them by "... the association. ..."

S. 21: "(1) For the purposes of "any proceedings before the Court "... a restriction accepted in pur-"suance of any agreement shall be "deemed to be contrary to the public "interest unless the Court is satisfied "of any one or more of the following "circumstances ... (*b*) that the "removal of the restriction would "deny to the public as purchasers, "consumers or users of any goods "other specific and substantial bene-"fits or advantages enjoyed or likely "to be enjoyed by them as such, "whether by virtue of the restriction "itself or of any arrangements or "operations resulting therefrom ... "and is further satisfied ... that "the restriction is not unreasonable "having regard to the balance be-"tween those circumstances and "any detriment to the public or to "persons not parties to the agreement "(being purchasers, consumers or "users of goods produced or sold by "such parties, or persons engaged ... "in the trade or business of "selling such goods ...) resulting "or likely to result from the operation "of the restriction."

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The following case was cited in argument: *In re Yarn Spinners' Agreement.*[2]

Cur. adv. vult.

March 23. Devlin J. The judgment of the court will be read by Upjohn J.

Upjohn J. read the following judgment: The respondent, the Blanket Manufacturers' Association, was formed in January, 1946, with the main object of co-operating for the common good, protection and benefit of the members and to safeguard and further their interests. Membership is confined to manufacturers of woven woollen blankets and consists at the present time of about 20 companies. Members are centred for the most part in the West Riding of Yorkshire or at Witney in Oxfordshire.

Originally the main energies of the association were engaged in co-ordinating the blanket industry's approaches to the Board of Trade about price control and utility schemes. From 1949 onwards at general meetings of the association a number of resolutions relating to minimum prices, terms of trade and minimum qualities were passed. These resolutions, with one exception, with which we shall deal later, are admittedly restrictions for the purpose of section 6 of the Restrictive Trade Practices Act, 1956, and are the subject-matter of this reference.

According to the statement of case these resolutions were sometimes expressed to be "recommendations" to the members and sometimes to be agreements between the members. But looking at the substance of the matter it is clear that each resolution was mandatory in form and it is not disputed that members recognise that such resolutions are binding (at any rate in honour) upon them, and that if a member is not prepared to accept and act on the resolution it is his duty to resign from the association. We are not concerned in this reference to consider the position under section 6 (7) of the Act if the recommendations had been phrased as genuine recommendations which in terms the member might accept or reject.

Blankets are manufactured in a great variety of qualities. Raw materials may consist of the following: (a) Pure merino wool blends. These are the highest quality. (b) Blends of merino and cross-bred wools. (c) Blends of a wide range of cross-bred wools. (d) Blends of various man-made fibres with or without a wool content. The agreed figures put before us show that members of the association are gradually producing an increasing proportion of the blankets sold in the United Kingdom. Thus of all wool blankets (excluding grey) members sold 51 per cent. in 1955, 59 per cent. in 1956 and 61 per cent. in 1957. Of all blankets (including all wool, grey and mixtures) the corresponding percentages were 59 per cent., 67 per cent. and 70 per

[2] (1959) L.R. 1 R.P. 118; [1959] 1 W.L.R. 154; [1959] 1 All E.R. 299.

cent. 15 per cent. of the total of woven woollen blankets sold by members in the years 1955–58 inclusive were white all wool raised blankets which are the only blankets subject to a minimum price scheme. The production of such blankets expressed as a percentage of total production of each member, however, varies very greatly. Members of the association purchase practically the whole of the wool they require for woollen blankets in the form of raw wool which they spin and weave themselves.

The utilisation of the available production capacity of members' plant (measured as a percentage of total productive capacity of members), in recent years, seems to have been high over the last three years, 87–90 per cent. There was no evidence before us of any short time working, and the number of employees employed by members has been remarkably constant. There is no evidence of any unreasonable excess capacity among members, though in this connection it must be remembered that they are taking each year an increasing proportion of the total trade from non-members. Imports of blankets into the United Kingdom are negligible. On the other hand, from the summary of accounts produced by some of the members, the profits over the last three years (up to the end of 1957) seem to have been reasonable and by no means excessive, whether expressed as a percentage of sales or of capital employed.

From figures supplied by 16 of the members it appears that £2,142,706 has been expended by them in plant, machinery and buildings over the last 10 years. Taking the profits of the last three years as the average for the last 10 years, then the association's accountant, Eric Henry Illingworth, the partner in Armitage & Norton, chartered accountants, dealing with the association's affairs, has calculated that this outlay represents 58 per cent. of the profits earned by the 16 members after deduction of tax. This may be so, but there is no evidence that the average profits for those three years do represent the average profits for the 10 years. Furthermore, the profits in question relate not to the profits of white all wool raised blankets but to the whole of the activities of each of the members including not only all their blanket products but all their non-blanket activities. While most of the members concentrate substantially on blanket production, a few have considerable manufacturing activities in other cloths. While the figure of 58 per cent. may be arithmetically accurate, it takes into account neither existing reserves nor income tax allowances over the period nor depreciation allocation nor the amount of any new capital raised for this capital expenditure. In all these circumstances this figure of £2,142,706 does not seem to us to have the significance claimed for it or to be of any material assistance to us.

By a resolution made on or about May 17, 1949, set out in paragraph 2 of the statement of case the association recommended to its members as follows: "A standardised form of costing be

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"adopted by each member of the association. No member shall "offer sell or supply a white all wool raised blanket at a price "per lb. lower than a price fixed by the accountants for the time "being of the association, such price to be calculated ultimately "by the above system of costing. It shall be the lowest cost "price of that member of the association who produces the "cheapest white all wool raised blanket plus 4½ per cent. profit "for members in Yorkshire and 6½ per cent. profit for members "in Witney. No member shall give to any purchaser either "directly or indirectly any advantage or benefit which in effect "might be equivalent of a reduction in the said minimum price." In or about the month of June, 1951, that recommendation was varied in that the addition to the lowest cost price was recommended to be 5 per cent. profit for all members. We shall follow the course adopted in the pleadings and argument and refer to "white all wool raised blankets" as "specified blankets."

This minimum price scheme has been operated as follows: In 1948 and 1949 there was a cost investigation by Armitage & Norton of the books of 19 members of the association to provide independent evidence of costs to be presented to the Board of Trade in connection with prices to be charged for the sale of blankets under the National Price Controlled Blanket Scheme. The information obtained from this investigation was used to ascertain the conversion costs of each member, i.e., the costs of converting raw wool into a finished blanket together with the necessary administration and selling expenses except agents' commission and discount. From time to time percentage additions have been made to these figures to cover increased wages and overheads. Where, however, members have notified the accountants of new current conversion costs, those are adopted. It appears, however, that not all members have adopted the standard form of costing as recommended in the resolution, but most do so with modifications to suit themselves.

These conversion costs are returned each quarter to Armitage & Norton together with the raw wool costs. The raw wool cost is the cost to the member of the blend used for his cheapest specified blanket ruling at the date of the return, but in determining the price ruling at the date of the return the member may have regard to his stock position as well as market prices. The association has no rule or recommendation which governs the ascertainment of raw wool costs. Certain adjustments are then made to the cost of the blend of wool to allow for the cost of blending oil and to account for losses during manufacture. The conversion cost and raw wool costs as adjusted are added together and a percentage addition is then made to cover the discount and commission chargeable against the blanket, and finally the 5 per cent. profit is added. The accountants who make the necessary calculations then declare to a meeting of the association the six lowest costs so ascertained but not the names

of the six members concerned. The lowest cost of the six becomes the minimum price until revised.

These calculations and declarations are made at least four times a year, usually every quarter, and in addition and since July 5, 1958, the chairman of the association has a discretion to order a review of the minimum price on the request of any member at any time. The extent of the knowledge which a member acquires from this procedure is the minimum cost of each of the six lowest cost members. He does not know, and is not entitled to know, the name of the member unless volunteered, though very often it is the same member who has the lowest cost, and he in fact frequently volunteers the information. Members are not entitled to know the breakdown between raw wool cost and conversion cost of each of the six lowest cost producers, which is never disclosed. However, the accountants are permitted to supply on demand the average of the six lowest conversion costs. While we are satisfied that the variation in minimum price over the years depends mainly on the cost of raw wool, for that accounts for about two-thirds of the cost of a specified blanket, it has been proved that it by no means follows that on any given occasion the lowest cost producer has both the lowest raw wool cost and the lowest conversion cost.

Since 1952 the minimum price per pound of specified blankets has varied from 7s. 2½d. to 10s. 3¾d., and recent minimum prices have been as follows: January 1, 1958, 9s. 1¾d. April 1, 1958, 8s. 8¼d. June 12, 1958, 7s. 10d. October 27, 1958, 7s. 8¼d. January 5, 1959, 7s. 9½d. The average differences between the minimum price and the next five lowest prices from March, 1952, to June, 1958, have been as follows: Minimum price lower than 1st above by 5·72d. per lb. Minimum price lower than 2nd above by 8·70d. per lb. Minimum price lower than 3rd above by 10·77d. per lb. Minimum price lower than 4th above by 12·53d. per lb. Minimum price lower than 5th above by 13·95d. per lb.

It is agreed that during the years 1955–58 inclusive sales of specified blankets of members at the minimum price for the time being have been negligible and that practically all sales of these blankets took place at prices considerably higher than the prescribed minimum price. It appears that the average manufacturer of specified blankets is selling his cheapest quality of specified blankets at a price which is usually somewhere between the second and the third lowest cost producer above minimum price. On the evidence the top qualities have always been several shillings per lb. higher. All the witnesses regarded the minimum price as extremely low and even uneconomic, and it seems reasonably clear that very few members would be able to sell their cheapest quality specified blanket at the minimum price at a profit. It may, we think, be fairly described as an approximation to a stop loss minimum price. It is common ground that although the minimum price is not operating at the present time, and has seldom, if ever, operated, conditions in the blanket

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industry are, and at all material times have been, extremely competitive both in quality and price.

The evidence before us established that to some extent, even when the cheapest quality of specified blanket is selling well above the minimum price, the existence of a minimum price does tend to keep prices of specified blankets down. It was not, however, claimed to depend on more than the result of a psychological feeling in the minds of members that it is reasonable to keep near to the minimum in the low qualities, at the same time keeping far enough away from the danger zone of trading represented by the minimum price. But it comes really to no more than this, that it is helpful for a member to know his competitors' minimum costs when making a quotation. In short, in a highly competitive trade operating at prices well above the minimum, the actual effect of a minimum price scheme on the level of prices during times of prosperity seems conjectural, and the same result could be achieved by informing members of lowest costs at intervals without creating a minimum price.

There was some evidence that a minimum price for specified blankets might have some effect on stabilising at lower prices non-specified blankets of lower quality, such as union blankets, but on balance we are satisfied that the connection is too vague and remote to affect the issues we have to consider.

It was also said that the existence of a minimum price gave confidence as to the future of the industry and tended to promote reinvestment in the modernisation of plant and buildings. We accept at once that there is a greater feeling of confidence in the industry than before the war. One element in promoting that feeling of confidence may well be the existence of the minimum price scheme although it is in respect of such a small proportion of the total production of members. Anther—and (in the opinion of the chairman of the association, John Emerson Priestley), more important—element is the minimum substance resolution which we deal with later. Another element in giving this confidence is the better climate in the trade itself since the war. This is due in part to the very existence of the association, which gives confidence because, as Sir Ronald Walker, a very prominent member of the association, told us, the members have, as a result, met one another more often and got to know one another much better and have established standard terms of sale. However, whatever be the beliefs of members as to the reason for confidence which was lacking before the war, and we accept them as honestly held, in our opinion the expenditure of money on modernisation is due only to a very small extent to the existence of this minimum price scheme seldom, if ever, operative. We also accept that there has been some improvement in quality since the war, but that is, in our view, due to keen competition between members and to the minimum substance resolution, and very little, if at all, to the existence of this minimum price scheme.

We are not called on to say whether a stop loss scheme such as this is fair and reasonable, nor whether it is likely to be for the general economic advantage of the community. The legislature has performed that task and has decided that in general such schemes are to be deemed to be contrary to the public interest unless they satisfy certain stated conditions. The association rely on paragraph (*b*) of section 21 (1) of the Act and contend that the removal of this restriction on the price at which members may sell specified blankets would deny to the public as purchasers and users of woven woollen blankets and, in particular, of specified blankets, specific and substantial benefits and/or advantages enjoyed or likely to be enjoyed by them as such whether by virtue of the restriction itself or of arrangements or operations resulting therefrom.

To pass the test there laid down the benefits or advantages must be both specific and substantial. Mr. MacKenna, for the association, in the first place invited us, in effect, to consider as a whole the restrictions imposed upon members and to say that they promoted confidence and led members to invest in new and improved machinery and to adopt new processes. This in turn led to cheaper and improved blankets.

Though some of the resolutions were passed on the same day, it was never in pleading or argument suggested that they were all part and parcel of one agreement which stood or fell as a whole. Each resolution could, if the majority of the members so desired, be rescinded leaving the rest standing. The validity of each resolution must, in our opinion, be considered separately.

We turn, then, to his submissions on the minimum price scheme. First, he says that in times of prosperity the scheme tends to keep down prices and to improve quality; that promotes confidence and accordingly leads to modernisation of the plant and equipment of the industry. Secondly, he says that without the scheme in times of deep depression there would be a serious debasement of quality and weight of blankets, as sometimes happened in the 1930's. With regard to his first point, we have already reviewed the facts and set out some of the considerations to be borne in mind in considering the test. In regard to the second point, the first question is whether there is likely to be a depression so deep that apart from the minimum price scheme there would be cut-throat competition and a virtual disruption of the industry (for the disappearance of some of the weaker members would not be a disadvantage). The registrar's economist, Aubrey Silberston, has produced some figures to show that variations in trade were smaller in the 1930's than in the 1950's. The last two years, 1957 and 1958, have been years of recession, yet the minimum price has hardly ever been reached. Since 1949 there have been recessions, the chairman of the association told us, sharper than before the war though not so prolonged. Another matter for consideration is that this particular minimum price scheme does not prevent debasement of quality, for debasement

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of quality at any time is limited only by the cheapest blend of wool which members can persuade buyers to accept for a specified blanket. Debasement is to some extent prevented by the minimum substance resolution of the association which we have already mentioned.

It is only fair to say that no detriment to the public is alleged in respect of this stop loss scheme, and we think rightly, for since it was instituted in 1949 its effect on the public has been negligible. But it is not sufficient to prove that it is harmless or may only do good.

In the end we have to satisfy ourselves that the minimum price scheme passes the test of section 21 (1) (*b*). That essentially is a question of degree in the light of all the evidence and arguments presented to us. Each case must depend on its own facts.

We reach the conclusion that the benefits and advantages alleged cannot be described as specific and substantial.

The real difficulties in the way of the association on the particular facts before us are, first, those that flow from the basic fact that the stop loss scheme applies to so small a proportion of the total blanket production of the association which itself produces only some 70 per cent. of the total production of the industry; secondly, in establishing any likelihood of a recession sufficiently severe to bring it into really effective operation.

The remaining resolutions of the association relate to what have been described as general restrictions. The first one relates to "Minimum Substance," and the relevant resolution which was made on or about May 17, 1949, is set out in paragraph 7 of the statement of case: "Members would not make pastel "coloured blankets or white blankets with or without headings "of a specification thinner in substance than is represented by "a blanket 60 × 80 2½ lbs. for the home trade and other sizes "in proportion." 2½ lbs. for a blanket of 60″ × 80″ is 10·8 ozs. per square yard

This resolution, as we understand it, is confined to woven woollen raised blankets which are white or pastel coloured, but is not applied in practice to merino or cellular blankets. This is the resolution we have already mentioned and is intended to prevent the debasement which as the result of pressure from customers used to take place before the war and to ensure that the general public receive a certain minimum quality for these blankets.

It is possible to make a lighter woven woollen fabric but it will not have the proper characteristics of a blanket because the "raising" process on these blankets will make it very thin and flimsy. The result is a most unsatisfactory blanket; the texture is weakened and its qualities both for warmth and durability are greatly impaired. These defects would be unlikely to be discovered by the housewife on inspection of a new blanket. Witnesses for the association freely admitted that it is possible to make an

unsatisfactory blanket of the type described in the resolution which would weigh more than 10·8 ozs. per square yard by using very cheap wool. They also admitted that other tests to maintain a minimum quality could be devised, but insisted that the weight ratio was a vital element. We accept the view that the specification laid down on the whole provides a good practical, though by no means conclusive, test of minimum quality to be desired in the type of blankets covered by it.

The association contend that this restriction falls within section 21 (1) (*b*), the terms of which we need not repeat. In our judgment this contention succeeds and the benefits or advantages to the public may properly be described as specific and substantial. We are further satisfied that the benefit to the general public outweighs any detriment to the public in finding lighter-weight blankets at cheaper prices either not available or not so readily available in the shops. The association on behalf of its members must, however, give an undertaking that in accordance with the actual practice the specification is not applied to cellular or merino blankets.

The remaining restrictions set out in the statement of case all relate to terms of sale and broadly cover all types of blankets. They were made to implement the Report of the Wool Working Party to the President of the Board of Trade in 1947, to the effect that it was most desirable that the terms of sale should be standardised, and partly to support the minimum price scheme. In that context they may, for the most part, be regarded as reasonable and fair both to seller and buyer but we have to be satisfied that the restrictions satisfy section 21 of the Act, in light of the fact that the minimum price scheme has gone. In every case the association relies on section 21 (1) (*b*) and in some cases on section 21 (1) (*g*) as being necessary to support the minimum price scheme, but in the circumstances it is unnecessary to consider this alternative plea further.

We propose to consider first the restriction set out in paragraph 31 of the statement of case relating to "Sanctity of "Contracts" as it has been called in argument. The resolution was made on or about June 19, 1951, to the following effect: "No manufacturer shall agree to the breaking of any contract "by reduction of price or other procedure. Should any attempt "be made to break or vary the contract the manufacturer shall "refuse to accept cancellation or variation and endeavour to "obtain completion of the contract. If this should fail the "member must send all correspondence to the secretary without "informing the customer that he is doing so. The secretary "should then forthwith write the customer to the effect that "the correspondence had been handed to him and asking for "the customer's explanation for his attempt to break the contract "in order that he may advise the manufacturer concerned. If "a manufacturer has good reason to agree a request for the "cancellation or variation of a contract he shall not so agree

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"until approval is given by the reference committee which "reference committee shall consist of the chairman, Mr. Illing-"worth and the secretary."

The first question is whether such a resolution is a restriction within section 6 (1) of the Act, the registrar acceding to the view that if it is not within the section, we have no jurisdiction to consider it. We have not found this an easy question to answer. The real question is whether an agreement between two or more persons, being manufacturers of the same type of goods, not to cancel or vary any contract of sale of goods made or to be made in the future by any of those persons with their customers without the consent of some third party, is the acceptance of a restriction which falls within any one or more of sub-paragraphs (*a*)–(*c*) of section 6 (1). This is a question of construction and we have reached the conclusion that, giving the words used in the section their natural and ordinary meaning, such an agreement cannot be fitted into any of the sub-paragraphs.

Accordingly, in our judgment, we have no jurisdiction to entertain this resolution. We may add that had we reached a contrary conclusion we should have held that the resolution, though highly beneficial to the members of the association, was not for the benefit of the general public or to wholesalers or retailers dealing with members of the Association and was therefore contrary to the public interest.

The next resolution we propose to consider was made on or about June 29, 1956, and is set out in paragraph 11 of the statement of case: "Patterns for the home trade may be met "by the supply of not more than 2,000 square inches free of "charge. If more than 2,000 square inches are asked for in "any one request the whole will be charged for at half-price "of the total net weight involved. These patterns may be "supplied on request to any particular branch of a concern."

The argument on behalf of the association on this resolution is that some wholesalers make quite unreasonable demands for patterns and this is intended to discourage such unreasonable demands. These patterns are costly to produce and if the manufacturer is to meet such unreasonable demands it will increase his overheads and therefore the cost of his blankets to the wholesaler or retailer. This increased cost is again increased when the wholesaler and then retailer adds his trade commission or "mark up" to the manufacturer's price. We were told, taking wholesaler and retailer together, that this might amount to as much as 50 per cent. The resolution appears to us reasonable and fair but in our judgment the benefit to the public is too small to be described as "substantial" for the purposes of section 21 (1) (*b*).

The next resolution was made on or about December 5, 1950, and is set out in paragraph 14 of the statement of case: "Carriage be charged on all parcels weighing under 30 lbs. and "that under 15 lbs. the customer should pay for packing as

"well as carriage." This resolution like the last is a reasonable attempt to reduce the cost to the public by discouraging small orders which are proportionately more costly in carriage than larger orders. It is open to question whether the retailer would be likely to recover such costs from the public in any event, but in our judgment it must suffer the same fate as the last mentioned resolution for the same reason.

The next two resolutions relate to discounts and we propose to consider them together. First, a resolution made on or about December 28, 1950, and set out in paragraph 18 of the statement of case: "The discount terms be that 2½ per cent. of the gross "price be allowed for payment on or before the 10th of the "month immediately succeeding the consignment to the buyer." Secondly, a resolution made on or about December 5, 1950, and amended in 1955 and set out in paragraph 22 of the statement of case: "In no circumstances should goods be dated "forward more than 14 days, and the secretary should be notified "at once of any infringement, i.e., in cases where goods were "dated forward more than 14 days. Goods sold for delivery "on or before the first working day in one month but dispatched "within five days of the end of the previous month should be "invoiced on the date on which delivery was promised." These resolutions are sought to be justified on the ground that, if the manufacturer is free to give bigger discounts for shorter periods, e.g., 3¾ per cent. for payment in seven days or by extending the period by some artificial means as dating forward, that must be reflected in his gross selling price to which the wholesaler and/or retailer will add their "mark up." On the other hand, this overlooks the fact that in the absence of restrictions a retailer getting a better discount for very prompt payment may be able to offer the public more favourable terms and sell at lower prices than his competitors.

We are not satisfied that these restrictions confer any benefit on the public.

The next two resolutions relate to fixed prices for wrapping and blankets woven with stripes or block headings and we propose to consider them together. First, a resolution made on or about December 14, 1949, and set out in paragraph 27 of the statement of case: "Transparent wrapping must be in addition to the "agreed minimum price and the minimum charges for such trans-"parent wrapping shall be 6d. per blanket for cot sizes and 9d. per "blanket for other sizes. This may be charged separately or "otherwise, but in the latter case a note shall be inserted on "the invoice to the effect that the blanket price is inclusive "of the charge for transparent wrapping." On or about December 19, 1955, charges were varied by substituting 8d. for 6d. and 1s. for 9d.

Secondly, a resolution made on or about June 11, 1952, and set out in paragraph 37 of the statement of case: "2d. per lb. "for ordinary stripes and 3d. per lb. for block headings be

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"added to the manufacturers' price for plain blankets." A minimum price scheme being out of the way, there seems no point in these resolutions.

If the price of the blanket is a matter for free negotiation there seems no possible ground for fixing an additional minimum price for wrapping or an additional fixed price for a special weaving. Further, the costs of these wrappings were shown to vary greatly, and in 1957 it appeared from returns made by fourteen members that the cost (but without any element of profit) of the 1s. size varied from 7·8d. to 25d. It cannot be to the benefit of the public to establish a minimum price at 1s. We had no costs figure in relation to special weaving.

If the public want specially woven blankets or special wrapping, they must in the long run, either directly by individual additional charges or indirectly by a general increase of costs, pay for them and any regulation on those matters seems unnecessary. These resolutions contain no element of benefit to the public.

The next resolution was made on or about September 21, 1951, and is set out in paragraph 34 of the statement of case: "No "contracts be entered into which include delivery at the price "ruling at the date of delivery, but all orders be booked at "a firm price." We appreciate that it may be difficult to trade on the terms of prices ruling at the date of delivery owing to the difficulty of ascertaining that price. This is another example of a sensible attempt to have orderly conditions of sale. But it seems to us essentially a matter for negotiation between manufacturer and wholesaler or retailer, and the public has no real interest in this matter. It certainly cannot be to any benefit of the general public that a manufacturer and the wholesaler or retailer should be precluded from negotiating a contract based on forward prices if a satisfactory means of doing so can be found.

The last resolution we have to consider is a resolution made on or about March 30, 1954, and set out in paragraph 41 of the statement of case: "It is not permissible to supply goods on "sale or return." When a blanket is returned there may be a certain amount of spoilage in the way of soiling or damage in transit and shop soiling. This may happen even when the blanket is wrapped in a transparent wrapping, which may burst. Double transport charges will be incurred and such blankets have to be sold as "seconds" at a lower price. There is the further danger that some buyers may be tempted to overbuy, relying on a contract for sale or return to throw back their purchases on a falling market. These losses have to be taken into account in the manufacturers' costing and if the practice becomes widespread the price of new blankets may be substantially increased.

We think there is much substance in this but the difficulty in the way of the association is that, on the evidence, such a practice has never been widespread and there is no evidence

of any pressure on the part of wholesalers and retailers to try and obtain this service. In the circumstances we are not satisfied that it can properly be said that the removal of this restriction would deny to the public specific and substantial benefits and advantages.

We desire to conclude by saying that, as in the case of the minimum price scheme, our judgment on the "general restrictions" depends on the particular facts of this particular case and does not necessarily afford a guide to other cases where different circumstances exist.

On the whole matter therefore we must declare that the resolutions set out in paragraphs 2, 11, 14, 18, 22, 27, 34, 37 and 41 are contrary to the public interest.

Declaration accordingly.

Solicitors: *Brooke, Dyer & Goodwin, Leeds; Treasury Solicitor.*

J. F. L.

[CHANCERY DIVISION.]

* *In re* YOUNG'S SETTLEMENT TRUST. ROYAL EXCHANGE ASSURANCE AND ANOTHER *v.* TAYLOR-YOUNG AND OTHERS.

1959
Feb. 18;
Mar. 4, 25.

Harman J.

[1958 Y. 1076.]

Settlement—Construction—Acceleration—Direction to distribute capital "upon the determination or failure of the last surviving life "interest"—Surrender of interest by last surviving tenant for life —Whether interests in remainder accelerated.

By a voluntary settlement, dated September 11, 1937, a settlor directed that trust funds should be held on trust to pay the income therefrom and in equal shares to each of her three sons during his life with remainder to his named wife, if married to him at the date of his death, during her widowhood, with remainder to his children, whether by the named wife or any other wife. The settlor further directed that "upon the determination or failure of the "last surviving life interest in any part of the income" the capital and income should be equally divided per capita among the children of her three sons who being male should attain twenty-one years or being female should attain that age or marry. Two of the settlor's sons having died in 1942 and 1955 respectively, each leaving no wife, but one son, one-third of the income became payable to the

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[Reported by Miss MARGARET THOMAS, Barrister-at-Law.]

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surviving son, and one-third each to the sons of the deceased sons. The surviving son of the settlor had two children. By a deed dated August 15, 1958, the wife of the surviving son purported to disclaim irrevocably her reversionary interest expectant on the death of her husband "to the intent that [her] life interest in any and every "part of such income shall fail and determine" and the surviving son, in consideration of £7,500 paid to him by each of his two children (both now of full age), purported irrevocably to surrender his life interest "to the intent that [his] life interest in any "and every part of such income shall henceforth be absolutely "determined."

On a summons to determine whether, inter alia, having regard to the deed of August 15, 1958, the capital of the fund might now be distributed among the four grandchildren of the settlor; and if not, to whom the income from the share given to the surviving son should be paid until the capital became distributable:—

Held, (1) that the doctrine of acceleration could only be brought into play when the court could conclude from the trust instrument that the testator or settlor had so intended, and that upon the true construction of the settlement, the settlor, in directing that capital was not to be distributed until after the life interests had determined, had shown an intention that the date of distribution should not arrive until the named lives (which in the case of females must be construed as life or widowhood) had come to an end. Accordingly, the capital was not distributable until after the death of the survivor of the surviving son and his wife.

(2) That the surviving son having effectively surrendered his interest, the one-third share of income was now payable to his children or remoter issue.

Dictum of Jenkins L.J. in *In re Flower's Settlement Trusts* [1957] 1 W.L.R. 401, 405; [1957] 1 All E.R. 462 applied.

Adjourned summons.

By clause 2 (a), (b) and (c) of a voluntary settlement of personalty dated September 11, 1937, the settlor, Mrs. Annie Rankin Young, directed her trustees to hold the trust funds for her three sons, William Hugh Taylor-Young, Harold Strang Taylor-Young, the second plaintiff, and Walter Taylor-Young respectively, in manner following. Sub-clauses (a), (b) and (c) were in similar terms and sub-clause (b), the relevant clause, was as follows: "As to another equal third part of the income "... from the trust fund upon trust to pay the same to ... "Harold ... during his life and from and after the death of "... Harold ... to pay the same to [his named wife] (if "she be living and married to him at the date of his death) "during her widowhood and from and after the death of both "... Harold and [his wife] or the death of ... Harold ... "and the remarriage of [his wife] to pay the same to the ... "children of Harold ... whether they be the issue of his "present wife or of any other wife of his and if there be more "than one such child then equally between all such children. "Provided always that if any such child of ... Harold ... "shall die before the date hereinafter fixed for the distribution "of the capital of the trust fund leaving issue then and in

"such case the share of income which would have been payable to such child hereunder had he or she survived shall be paid to the issue of such child and if more than one in equal shares per stirpes. Provided also that if before the date hereinafter fixed for the distribution of the capital of the trust fund there shall be a complete failure of the trusts of the income in this clause 2 (b) hereinbefore contained then and in such event the said equal third part of the income arising from the trust fund shall be paid as to one equal moiety thereof to the . . . persons entitled to the share of income hereinbefore mentioned in clause 2 (a) hereof and as to the remaining equal moiety thereof to the . . . persons entitled to the share of income hereinafter mentioned in clause 2 (c) hereof."

By clause 2 (d) of the settlement: "Upon the determination or failure of the last surviving life interest in any part of the income of the trust fund hereinbefore granted to the [three sons and their named wives] the trustees shall stand possessed of the trust fund both as to capital and income upon trust to divide the same equally and per capita amongst each and every the child or children of the [three sons] (whether such child or children be the issue of their present respective wives or of any other wife or wives of any of them) as being male shall attain the age of twenty-one years or being female shall attain that age or previously marry."

Walter Taylor-Young died in 1942, having survived his wife named in the settlement and not having married again, leaving one child, Michael Hugh Taylor-Young, the fourth defendant, who was unmarried and of full age. William Hugh Taylor-Young died in 1955 unmarried, but having been twice married and leaving one child of each marriage; of those two children one had been expressly excluded from the benefits of the settlement and the other, Richard Hugh Taylor-Young, the first defendant, had attained 21 and was married with one child, the fifth defendant. At the date of the summons the surviving son of the settlor, Harold Strang Taylor-Young, had two children, Mrs. Patricia Jean Noble and Christopher William Taylor-Young, the second and third defendants, both of whom had attained 21; Patricia Jean Noble had one child, an infant, the sixth defendant; Christopher William Taylor-Young was unmarried. Thus, immediately before August 15, 1958, the income from the trust fund was payable as to one-third to the settlor's surviving son, the second plaintiff, one-third to her grandson, the first defendant, and one-third to her grandson, Michael Hugh Taylor-Young, the fourth defendant.

On August 15, 1958, the surviving son Harold and his wife, by deed expressed to be made between them and the four existing grandchildren of the settlor (but not executed by the grandchildren) purported to dispose of their interests under the

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settlement. Clause 1 of the deed was in the following terms: "Mrs. Taylor-Young doth hereby irrevocably disclaim and forever "forgo the reversionary interest for life expectant on the death "of Mr. Taylor-Young to which she is entitled under the settle- "ment in the income of the property comprised therein to the "intent that Mrs. Taylor-Young's life interest in any and every "part of such income shall fail and determine."

By clause 2: "In consideration of the . . . sum of £15,000 "this day paid to him as to £7,500 by . . . Patricia Jean Noble "and as to £7,500 by . . . Christopher William Taylor-Young ". . . Mr. Taylor-Young doth irrevocably surrender and forever "forgo the interest for life to which he is entitled under the "settlement in the income of the property comprised therein to "the intent that Mr. Taylor-Young's life interest in any and "every part of such income shall henceforth be absolutely "determined."

The present trustees, the Royal Exchange Assurance and Harold Strang Taylor-Young, took out this summons asking the court to determine, inter alia, whether upon the true construction of the settlement and in the events which had happened, including in particular the deed of August 15, 1958, the capital of the fund might now be distributed equally among the four grandchildren of the settlor; and if it were not so distributable whether the share of income settled by clause 2 (b) of the settlement should be paid to the children and remoter issue of Harold or to the four grandchildren of the settlor.

R. Cozens-Hardy Horne for the trustees.

John Vinelott for the first to third defendants.

L. H. L. Cohen for the fourth defendant.

P. R. Giffard for the fifth and sixth defendants, the great grandchildren of the settlor.

The following cases, in addition to those referred to in the judgment, were cited in the course of argument: *In re Hatfeild* [1]; *Jull* v. *Jacobs* [2]; *In re Taylor* [3]; *In re Hodge* [4]; *Fry* v. *Inland Revenue Commissioners* [5]; *In re Huntington's Settlement Trusts.* [6]

Cur. adv. vult.

March 4. Harman J., reading his judgment: This summons which raises a question of construction affecting the trusts of the settlement mentioned at the head of it, does not, as it should, ask for execution of those trusts so far as necessary,

[1] [1958] Ch. 469; [1957] 3 W.L.R. 28; [1957] 2 All E.R. 261.

[2] (1876) 3 Ch.D. 703.

[3] [1957] 1 W.L.R. 1043; [1957] 3 All E.R. 56.

[4] [1943] Ch. 300; 59 T.L.R. 373; [1943] 2 All E.R. 304.

[5] [1959] 1 Ch. 86; [1958] 3 W.L.R. 381.

[6] [1949] Ch. 414; 65 T.L.R. 249; [1949] 1 All E.R. 674.

but this is a technical defect which can be cured by amendment.

His Lordship stated the facts and continued: It was not suggested before me, having regard to the preceding trusts of income, that one-third of the capital became distributable on the cesser of the life interests limited to each son and his wife, and this, in my judgment, was right, because there is clearly one date for distribution and not three, notwithstanding the curious reference to "any part of the income" in clause 2 (d). Thus, so long as any of the so-called life interests subsist, the income of the trust fund is divisible in thirds among the three stocks represented by the sons, but at the end of that period the capital becomes distributable in as many shares as there are children of the three sons, whether surviving the period of distribution or not, who attain 21 or marry under that age.

The question is whether the effect of the deed of August 15, 1958, has been to bring to an end the trusts affecting income and bring into possession the trusts affecting capital or not. On the face of the settlement, the trusts affecting capital come into operation "upon the determination or failure of the last sur-"viving life interest in any part of the income of the trust fund "hereinbefore granted to" the three sons of the settlor and their named wives. The first four defendants, that is to say (ignoring the excluded grandchild), all the existing grandchildren, being of full age, have elected to argue that the event has happened, with the result that the first and fourth defendants exchange an interest in one-third of the income for one-quarter of the capital, while the second and third defendants take one-quarter of the capital each instead of no interest in possession. Under the 1958 deed each of these latter is expressed to have paid £7,500 to his or her father in consideration of that advantage.

If this be the right view, it follows that the interest of any son hereafter born to the second plaintiff, the surviving son, Harold, will be cut out and also that the fifth and sixth defendants and any after-born members of that generation lose their contingent interests in income. This is a startling result. It would be still more startling if, for instance, the second plaintiff had twelve children, for capital would then go as to twelve-fourteenths to them, while the child of each of the other two sons of the settlor, that is to say, the first and fourth defendants, would, at the behest of their uncle and aunt, be obliged to accept one-fourteenth of the capital in place of one-third of the income. An even odder result would ensue had the settlement not excluded the child of William Hugh Taylor-Young by his first wife; and it is more curious still that the children of the second plaintiff, by buying their father's life interest, should be able entirely to alter the beneficial interests of their cousins.

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This case was argued before me on behalf of the four grandchildren upon the footing that it was a case of acceleration, and it was pointed out that this doctrine does at times involve some alteration in beneficial interests; for instance, in *In re Davies*,[1] Vaisey J. alluded to it in these words[2]: "It seems "rather surprising that the purely gratuitous act (that is, the "disclaimer) of one of the beneficiaries, Mrs. Mackintosh, should "operate to deprive and dispossess a number of other bene-"ficiaries, namely Mrs. Mackintosh's grandchildren and remoter "issue, of the interest which she, the testatrix, had given them "by her will. It is clear, however, that acceleration may and "does sometimes alter the constitution of a class of beneficiaries "from what it would have been if the gift had not been acceler-"ated: see *In re Johnson*.[3] Another view, which I will call the "second view, is that, as the disclaimed life interest must be "treated as struck out of the will and as not having been thereby "effectively disposed of, the obvious consequence is a partial "intestacy."

All the cases to which I have been referred, where the so-called doctrine of acceleration has been applied, involve construing a reference to an interest for life as being equivalent to some such words as "subject as aforesaid," it being held that the only object of holding up the distribution of capital was to provide for the interest of the life tenant, so that when that interest failed, whether by death, disclaimer or other form of forfeiture, such as, for instance, the life tenant witnessing the will, the court will as a general rule accelerate the remainder. This usually applies to wills, but may take effect in the case of settlements, as in *In re Flower's Settlement Trusts*,[4] where Jenkins L.J. said[5]: "The principle, I think, is well settled, at all events "in relation to wills, that where there is a gift to some person "for life, and a vested gift in remainder expressed to take effect "on the death of the first taker, the gift in remainder is con-"strued as a gift taking effect on the death of the first taker "or on any earlier failure or determination of his interest, with "the result that if the gift to the first taker fails—as, for "example, because he witnessed the will—or if the gift to the "first taker does not take effect because it is disclaimed, then "the person entitled in remainder will take immediately upon "the failure or determination of the prior interest, and will not "be kept waiting until the death of the first taker. It has long "been settled that this principle applies not only to realty (in "respect of which I think it was first introduced) but equally "in respect of personalty; and although all the authorities to "which we have been referred have been concerned with wills,

[1] [1957] 1 W.L.R. 922; [1957] 3 All E.R. 52.

[2] [1957] 1 W.L.R. 922, 925.

[3] (1893) 68 L.T. 20.

[4] [1957] 1 W.L.R. 401; [1957] 1 All E.R. 462.

[5] [1957] 1 W.L.R. 401, 405.

"counsel for the trustees submits—and I do not think that "counsel for the Crown disputes—that there is no reason for "applying any different rule to a settlement inter vivos. As to "that I would say that I am disposed to agree that the principle "must be broadly the same; but I cannot help feeling that it "may well be more difficult, in the case of a settlement, to "collect the intention necessary to bring the doctrine of accelera-"tion into play." Then he referred to a number of authorities, which have been read to me and to which I do not propose to refer. As Jenkins L.J. observed in the last words I have read, the result is only reached where the court can conclude from the instrument the express or implied intention of the settlor or testator to bring it about.

I was referred to no case in which the effect of a disclaimer or surrender was to alter vested interests in possession, as is suggested to be the result here. Counsel for the infants pointed out that so to construe the settlement would have the odd result that a renunciation by either of the first two sons to die would have no immediate effect on the distribution of capital, whereas the third son or his widow could, by a stroke of the pen, change the interests of his nephews and nieces. Apart from this, the limitation of capital is for all the children of the sons who attain full age, and it is now proposed to exclude a possible future child of the second plaintiff. Furthermore, the sixth defendant, representing here the next generation, will also lose the chance of inheriting a third of the income in the event of her father dying during the lifetimes of the second plaintiff or his wife.

Alternatively, it was argued for the grandchildren of the settlor that this is not a case of acceleration at all, but of construing the words in clause 2 (d) of the settlement, and it was said that in ordinary parlance the last surviving life interest has in fact determined or failed, by death in the cases of the sons Walter and William Hugh, by surrender in the second plaintiff's case, and by disclaimer in that of his wife, so that the moment of distribution indicated in the words of the settlement has arrived.

In my judgment, it would be wrong, in view of the very peculiar limitations of this document, to infer an intention on the settlor's part to bring about a distribution of capital so long as any of her sons is alive and any of the named daughters-in-law has survived and has not remarried. I feel constrained to hold that when the settlor directs that distribution shall be made when the life interests have determined, she means after the lives in question (which, in the case of females, must be construed as life or widowhood) shall have come to an end.

March 25. The summons was restored for argument on the question as to whom the one-third share of income formerly settled on Harold Strang Taylor-Young should now be paid.

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Young's Settlement Trust, *In re.*

R. Cozens-Hardy Horne for the trustees.

L. H. L. Cohen for the first and fourth defendants.

John Vinelott for the second and third defendants.

P. R. Giffard for the fifth and sixth defendants.

Harman J. I have decided that Harold and his wife cannot alter the trusts of capital by their surrender and disclaimer. The question now before me is the effect of the deed of August 15, 1958, on the one-third share of income formerly payable to Harold and on his death to his wife if she survives him.

Two submissions have been put forward. First, that although the deed of August 15, 1958, did not affect capital yet it affected income, which must be treated as to one-third as though the date of distribution had in fact arrived, and therefore clause 2 (d) was brought into effect so far as this third is concerned. The result of that is the per capita distribution of the income among the four surviving members of the next generation. The second submission is that Harold, in surrendering his interest in income, must be taken to have surrendered in favour of those next interested, so that his children take the income between them, defeasible in favour of issue pending the date of distribution. I prefer the second view.

Clause 2 (d) is intended to be a clause operating on capital on the determination of the last surviving life interest, and I have held that it must be construed literally. The events governing the distribution have not yet occurred, and therefore one must not look at clause 2 (d). One is accordingly thrown back on clause 2 (b). My difficulty has been that in the deed of 1958 there was no mention of a surrender to any person. Coke on Littleton, 17th ed., sect. 636, reads as follows: "Surrender ". . . is a yielding up an estate for life or years to him that "hath an immediate estate in reversion or remainder. . . ." That applies to the children of Harold, and I declare that the one-third share of income is to be paid to the children or remoter issue of Harold under clause 2 (b) of the settlement.

Declarations accordingly.

Solicitors: *Freshfields.*

[CHANCERY DIVISION.]

* RHYL URBAN DISTRICT COUNCIL *v.* RHYL AMUSEMENTS LTD.

1958
Nov. 3, 4, 5, 6, 7, 11;
Dec. 9.

Harman J.

[1956 R. No. 1616.]

Local Government—Lease from local authority—Validity—Deed of surrender of tenancy—Surrender expressed to be in consideration of grant of new lease—Grant of new lease—Failure of local authority to obtain consent of Minister of Health to grant of lease—New lease ultra vires and void — Whether local authority estopped from denying validity of new lease—Whether surrender effective—Public Health Act, 1875 (38 *&* 39 *Vict. c.* 55), *s.* 177.

Landlord and Tenant—Business premises (Security of tenure)—Yearly tenancy—Notice to quit—Validity—Landlord and Tenant Act, 1954 (2 *&* 3 *Eliz.* 2, *c.* 56), *s.* 25.

Landlord and Tenant—Surrender of lease—Void lease—Effect of surrender—Merger with freehold.

Landlord and Tenant—Yearly tenancy—Terms of tenancy—Termination —Notice to quit—Effect.

Landlord and Tenant—Notice to quit—Form—Yearly tenancy.

Limitation of action—Local authority—Act ultra vires—Whether continuing default—Grant of lease by local authority in 1932—*Failure of local authority to obtain consent of Minister of Health—Whether Limitation Act,* 1939, *applicable—Limitation Act,* 1939 (2 *&* 3 *Geo.* 6, *c.* 21).

Estoppel—Conduct, by—Act done ultra vires—Statutory authority, by—Whether act can support plea of estoppel—Grant of void lease.

By section 39 of the Rhyl Improvement Act, 1892, a local act, the predecessors in title of the plaintiff council, the Rhyl Urban District Council, were empowered to appropriate part of certain reclaimed land as an ornamental lake and pleasure grounds, and by section 46 of that Act were authorized to let refreshment rooms and booths on the property for a period not exceeding three years. By section 83 of the Rhyl Improvement Act, 1901, the plaintiffs were authorized to let the pavilions and other buildings for the time being belonging to them in the recreation grounds for any period not exceeding seven years. By section 177 of the Public Health Act, 1875, "Any local authority may, with the consent of "the local government board, let for any term any lands which "they may possess. . . ." By 1932 the local government board had been superseded by the Ministry of Health.

By a deed dated March 21, 1910, the plaintiff council leased the lake and pleasure grounds to the defendants for a term of 14 years from June 1, 1910. By an indenture dated June 18, 1921, the defendants surrendered the lease, the term being expressed to merge in the freehold, in consideration of the grant of a new lease. By a deed dated June 20, 1921, the plaintiffs demised the same property to the defendants for a term of 24 years from February 1, 1921. By a deed dated June 23, 1932, the defendants surrendered to the plaintiffs all the property comprised in the lease, such term to merge in the freehold, to enable the plaintiffs to grant a new lease. By a further deed dated June 24, 1932, the plaintiffs demised the same property to the defendants for a term of 31 years from May 1, 1932, rent being payable on May 1 and November 1 of each year. No consent was obtained by the plaintiffs from either the local

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government board or the Minister of Health to the grant of any of the leases as required by section 177 of the Public Health Act, 1875.

On June 10, 1954, the plaintiffs, on the basis that the lease of June 24, 1932, was void, served on the defendants a notice to quit the premises which "you hold of the [plaintiffs] as yearly tenants "on May 1, 1955, or other the end of your tenancy which will "expire next after the end of one half-year from the service of this "notice. . . ." On October 1, 1954, Part 2 of the Landlord and Tenant Act, 1954, came into force, and on the same day the defendants served on the plaintiffs a notice under section 26 of that Act proposing a new tenancy to begin on May 1, 1955; which notice was repudiated by the plaintiffs. On October 28, 1955, the plaintiffs served a notice under section 25 of the Act of 1954 to terminate the tenancy on May 1, 1956. The defendants served a counter-notice under section 25 (5) of the Act of 1954 and on December 22, 1956, wrote saying that notwithstanding any steps they had taken under the Act, the lease of June, 1932, was valid and the plaintiff's notice a nullity.

By an originating summons dated February 21, 1956, the defendants applied to the court for a new tenancy, but before the summons could proceed it was necessary to determine certain questions of fact, and the plaintiffs brought the present action claiming declarations that the lease of June 24, 1932, was void and ineffective as a lease, and that the notice dated October 28, 1955, was valid. The defendants counterclaimed for damages for the plaintiffs' failure to obtain any necessary consent to the grant of the lease of 1932:—

Held, (1) that notwithstanding their service of a notice under section 26 of the Landlord and Tenant Act, 1954, and the issue of the summons, the defendants were entitled to say that the lease of 1932 was a valid lease, since their letter of December 22, 1956, showed that they had not elected to rely only on that Act.

(2) That the only material power of letting which the plaintiffs had was that contained in section 177 of the Public Health Act, 1875, and that, therefore, having failed to obtain the necessary consent of the local government board or Minister of Health, to the exercise of that power, the leases of 1921 and 1932 were ultra vires and void.

(3) That the plaintiffs were not estopped from denying the validity of the 1932 lease for a plea of estoppel could not prevail as an answer to a claim that an act done by a statutory body was ultra vires.

Minister of Agriculture and Fisheries v. *Matthews* [1950] 1 K.B. 148; 65 T.L.R. 655; [1949] 2 All E.R. 724 followed.

(4) That although the leases of June 20, 1921, and June 24, 1932, were invalid the surrenders were effective to merge the terms in the freehold reversion as they were expressed to do.

Doe d. *Egremont* v. *Courtenay* (1848) 11 Q.B. 702 and *Corporation of Canterbury* v. *Cooper* (1908) 99 L.T. 612 distinguished.

(5) That since the lease of 1932 was void, there was created a yearly tenancy on the same terms as those of the void lease, and that the parties must be taken to have agreed that the yearly tenancy should be by reference to the dates when the rent was payable and paid, i.e., May 1 or November 1. Therefore, the notice to quit served on June 10, 1954, was effective, and it followed that the subsequent notice under section 25 of the Landlord and Tenant Act, 1954, dated October 28, 1955, terminating the tenancy on May 1, 1956, was also effective.

Martin v. *Smith* (1874) L.R. 9 Exch. 50 followed.

(6) That the plaintiffs' failure to obtain consent to the lease of 1932 under section 177 of the Public Health Act, 1875, was not a continuing default, for the lease was void ab initio and the plaintiffs had a good defence to the defendants' counterclaim under the Limitation Act, 1939.

Whitmore-Searle v. *Whitmore-Searle* [1907] 2 Ch. 332 distinguished.

Peyler v. *Great Western Railway Co.* (1947) 63 T.L.R. 178; [1947] 1 All E.R. 355 applied.

Per Harman J. Where a notice to quit has been given under a yearly tenancy, that tenancy is not brought to an end until the notice to quit expires, so that the tenancy existing on October 1, 1954, was the annual tenancy and not a tenancy for a fixed term ending when the notice to quit of June 10, 1954, would expire, and it was that tenancy which was expressed to continue by virtue of the Act. If then I had held that the tenancy would have expired, apart from the Act, after May 1, that is, on June 24, in any calendar year, I should have held the statutory notice of 1955 to be bad.

ACTION.

The plaintiffs, the Rhyl Urban District Council, claimed against the defendants, Rhyl Amusements Ltd., (1) a declaration that a deed dated June 24, 1932, made between them and the defendants was at all material times void and ineffective as a lease and that no term was thereby demised; (2) a declaration that a notice dated October 28, 1955, given under the Landlord and Tenant Act, 1954, by the plaintiffs to the defendants was a valid notice; (3) alternatively, a declaration that a notice dated September 12, 1955, given under the Landlord and Tenant Act, 1954, by the plaintiffs to the defendants was a valid notice.

The following statement of facts is taken from the judgment of Harman J.: In 1892 the Rhyl Improvement Commissioners, then the local authority for the district of Rhyl, North Wales, promoted a local bill for the improvement of the town. The bill received the Royal Assent on June 27, 1892. Under it the commissioners were empowered to enclose and reclaim by means of embankments, certain stretches of the foreshore of the tidal River Clwyd adjacent to the town and known as "the Foryd "Mudlands," and to appropriate the whole or part of the reclaimed land for the purpose of an ornamental lake and pleasure grounds, and to lay out the land for recreation purposes. This was effected by Part III of the Act, which conferred limited powers of purchase, both compulsorily and by agreement, and to construct the specified works at an estimated cost, so far as the ornamental lake and pleasure grounds were concerned, of £3,000 which the commissioners were authorised to borrow. Section 38 of the Act read as follows: "The commissioners may "from time to time enclose and reclaim from the River Clwyd "so much of the Mudlands now belonging or reputed to belong "to Her Majesty the Queen in right of Her Crown and situate "in the parish of Rhuddlan as will lie to the north-east east and "south-east of the embankment Number 1 by this Act autho-"rized." Section 39 of the Act read: "The commissioners may

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"appropriate all or any part of the lands lying to the north-east "east and south-east of the embankment Number 1 for the "purposes of an ornamental lake and pleasure grounds and may "level drain gravel lay out plant ornament and improve such "lands for recreation purposes and cover such parts thereof with "water as to them may seem desirable. . . ." By section 42: "All lands reclaimed by the commissioners under this Act "shall for the estates terms or interests therein so acquired "by the commissioners and in accordance with and subject to "the terms and conditions on which they are so acquired be "vested in them for the purposes and subject to the provisions "of this Act."

Section 43 read: "The commissioners may from time to time "when and as they think fit but subject to the provisions herein-"after contained sell and convey or dispose of all or any part "or parts of any lands acquired by them under this Act (not "being the site of either of the embankments by this Act "authorized) or the reversion of the commissioners in any such "lands to such person or persons and upon and subject to such "terms and conditions as they think fit." Section 44 dealt with the proceeds of sale of superfluous lands. Section 46 was in these terms: "The commissioners may in any part of the pleasure "grounds erect and maintain refreshment rooms and may permit "the erection of refreshment rooms and of booths for the sale "of goods on such terms and conditions pecuniary and otherwise "as they may see fit. The commissioners may let any refresh-"ment rooms erected by them for such term not exceeding three "years and for such rent and generally subject to such covenants "and conditions as they may see fit."

The commissioners in fact anticipated one of their powers by acquiring from the Crown part of the foreshore on the River Clwyd, which was conveyed to them by an indenture of May 17, 1892. The commissioners here covenanted not to use the land for any other purpose than an ornamental lake and pleasure ground. The embankment and works were duly constructed, either by the commissioners or their successors, the plaintiffs in this action, who took over their rights, powers and duties in 1895. Parts of the reclaimed land were duly appropriated for the ornamental lake and pleasure grounds, and these were duly constructed. By a subsequent Act, the Rhyl Improvement Act, 1901, Part VIII, section 83, the following further power was conferred: "The council may in any pavilion or other buildings "for the time being belonging to them or under their control "in any recreation ground or upon the pier when acquired by "the council provide and carry on or arrange for the provision "or carrying on of suitable entertainments exhibitions and "amusements or may let for any period not exceeding seven "years any such pavilion or other building for the purpose of "such entertainments exhibitions or amusements upon such "terms and conditions as they may think fit."

The history of the matter until 1908 was not before his Lordship. In that year the defendant company, who styled themselves "amusement caterers," came into possession of the marine lake and pleasure grounds abutting on it. What tenancy was then conferred did not appear, but by an indenture of March 21, 1910, the plaintiffs leased, or purported to lease, the lake and pleasure grounds to the defendants for a term of fourteen years, to be calculated from June 1, 1910, at a rising rent. In 1921 negotiations were entered into between the parties for a further lease, and as a result, in an indenture of surrender dated June 18, 1921, the property comprised in the 1910 lease was surrendered to the plaintiffs, the term being expressed to be merged in the freehold. The consideration expressed was the grant of a new lease, and accordingly, by a further indenture of June 20, 1921, the plaintiffs demised to the defendants a part of the same property, comprising the lake and pleasure grounds as they were then enclosed, for a term of twenty-four years from February 1, 1921, with rights to abridge which were never exercised, and at a rising rent. In 1932 there were further negotiations for a new lease, as a result of which, by a deed of surrender made June 23, 1932, the defendants surrendered to the plaintiffs all the property comprised in the lease of 1921, such term to merge in the reversion.

This deed, after reciting the 1921 lease, further recited: "And "whereas the company has agreed with the council for the "surrender to the council of the said premises described in the "schedule hereto for the unexpired residue of the said term to "enable the council to grant to the company a new lease of the "said premises." The habendum was in the following terms: "To hold unto the council and their successors for all the unex-"pired residue of the said term to the intent that the said term "may merge and be extinguished in the freehold and inheritance "of the said premises. And to the further intent that the council "may forthwith grant to the company a new lease of the "surrendered premises."

By another lease made on June 24, 1932, between the plaintiffs of the one part and the defendants of the other part, the same property was expressed to be demised to the defendants for a term of 31 years from May 1, 1932, at a rent rising to £1,500 a year from May 1, 1945. At some date after the execution of this document it occurred to the clerk to the plaintiff council that this lease might be invalid because necessary consent to its execution had not been obtained from the Minister of Health and, therefore, that the council had no power to grant such a lease. No steps were, however, taken either to communicate this doubt to the defendants or to invalidate the lease till the beginning of 1953, when negotiations were opened for a surrender of the existing lease and the grant of a further one. These negotiations, however, broke down after a long period of bargaining on the question of the amount of rent to be paid under the new lease,

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and ultimately, on June 10, 1954, notice to quit was served by the plaintiffs. This document was in the following terms: "We, the "undersigned, as solicitors and agents of the Rhyl Urban District "Council hereby give you notice to quit and deliver up to them "possession of the premises situate and known as the marine lake "and pleasure grounds at Rhyl . . . " and then there was a description by reference to the 1932 lease " . . . which premises "you hold of the said council as yearly tenants on the First day "of May One thousand nine hundred and fifty-five or other . . . "the end of the year of your tenancy which will expire next after "the end of one half-year from the service of this notice. Dated "this tenth day of June One thousand nine hundred and fifty-four, "Joseph Lloyd & Co., solicitors and agents for your landlords." The basis on which this notice was served was that the 1932 lease was void, and that therefore the defendants hold the property comprised in the lease on a yearly tenancy, beginning on May 1 in each year, and otherwise upon the terms of the void lease.

On July 30, 1954, there was passed the Landlord and Tenant Act of that year, one of the objects of which, as appeared from its long title, was "to enable tenants occupying property for "business, professional or certain other purposes to obtain new "tenancies in certain cases." It was agreed by the parties that Part II of this Act applied. On October 1, 1954, the defendants served on the plaintiffs notice, under section 26 of the Act, proposing a new tenancy to commence on May 1, 1955, and to be for a term of 14 years at a rent of £3,000 a year. This notice was accompanied by a letter stating that it was given without prejudice to any existing rights or claims of the defendants, that is to say, their right or claim that the 1932 lease was still current and valid. This notice was repudiated by the plaintiffs and no further steps were taken upon it. The defendants continued in possession, paying the rent payable under the 1932 lease. In 1955 the plaintiffs threatened proceedings for possession, but took no further step until October 28, 1955, when they served through their solicitor a statutory notice under section 25 of the Act of 1954 to terminate the defendants' tenancy on May 1, 1956. This notice stated that an application for a new lease would be opposed. The defendants served a counter-notice under section 25 (5) stating their unwillingness to give possession, and on December 22 they followed this with a letter stating that any steps taken by them under the Act were precautionary and without prejudice to their contention that the 1932 lease was valid and the plaintiffs' notice a nullity. A technical objection was taken to the form of the notice, which was later abandoned, but as a result the plaintiffs served a further notice to terminate the tenancy on May 1, 1957, but stated on this occasion that they were not opposed to an application for the grant of a new tenancy. On October 18, 1956, the defendants served a further counter-notice, stating their unwillingness to give up possession.

As a result, the defendants started proceedings by an originating summons dated February 21, 1956, applying to the court for a new tenancy. This summons maintained that the 1932 lease was still current, and by way of alternative that a yearly tenancy subsisted to be inferred from the payment and acceptance of rent. When the matter came before the master it became obvious that questions of fact arose which it was necessary to decide before the summons could proceed, and the present action was the result.

John Arnold Q.C. and *John Monckton* for the plaintiffs.

R. E. Megarry Q.C. and *C. Fletcher-Cooke Q.C.* for the defendants.

The following cases, in addition to those referred to in the judgment, were cited in argument: *Orman Bros. Ltd.* v. *Greenbaum* [1]; *Lewis (E. H.) & Son Ltd.* v. *Morelli* [2]; *Phillips* v. *Halliday* [3]; *McCarrick* v. *Liverpool Corporation* [4]; *Day* v. *Singleton* [5]; *Shaw* v. *Shaw* [6]; *Tidey* v. *Mollett.* [7]

Cur. adv. vult.

December 9. HARMAN J. read the following judgment in which he stated the facts and continued: Under the circumstances which I have stated, the followings questions seem to arise: (1) Whether the defendants, having served notice for a new lease under section 26 of the Act of 1954 and having issued the originating summons, can still be heard to argue that the 1932 lease is valid: (2) The validity of the 1932 lease: (3) Whether, if the lease be invalid, the plaintiffs are estopped from relying on that fact: (4) The validity of the 1921 lease: (5) The validity of the two notices served by the plaintiffs in 1955 and 1956, the point here being whether either of these comply with section 25 of the Act in seeking to terminate the defendants' tenancy on May 1, 1956, or May 1, 1957, respectively; and (6) There is a counterclaim by the defendants for damages for failure by the plaintiffs to obtain, or attempt to obtain, any necessary consent to the grant of the 1932 lease. By way of answer the plaintiffs plead the Limitation Act, 1939. The case has raised a number of points of law and much authority has been cited.

(1) The first point taken is that the defendants, having asked for a new lease, must be taken to have elected to rely upon their rights under the Act of 1954, and cannot now be heard to say that the 1932 lease is still subsisting. This is a point akin to estoppel and should have been, but it is not, taken in the pleadings, and I was asked to hold that it was not open to the plaintiffs.

[1] [1954] 1 W.L.R. 1520; [1954] 3 All E.R. 731; [1955] 1 W.L.R. 248; [1955] 1 All E.R. 610.

[2] (1948) 65 T.L.R. 56; [1948] 2 All E.R. 1021.

[3] [1891] A.C. 228.

[4] [1947] A.C. 219; 62 T.L.R. 730; [1946] 2 All E.R. 646.

[5] [1899] 2 Ch. 320.

[6] [1954] 2 Q.B. 429; [1954] 3 W.L.R. 265; [1954] 2 All E.R. 638.

[7] (1864) 16 C.B.N.S. 298.

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It would, however, be open to me to allow an amendment, and I propose to consider the merits of this point as if I had done so. In my opinion, there is nothing in it. It is true that in 1954 the defendants did by their notice under section 26 of the Act demand a new lease, but they sent a covering letter on the same date stating that this was a notice made without prejudice. In my judgment this shows that there was no true election. The defendants were alleging the validity of the 1932 lease, but by way of insurance, in case that proved wrong, they sought to protect themselves under the Act of 1954, and I do not see why they should not take this course. It was argued that the decision of Henn-Collins J. in *W. Davis (Spitalfields) Ltd.* v. *Huntley*[1] was authority which I ought to follow in this respect. That was an application under a different Act, namely, the Landlord and Tenant Act, 1927. The headnote, so far as relevant, is in these words[2]: "... A tenant who asks for a new tenancy under the "Landlord and Tenant Act, 1927, section 5 (1), cannot be heard "to say that the old tenancy is still subsisting, even if he fails "to obtain a new tenancy. ..." The judge dealt with the point in these terms[3]: "Where, however, the tenant is asking for a "new tenancy (under section 5 (1) of the Act), the matter is "completely different. He cannot have both the old tenancy "and a new one. If he affirms the position that he wants a new "tenancy, he can only do so on the footing that the old one is "at an end. If and in so far as the tenant claims a new tenancy, "he is not thereafter entitled to say that the old one is still "subsisting, and he certainly is not entitled to do so any the "more if he fails to obtain the new tenancy. ..." That case went to the Court of Appeal,[4] but that court did not deal with this point. It has, however, been approved in *Tennant* v. *London County Council*.[5] In my judgment, it does not apply here.

The tenancy which the defendants here were desirous of retaining was the 1932 lease, which the plaintiffs were alleging to be void, and not the yearly tenancy of which notice to quit had been given under the Act by the plaintiffs. It was, therefore, not a matter of waiving some point about the sufficiency of the notice, but a claim that no notice could be given at all. It is said, further, that by issuing the originating summons on February 21, 1956, the defendants once more elected to have a new lease, but it seems to me clear from the form of the summons itself that the defendants did all they could there to preserve their rights, and I am of opinion that, even if the plaintiffs are entitled to take this point, it will not avail them.

(2) The question of the validity of the 1932 lease depends upon the construction of the Act of 1892. The defendants argue that upon a true reading of this statute there was such power of

[1] [1947] 1 All E.R. 246.
[2] [1947] 1 All E.R. 246, 247.
[3] Ibid. 248.
[4] [1947] 2 All E.R. 371.
[5] (1957) 121 J.P. 428.

letting under section 43. The words relied on are: "The commissioners may from time to time when and as they think fit "but subject to the provisions hereinafter contained sell and "convey or dispose of all or any part or parts of any lands "acquired by them under this Act. . . ." It is argued that the words "dispose of" are the widest words possible, and the greater must include the less. In this connection I was referred to *Carter* v. *Carter*,[6] where the word "disposition" in the Fines and Recoveries Act was under consideration, and Stirling J. said[7]: "The words 'dispose' and 'disposition' in the Fines and "Recoveries Act are not technical words, but ordinary English "words of wide meaning; and where not limited by the context "those words are sufficient to extend to all acts by which a "new interest (legal or equitable) in the property is effectually "created." That was, of course, said in relation to that Act, and to a declaration by a married woman. It is a very different matter from that under consideration here. On the other hand, I was referred to the use of this word in the Lands Clauses Consolidation Act, 1845, where it is used in connection with the words "sell and convey," sometimes with the word "absolutely" added and sometimes without, and seems to mean in either case an absolute or out and out disposition.

I was referred to *Astley* v. *Manchester, Sheffield and Lincolnshire Railway Co.*,[8] where the words "dispose of," as used in section 128 of the Lands Clauses Consolidation Act were under discussion, and Lord Chelmsford L.C. decided that "dispose of" meant an out-and-out disposition. In my judgment, the words "dispose of" here used must mean dispose of absolutely. It is merely a description of the disposition of the land following on a sale.

Apart from this, the very limited powers of letting conferred on the commissioners by section 46 of the Act of 1892, which I have read, would be unnecessary if section 43 already gave them an unlimited power of letting, and Parliament must have taken the same view when it passed section 83 of the Rhyl Improvement Act, 1901, granting a power to let not exceeding seven years. In addition, I am of opinion that in fact section 43, when read in conjunction with section 44, shows that the former was only intended to apply to surplus lands, and therefore did not apply to the marine lake and pleasure grounds as a whole. In my judgment, therefore, the only power of letting which the plaintiffs had at the time of the 1932 lease was that contained in section 177 of the Public Health Act, 1875, which reads as follows: "Any local authority may, with the consent of the local "government board, let for any term any lands which they may "possess, as and when they can conveniently spare the same." By 1932 the local government board had been superseded by the

[6] [1896] 1 Ch. 62.
[7] Ibid. 67.
[8] (1858) 2 De G. & J. 453.

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Ministry of Health. If, therefore, the consent of that body was not obtained, the lease was, in my opinion, ultra vires and void. Apart from this the land in question was in fact acquired, as I have mentioned, before the Act of 1892 came into force, and it follows that it cannot have been acquired "under the Act," and that section 43 is not available for this purpose.

The question of consent or no consent is one of fact. [His Lordship considered the evidence on the question of consent and continued:] I am of opinion that the plaintiffs have sufficiently proved that no consent was applied for, still less given, to the grant of the 1932 lease, which was, therefore, in my judgment, not merely voidable but void.

(3) It was, nevertheless, argued by the defendants, and so pleaded, that the plaintiffs are now estopped from denying the validity of the lease. The plea is based on the fact that the relations of the parties have been regulated by it ever since 1932, and that in that year the defendants changed their position by surrendering their 1921 lease on a promise to grant the new one. The representation so acted on must have been that the plaintiffs had power to grant a valid new lease. If the plaintiffs were private people this would be a strong plea, but in my judgment a plea of estoppel cannot prevail as an answer to a claim that something done by a statutory body is ultra vires: see *Minister of Agriculture and Fisheries* v. *Hulkin*,[9] an unreported case alluded to by Cassels J. in *Minister of Agriculture and Fisheries* v. *Matthews*,[10] where he said[11]: "If, therefore, the Minister "does something which is an ultra vires act, it is not the act "of the Minister at all. In the unreported case of *Minister of "Agriculture and Fisheries* v. *Hulkin*[12] the present plaintiff was "suing for the possession of a cottage and garden which was in "the possession of the defendant. The action was brought in "the county court and the county court judge took the view that "under the relevant defence regulations it was competent for "the County Agricultural Committee, acting under the authority "of the Minister, and as the delegate of the Minister's own "powers, to create a relationship of landlord and tenant between "the Minister and the defendant.

"The case went to the Court of Appeal and the appeal of the "plaintiff was allowed. The first point which called for con-"sideration was the finding of the county court judge that under "the regulation the Minister had power to create a tenancy and "that, by the document relied on in that case, he had in fact "done so. In the Court of Appeal the defendant's counsel "disclaimed any intention of attempting to support the county "court judge's judgment on that point. He contended, however, "that the Minister having done what he had done in that case

[9] Unreported (1948).

[10] [1950] 1 K.B. 148, 153; 65 T.L.R. 655; [1949] 2 All E.R. 724.

[11] [1950] 1 K.B. 148, 153.

[12] Unreported.

"was estopped from denying that the document, under which "the defendant was in possession, created a tenancy.

"In dealing with that contention, Lord Greene M.R. said: "'He' (the defendant's counsel) 'suggested, first of all, that "'even assuming, as he conceded, that the regulations gave no "'power to the Minister to create a tenancy, nevertheless the "'Minister was estopped from denying that the document in "'question did create a tenancy and, accordingly, the relation- "'ship must be regarded as one of landlord and tenant. There "'is, I think, a very short answer to that. Accepting the view "'which Mr. Bailleu' (the defendant's counsel) 'accepts, that "'the Minister had no power under the regulations to grant a "'tenancy, it is perfectly manifest to my mind that he could "'not by estoppel give himself such power. The power given to "'an authority under a statute is limited to the four corners of "'the power given. It would entirely destroy the whole doctrine "'of ultra vires if it was possible for the donee of a statutory "'power to extend his power by creating an estoppel. That "'point, I think, can be shortly disposed of.'" If I may say so, with respect, this seems as good sense as it is good law.

It was ingeniously argued that the present was not a case of the plaintiff council having no power, but that they had a power if they obtained the necessary consent and that the doctrine does not apply except where no power exists, so that the plaintiffs might be estopped from denying that they obtained consent. If this be not, as I suspect, a quibble, a like answer could be made that it would destroy the necessity of ever obtaining consent if a statutory body omitting to obtain it could thereafter be held estopped. Such a body could by these means confer on itself a power which it had not got, and the ultra vires doctrine would be reduced to a nullity.

(4) The position when the 1921 lease was executed seems to have been the same as in 1932. [His Lordship referred to the evidence and continued:] In my judgment, the evidence is enough to show that no consent was obtained in 1921, and that the 1921 lease was therefore similarly invalid. It may well be that a like invalidity affects the lease of 1910, but no evidence was proffered on this subject, and I must assume the validity of that lease. It will be remembered that before the grant of the 1921 and 1932 leases there were formal documents of surrender of the existing terms, and it was argued before me that, if and so far as the new lease in each case was a nullity, so was the surrender made in consideration of the grant of a new lease, with the result that the 1910 lease continued until its expiration on June 1, 1924, and similarly the 1921 lease, if held valid, would have continued until its expiration on February 1, 1945. The importance of this will be seen when I deal with the statutory notices under the Act of 1954.

In support of this proposition there was cited *Canterbury*

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Corporation v. *Cooper*.[13] That was a decision of a Divisional Court on appeal from a county court, and the relevant judgment is that of Channell J., who held that a lease granted by the corporation under the Municipal Corporations Act, 1882, was invalid, that the surrender by the defendant of a former lease was similarly ineffective, and therefore that the old lease continued in operation: there was, however, no express surrender of the old lease; it was merely a surrender by operation of law and delivery up of the lease. That case went to the Court of Appeal,[14] and the decision of the Divisional Court was upheld. To a like effect is *Doe* d. *Egremont* v. *Courtenay*.[15] That was a case of a lease executed by a tenant for life in excess of his powers and in consideration of the surrender of a former lease. Here, again, there was no surrender by deed, though, as the sidenote shows, surrender was expressly mentioned in the lease. The sidenote reads as follows: "Tenant in fee demised the land "by indenture for a term depending on certain lives, and then "devised his estate to his son for life, with remainders over, and "with a power to tenant for life to grant leases. After testator's "death, and during the above term, the son granted the lessee "a fresh lease of the land, and the new indenture of lease set "forth that it was granted in consideration of the surrendering "up into the hands of the lessor by the lessee, at or before the "delivery thereof, of the lease first granted, *which surrender is* "*hereby made and accepted accordingly*. The new lease was a "bad execution of the power. One of the lives mentioned in "the first lease was still existing. Held, that the surrender was "inoperative, and the first lease remained in force; and this, "whether the second lease, at the time of the demise, was void "or only voidable at the will of the tenant for life, and whether "the surrender was implied or express: the ground of decision "being that the new lease did not pass an interest according to "the contract, and therefore the acceptance of it, though with "express words as above stated, did not effect an absolute sur-"render." Giving judgment, Coleridge J. said[16]: ". . . where "the new lease does not pass an interest *according to the con-*"*tract*, the acceptance of it will not operate a surrender of the "former lease; that, in the case of a surrender implied by law "from the acceptance of a new lease, a condition ought also to "be understood as implied by law, making void the surrender in "case the new lease should be made good; and that, in case of "an express surrender, so expressed as to show the intention of "the parties to make the surrender only in consideration of the "grant, the sound construction of such instrument, in order "to effectuate the intention of the parties, would make that "surrender also conditional to be void in case the grant should "be made void."

[13] (1908) 99 L.T. 612.
[14] (1909) 100 L.T. 597.
[15] (1848) 11 Q.B.D. 702.
[16] 11 Q.B.D. 712.

I was then referred to the case reported immediately afterwards, *Doe* d. *Biddulph* v. *Poole*,[17] where Erle J. said[18]: "Indeed, where the terms of a lease import an express surrender "solely in consideration of the new grant, we think a construc- "tion that such surrender was conditional would be warranted, "and would give effect to the intention of the parties." In my judgment, these cases do not carry the defendants home. They are not authority in a case where, as here, there has been a separate surrender by deed. No doubt, as indeed Channell J. points out in *Corporation of Canterbury* v. *Cooper*,[19] the surrenders may have been voidable and might have been set aside while the former terms were still running, but that was never done here and the terms have long since expired. In my judgment, the surrenders did operate to merge the term in each case in the reversion, as they were expressed to do.

(5) What, then, was the position on June 24, 1932? Clearly the plaintiffs as freeholders were under a contractual obligation to grant a new lease to the defendants, and this they purported to do by the lease of June 24, but that document being, as I hold, void, what is the result? It has, admittedly, in view of the fact that the grantee has been in possession and has paid rent and performed the covenants as provided by the void lease, created a yearly tenancy. This is shown by *Martin* v. *Smith*,[20] where Kelly C.B. thus expressed himself[21]: "The agreement being "void at law as a lease [that was a lease over seven years, orally "created], under 8 & 9 Vict. c. 106, section 3, but the tenant "having entered into possession and having occupied and enjoyed "the premises during the whole period, the question is, what are "the liabilities of the tenant under the agreement coupled with "this occupation and enjoyment? It is now clearly settled that "when a tenant enters under an agreement for a term which is "void at law, he is liable as a tenant from year to year, on all "the terms of the agreement applicable to a yearly tenancy." See also the judgment of Atkin L.J. in *Cole* v. *Kelly*.[22] Where the parties differ, and this was the most debated question before me, was the date from which the yearly tenancy should be held to run. The plaintiffs point to the fact that it was one of the terms of the void lease that the term should be calculated by reference to May 1 and that rent should be paid on November 1 and May 1 every year, and argue that this provision is applicable to a yearly tenancy and must, according to the judgment of Kelly C.B. which I have just read, be one of the terms of the yearly agreement upon which the tenants hold. This seems in the earlier stages of the dispute to have been also the view of the defendants, for when in 1954 they applied for a new lease under the Act of 1954 they asked for a new tenancy starting on May

[17] (1848) 11 Q.B.D. 713.
[18] Ibid. 718.
[19] 99 L.T. 612.
[20] (1874) L.R. 9 Exch. 50.
[21] L.R. 9 Ex. 50, 52.
[22] [1920] 2 K.B. 106, 132; 36 T.L.R. 262.

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1, 1955. The defendants have now changed their ground, for reasons which will be clear later on. They allege that a holding over by a tenant must begin from the expiration of the former tenancy. On my findings this would be June 23, when the surrender operated, and on that footing the yearly tenancy would run from that date.

In support of this proposition *Croft* v. *William F. Blay Ltd.*[23] was cited. The argument there was that a holding over must be dated from the beginning of the expired tenancy agreement, but the Court of Appeal would not accept that and held that the annual tenancy created by the holding over should be deemed to begin on the day when the lease expired. I was also reminded that the estate of the lessee begins on the date of the grant and not the date from which the habendum is expressed to run: see *Earl Cadogan* v. *Guinness*,[24] where Clauson J. said[25]: "But it "must be borne in mind that it is not possible by a deed executed "in March, 1936, to create a term in such a sense as that it shall "bring into existence a term before the date of the execution of "the deed. Although it is spoken of as a 21 years' term, the "term in fact is 21 years less the period which elapses from "December 25, on which the term nominally begins, to the date "of the execution of the deed. That seems to me an obvious "proposition. But I am supported in my opinion of its obvious-"ness by referring to *Shaw* v. *Kay*[26]—a decision of the Court "of Exchequer consisting of Pollock C.B. and Parke B., Alder-"son B. and Rolfe B.—in which the proposition which I have "suggested to be a correct proposition was adopted."

On the other side it is argued that you must calculate the yearly tenancy by reference to the date prescribed by the document under which the relevant rent is paid. This finds some support in *Cole* v. *Kelly*[27]: see the judgment of Atkin L.J., where he says[28]: "Upon what terms did the defendant hold the "premises under the new quarterly tenancy? In reference to "that one has to approach the question recognising that the law "is that, ' where tenants hold over after the expiration of a term, "' and the facts do not exclude an implied agreement to hold "' upon the terms of the old lease, then the law determines that "' they impliedly hold subject to all the covenants in the lease "' which are applicable to the new situation ': *per* Swinfen "Eady L.J. in *Wedd* v. *Porter*.[29] I think that that rule applies "wherever there has been a holding over, the law being, as I "understand it, that a holding over with the consent of the "landlord prima facie gives rise to a tenancy at will, which by "subsequent payment of rent may be converted into a tenancy "from year to year. . . ." Further support was sought from

[23] [1919] 2 Ch. 343; 35 T.L.R. 556.
[24] [1936] Ch. 515; 52 T.L.R. 447; [1936] 2 All E.R. 29.
[25] [1936] Ch. 517.
[26] (1847) 1 Exch. 412.
[27] [1920] 2 K.B. 106.
[28] [1920] 2 K.B. 106, 132.
[29] [1916] 2 K.B. 91.

Roe d. *Jordan* v. *Ward*,[30] where the sidenote reads as follows[30]: "Tenant for life makes a lease for years, to commence on a "certain day, and dies (before the expiration of the lease) in the "middle of the year. The remainderman receives rent from "the lessee (who continues in possession, but not under a fresh "lease) for two years together, on the days of payment mentioned "in the lease. This is evidence from which the court will pre-"sume an agreement between the remainderman and the lessee, "that the lessee should continue to hold from the day, and "according to the terms of the original demise, so that *notice to "quit ending on that day* is proper."

I have felt some doubt about this point. I accept that the yearly tenancy begins on the date from which the tenant held over, namely, June 24, 1932, but one of the terms imported from the void lease was that rent should be payable on May 1 and November 1, and that was in fact done. I hold that by 1954, at any rate, the parties must be taken to have agreed that the yearly tenancy shall be by reference to the dates when rent was paid, that is to say, half-yearly on November 1 and May 1. If this be right, notice to quit should be given for May 1. This is what was in fact done by the notice served on June 10, 1954, for May 1, 1955. That notice was, when given, effective for any date on which the end of the year of the tenancy would expire after December 10, 1954. The coming into force of the Act of 1954, by virtue of section 24 (1), rendered the notice to quit ineffective, and the plaintiffs, recognising this, served the notice of October 28, 1955, as prescribed by section 25 of the Act. This section, by subsection (2), provides that it must be of not more than 12 nor less than six months; and by subsection (3) (*a*): "The date of termination specified in a notice under this section "shall not be earlier than the earliest date on which apart from "this Part of this Act the tenancy could have been brought to "an end by notice to quit given by the landlord on the date of "the giving of the notice under this section. . . ."

It was agreed in the course of the hearing that, if May 1 be the right date of termination, this was a good notice, and on my findings that is an end of this point. If, however, the alternative view be taken that the right date was June 24, May 1 was too early if subsection (3) (*a*) applies. At this point a further controversy arose, namely, what was the effect of the common law notice to quit of June 10, 1954? The plaintiffs argued that this notice, which was admittedly good at common law, put an immediate end to the yearly tenancy, and that all that remained was a tenancy for a fixed term expiring when the notice to quit expired. For this the plaintiffs relied on the decision in *Clarke* v. *Grant*.[31] That was a decision of Lord Goddard C.J. I do not think that I need read the headnote, because the point there

[30] (1789) 1 Hy.Bl. 97.

[31] [1950] 1 K.B. 104; 65 T.L.R. 241; [1949] 1 All E.R. 768.

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was quite a different one, about the waiving of a notice to quit. Lord Goddard C.J. said[32]: "With regard to the payment of "rent after a notice to quit, however, that has never been the "law: if a notice to quit has been given in respect of a periodic "tenancy such as a yearly tenancy, the result is to bring the "tenancy to an end just as effectually as if there had been a "term which had expired. Therefore, when a landlord has "brought a tenancy to an end by means of a notice to quit, a "payment of rent after that date will only operate in favour of "the tenant if it can be shown that the parties intended that "there should be a new tenancy." The Lord Chief Justice, however, was not considering the present point, which is what tenancy was existing on October 1, 1954, when the Act came into force. If it was only a term certain, section 25 (3) (*a*) does not apply but section 25 (4) does, and the notice would be good. The words of the Lord Chief Justice seem to me ambiguous on this point, but in my judgment, where a notice to quit has been given under a yearly tenancy, that tenancy is not brought to an end until the notice to quit expires. I find some support for this in the judgment of Lush J. in *Davies* v. *Bristow*,[33] where it seems to me that the judge held that the tenancy is not terminated till the notice to quit expires. If this be right, the tenancy which existed on October 1, 1954, was the annual tenancy, and it is this which is expressed to continue by virtue of the Act: see the statement of Denning L.J. in *H. L. Bolton (Engineering) Co. Ltd.* v. *T. J. Graham & Sons Ltd.*[34] I should prefer to express it rather differently. "Tenancy," in my judgment, here means the right to continue as tenant. The conditions surrounding this right are those attending the previously existing tenancy, with one exception, namely, that the right may be terminated as the Act provides. In order to find how that may be done, section 25 is to be consulted.

It was pressed upon me by the defendants that this view was inconsistent with my own decision in *Weinbergs Weatherproofs Ltd.* v. *Radcliffe Paper Mill Co. Ltd.*,[35] and with the decision of Sellers J. in *Castle Laundry (London) Ltd.* v. *Read*.[36] I do not accept this. In my judgment, the two cases, right or wrong, and I think right, have no effect upon the position in this case, and are in fact irrelevant. They deal with break clauses under leases, which are contractual terms between lessor and lessee. Sellers J. and myself saw no reason why they should be interfered with by the Act, but that has no bearing, in my judgment, on the notices to quit served in this case. If, then, I had held that the tenancy in the present case would have expired, apart

[32] [1950] 1 K.B. 104, 105.

[33] [1920] 3 K.B. 428, 438; 36 T.L.R. 753.

[34] [1957] 1 Q.B. 159, 168; [1956] 3 W.L.R. 804; [1956] 3 All E.R. 624.

[35] [1958] Ch. 437; [1958] 2 W.L.R. 1; [1957] 3 All E.R. 663.

[36] [1955] 1 Q.B. 586; [1955] 2 W.L.R. 943; [1955] 2 All E.R. 154.

from the Act, after May 1, that is to say, on June 24 in any calendar year, then I should have held the statutory notice of 1955 and the similar notice of 1956 to be bad, because section 25 (3) prescribes that the notice must not indicate a date earlier than that of the expiration of the tenancy continued by the Act. May 1 was on this footing too early, because the former tenancy could only have been ended on June 24. As it is, I hold the 1955 notice is good, and the 1956 notice is irrelevant.

(6) There remains the counterclaim. The plea here is that the defendants surrendered the 1921 lease upon the promise of a grant by the plaintiffs of a valid and effectual lease in the terms of the 1932 document, and that the plaintiffs are in breach of contract in that they did not obtain, or attempt to obtain, a consent which would have rendered the 1932 lease valid. It is certainly suggested by Channell J. in *Corporation of Canterbury* v. *Cooper*,[37] which I have mentioned, that this was so. Talking about the lady who held under a void tenancy he says[38]: "There "was a binding compromise; that binding compromise may have "included a contract by the corporation, and I think it did, to "grant her an effectual new lease for life, and it would have "been an effectual new lease if they had obtained the consent "of the local government board. Therefore there may have been "a contract to procure the consent of the local government "board, just as a contract to assign a lease includes the consent "of the lessor when that is wanted. It is similar to that. "Therefore her complaint, if any, is that she has not got this "valid lease, and that there was a contract to give it to her. "She may or may not make out that there was such a con-"tract. I offer no opinion on it, for many other considerations "arise upon it. She ought to have claimed damages for not "getting the valid lease which she expected to get, and which "possibly they contracted to give her." On the other hand, it is argued that the necessity for a consent to a grant by a statutory body must be as well known to lessee as lessor, this not being a matter of internal management, and that therefore it was the duty of the defendants to see to it that the necessary consent was obtained, and that they cannot complain having neglected so to do. This proposition has the authority of Lord Haldane in his speech in *Pacific Coast Coal Mines Ltd.* v. *Arbuthnot*[39] where he says: "No doubt where some act, such "as the granting of an obligation in the course of its business, "is put by the constitution of a company within its power, and "certain formalities of administration are prescribed by the "articles of association which for domestic purposes regulate "the duties of the directors to the shareholders, the mere failure "to comply with a formality, such as a proper appointment or "the presence of a quorum of directors, will not affect a person "dealing with the company from outside and without knowledge

[37] 99 L.T. 612.
[38] Ibid. 615.
[39] [1917] A.C. 607, 616.

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"of the irregularity. . . . But the case stands quite otherwise "when the act is one which has not, by the constitution of the "corporation, been put within its power excepting on the fulfil-"ment of a condition. In that event the persons dealing with "the corporation are bound to ascertain whether the condition "has been fulfilled."

I confess I prefer the view of Channell J., but however this may be, the real defence is the Statute of Limitations. As to this, it was said that the failure to obtain consent was a continuing default on the part of the plaintiffs, going on throughout the term, and that therefore the statute has not run. I do not accept this. The 1932 lease was void in my judgment and not voidable, and subsequent consent could not have validated that instrument. It is not like the case of *Whitmore-Searle* v. *Whitmore-Searle*,[40] where a subsequent consent by the protector of a settlement to the remainderman's deed of disentail was held effective. Such a deed is not void, though it has only a limited effect, namely, the creation of a base fee until the protector assents. This is quite different from a deed void ab initio. If that be so the statute will protect the plaintiffs unless there is any substance in yet one more point, namely, that the wrong statute has been pleaded. This was the Act of 1939. It is said that time would have run by 1938 under the Act of James I, and therefore that Act should have been pleaded. The answer made is, first, that the implied promise (if any) was a promise contained in a document under seal, namely, the surrender of January 23, 1932, and therefore was a specialty for which twelve years was the proper period, and, secondly, that the Act of 1939 was in either event the right Act to plead. Reliance was placed on the terms of section 33 (*a*) of that Act, and the decision of Lord Greene M.R. in *Pegler* v. *Great Western Railway Co.*[41] The decision in that case involved a finding that time had run before the coming into force of the Act of 1939 which was nevertheless held to be rightly pleaded. See also *Brueton* v. *Woodward*.[42] I hold that the latter answer prevails, and that the counterclaim must be dismissed.

Judgment for the plaintiffs.

Solicitors: *Speechly, Mumford & Soames for Joseph Lloyd & Co., Rhyl; Preston, Lane-Claypon & O'Kelly for Edward Hughes & Co., Rhyl.*

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[40] [1907] 2 Ch. 332.

[41] (1947) 63 T.L.R. 178, 179; [1947] 1 All E.R. 355.

[42] [1941] 1 K.B. 680; 57 T.L.R. 349; [1941] 1 All E.R. 470.

[PROBATE, ETC., DIVISION.]

* SQUIRES v. SQUIRES.

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Mar. 2, 3, 6.

Stevenson J.

Husband and Wife — Divorce — Decree — Decree nisi — Application to rescind—Jurisdiction of court to hear application—"Any person" —Meaning—Whether including party to suit—Matrimonial Causes Act, 1950 (14 *Geo.* 6, *c.* 25), *s.* 12 (2).

A husband whose wife had obtained in an undefended suit a decree nisi of divorce on the ground of cruelty applied by summons, which was contested, for the decree nisi to be rescinded, on the ground that, after the decree had been pronounced, the parties became reconciled and resumed cohabitation and that the wife thereby condoned the cruelty upon which the decree nisi was founded:—

Held, that the expression "any person" in section 12 (2) of the Matrimonial Causes Act, 1950,[1] does not include a party to proceedings under that Act, and the court has no jurisdiction under that subsection to entertain an application by such a party to rescind a decree nisi.

Stoate v. *Stoate* (1861) 2 Sw. & Tr. 384 and *Harries* v. *Harries and Gregory* (1901) 86 L.T. 262 applied.

ADJOURNED SUMMONS to rescind decree nisi.

The parties were married on March 11, 1947. By a petition filed on March 14, 1958, the wife prayed for dissolution of the marriage on the ground of cruelty. The husband did not defend the suit and on July 7, 1958, the wife was granted a decree nisi. On October 15, 1958, the husband issued a summons calling upon the wife to show cause why the decree nisi should not be rescinded. No ground for rescission was specified in the summons, but by an affidavit sworn by the husband in support, he alleged that in August, 1958, he and his wife had resumed cohabitation, that sexual intercourse had taken place between them and that the cruelty on which the decree nisi was founded had been thus condoned.

On October 22, 1958, the summons came before Stevenson J. Counsel for the husband submitted that the court had jurisdiction to deal with the application by section 12 (2) of the Matrimonial Causes Act, 1950. Counsel for the wife challenged this contention and his Lordship thereupon adjourned the matter for hearing in open court and for argument on behalf of the Queen's Proctor.

J. R. Bisschop for the husband.
H. J. Phillimore Q.C. and *John B. Gardner* for the wife.
James Comyn for the Queen's Proctor.

[1] Matrimonial Causes Act, 1950, s. 12 (2): "After the pronouncing of "the decree nisi and before the decree "is made absolute, any person may, "in the prescribed manner, show "cause why the decree should not be "made absolute by reason of the "decree having been obtained by "collusion or by reason of material "facts not having been brought "before the court, and in any such "case the court may make the decree "absolute, reverse the decree nisi, "require further inquiry or otherwise "deal with the case as the court "thinks fit."

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The following cases were cited in argument in addition to those referred to in the judgment: *Sneyd* v. *Sneyd and Burgess* [2]; *St. Paul* v. *St. Paul and Farquhar* [3]; *E.* v. *E.* [4]; *Rose* v. *Rose* [5]; *Hyman* v. *Hyman* [6]; *Lewis* v. *Lewis* [7]; *Ousey* v. *Ousey and Atkinson* [8]; *Quartermaine* v. *Quartermaine and Glenister* [9]; *Walker* v. *Walker and Walker* [10]; *Hulse* v. *Hulse and Tavernor.* [11]

Cur. adv. vult.

March 6. Stevenson J. stated the facts and continued: I express no opinion, and have formed none, as to the truth or otherwise of the husband's allegations, and I refer to them now only for the purpose of indicating the ground on which this summons is founded. It is to be observed that the matters on which the husband relies are matters which arose, if they arose at all, after the decree nisi. The husband brought his allegation of condonation to the attention of the Queen's Proctor who, having considered the matter, intimated to the parties and to the court that he did not intend to show cause why the decree nisi should not be made absolute. The Queen's Proctor's presence in the proceedings before me is due, and due alone, to a request by the court for his assistance on the question of jurisdiction raised on behalf of the wife.

The Queen's Proctor has argued that a party to a suit for dissolution of marriage is not entitled to show cause why a decree nisi should not be made absolute.

The applicant husband has, for the purpose of this summons, sought to invoke the jurisdiction vested in the court by section 12 (2) of the Matrimonial Causes Act, 1950.

[His Lordship read section 12 (2) and continued:] The Queen's Proctor contends that "any person" in section 12 (2) of the Act of 1950 has to be compared with the same phrase in section 10 (2) of the same Act, which provides: "any person may at any time "during the progress of the proceedings or before the decree nisi "is made absolute give information to His Majesty's Proctor of "any matter material to the due decision of the case, and His "Majesty's Proctor may thereupon take such steps as the "Attorney-General considers necessary or expedient." Those provisions, it is to be observed, are lineal descendants of section 7 of the Matrimonial Causes Act, 1860, which provided: "Every decree for a divorce shall in the first instance be a decree "nisi, not to be made absolute till after the expiration of such "time, not less than three months from the pronouncing thereof, "as the court shall by general or special order from time to time

[2] [1926] P. 27; 42 T.L.R. 247.
[3] (1869) L.R. 1 P.D. 739.
[4] [1950] P. 232; 66 T.L.R. (Pt. 1) 751; sub nom. *Elwes* v. *Elwes* [1950] 1 All E.R. 826.
[5] [1957] 1 W.L.R. 451; [1957] 1 All E.R. 517.
[6] [1929] P. 1; 44 T.L.R. 664.
[7] (1861) 2 Sw. & Tr. 394.
[8] (1875) 1 P.D. 56.
[9] [1911] P. 180; 27 T.L.R. 458.
[10] [1937] P. 206; 53 T.L.R. 802; [1937] 3 All E.R. 523.
[11] (1871) L.R. 2 P.D. 259.

" direct; and during that period any person shall be at liberty, " in such manner as the court shall by general or special order " in that behalf from time to time direct, to show cause why the " said decree should not be made absolute by reason of the same " having been obtained by collusion or by reason of material facts " not brought before the court; and, on cause being so shown, " the court shall deal with the case by making the decree abso- " lute, or by reversing the decree nisi, or by requiring further " inquiry, or otherwise as justice may require; and at any time " during the progress of the cause or before the decree is made " absolute any person may give information to Her Majesty's " Proctor of any matter material to the due decision of the case, " who may thereupon take such steps as the Attorney-General " may deem necessary or expedient; and if from any such " information or otherwise the said Proctor shall suspect that any " parties to the suit are or have been acting in collusion for the " purpose of obtaining a divorce contrary to the justice of the " case, he may, under the direction of the Attorney-General, and " by leave of the court, intervene in the suit, alleging such case " of collusion, and retain counsel and subpoena witnesses to prove " it; and it shall be lawful for the court to order the costs of such " counsel and witnesses, and otherwise, arising from such inter- " vention, to be paid by the parties or such of them as it shall see " fit, including the wife if she have separate property . . . "

I am told, and I think it is accurate to say, that section 7 of the repealed Act of 1860 was the first expression in statutory form of the rights and duties of the Queen's Proctor in relation to matrimonial causes, although that office had, of course, existed long before the Act was passed. The view of the matter put before me on behalf of the Queen's Proctor is that the phrase " any person " in section 10 (2) does no more than declare what was already a fact which was, or should have been, apparent to those who had to consider the matter, namely, that " any " person "—using that phrase in the widest sense to mean any member of the public—might give information to a public official charged with the duties which were and are imposed on the Queen's Proctor in relation to matrimonial causes. It is said, however, that the same phrase " any person " in section 12 (2) must be differently construed for the reason that that subsection is doing something quite different from declaring a fact which already exists; it is conferring a procedural right which is designed to safeguard the interest of the public in seeing that a marriage is not dissolved in consequence of collusion or of the suppression of material facts. But it was not intended to permit, and does not permit, a party to re-open a judgment in which a decree nisi has been pronounced against him, and emphasis has been placed on the inconvenience, indeed the scandal, which might result if a party to a suit were enabled by reason of this provision, which is

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designed for the protection of the public at large, to re-open litigation to which he has been a party and which he had an opportunity of defending.

Now, in support of that view of the matter my attention has been called to the old authority of *Stoate* v. *Stoate*.[1] The report is very short and I propose to read it in full. The case was heard on April 24, 1861, very shortly after the Act of 1860, to which I have just referred, was passed. The headnote reads: "Decree "nisi for dissolution of marriage—Right of respondent under the "Matrimonial Causes Act, 1860, s. 7—A respondent, against "whom a decree nisi for dissolution of marriage has been pro-"nounced, cannot show cause against the decree being made "absolute under section 7 of the Matrimonial Causes Act, 1860": and the report reads: "In this case a decree nisi had been pro-"nounced for dissolution of the marriage on the ground of the "adultery of the wife. The respondent had appeared. Dr. "Swabey now moved that the respondent might be allowed, "under section 7 of the 1860 Act, to show cause against the "decree being made absolute. Under that section a respondent "ought to be at liberty to show cause against the decree nisi "being made absolute, if material facts arise or come to her know-"ledge after the decree nisi has been pronounced. The Judge "Ordinary, Sir Cresswell Cresswell, said: 'The respondent has "'no right under that section to show cause against the decree "'nisi being made absolute. She should have applied for a new "'trial. The motion must be rejected, and the costs of it must "'not be allowed against the husband.'"

In *Howarth* v. *Howarth*[2] the Court of Appeal had to consider a case in which a husband respondent applied for a new trial of a petition which had resulted in a decree nisi against him. The ground of the application was that fresh evidence had been discovered to show the wife's adultery before the decree nisi, and the husband filed affidavits alleging facts not known at the trial which it was said went to prove adultery. He obtained a rule nisi but the rule was discharged on argument, and from that decision the husband appealed. Immediately afterwards an uncle of the husband entered an appearance as intervener, and filed affidavits which were substantially the same as those used on the application for a new trial. There was nothing to show that he was acting on behalf of or in collusion with the respondent. The wife moved to make the decree for dissolution absolute. This was refused, but leave was given to her to move the court to reject the intervention. The husband abandoned his appeal from the refusal of a new trial. After this the motion of the wife to reject the intervention of the uncle was heard by the President and refused. Against that decision the petitioning wife appealed, and it was held by the Court of Appeal that section 7 of the Act of 1860 authorised intervention by any person where material

[1] (1861) 2 Sw. & Tr. 384.

[2] (1884) 9 P.D. 218.

facts had not been brought before the court, whether by intention or through accident. But in the headnote of this case it is said: "Whether where the petitioner, after the decree nisi, is guilty "of conduct disentitling him or her to have the decree made "absolute, the right to intervene is confined to the Queen's "Proctor, *quaere*." I venture to doubt whether that headnote is a completely accurate reproduction of the effect of what is said in the judgment because Lindley L.J. says[3]: "The question "turns upon the 7th section of the Act of 1860. That section "provides that during the period there referred to any person "shall be at liberty to show cause why the decree nisi should not "be made absolute. Pausing there for a moment, let us consider "the meaning of 'any person.' It has been decided, and "properly, that 'any person' does not include the respondent. "The respondent has other means of applying to the court besides "availing himself of this intervention proceeding. 'Any person' "not only does not apply to the respondent, but it does not apply "to the respondent in disguise, that is to say, to any mere "nominee or puppet of his. That which he cannot do in his own "name he cannot do by anybody else, or by using anybody else's "name, but so far as I know 'any person' means anybody except "the respondent and somebody who is the respondent in disguise, "his agent, or his puppet." The suggestion was, of course, that in this particular case the uncle of the respondent, who had sought to intervene, was for that purpose an agent or puppet of the respondent. Baggallay L.J. said[4]: "In this case I am "bound to say I have arrived at the conclusion to which the "President of the court came, that there are now brought before "the court facts more or less material as regards the ultimate "decision of this case, that had not been brought before the court "at the time when the decree nisi was made. It appears to me, "therefore, that, assuming Mr. Walker to be an independent "intervener, not an intervener acting in collusion or by arrange-"ment with either of the parties to the suit, there were "circumstances which would justify the intervention. The "question then is whether he may be regarded as a person inde-"pendently intervening. I am not sure that it is necessary for "the court to be satisfied that the party is not acting in collusion "with either of the parties to the cause. I am rather disposed "to think that the court should allow the intervention unless it is "satisfied that there is collusion between the party intervening "and one of the parties to the cause."

Now those words, as I understand them, could only have been used by Baggallay L.J. on the basis that he accepted the view which is stated with so much emphasis by Lindley L.J. on this matter. I do not think any real assistance is to be gathered from the judgment of Cotton L.J. He took the view which he expressed in the sentence[5]: "the Queen's Proctor certainly can

[3] 9 P.D. 218, 228–229.
[4] Ibid. 224.
[5] Ibid. 226.

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"intervene on the ground of subsequent adultery, and we have "not to consider the question whether any other person can." So, one derives, I think, no assistance on this matter from the judgment of Cotton L.J. But I am in no doubt as to what view was taken by Lindley L.J., and, I think, also by Baggallay L.J.

Harries v. *Harries and Gregory* [6] was a case in which the co-respondent entered an appearance in a divorce suit but did not defend the proceedings. A decree nisi was obtained by the petitioner, and it was held by the court that the co-respondent could not afterwards intervene to show cause why the decree should not be made absolute. This was a decision of Gorell Barnes J. It was contended on behalf of the co-respondent, who asked for leave to intervene: (1) that the decree nisi was obtained contrary to the justice of the case by withholding material facts from the court. (2) That the petitioner had been guilty of unreasonable delay in presenting his petition, and (3) that the court had been misled and deceived at the hearing of the case by the false evidence of the petitioner. Gorell Barnes J. said [7]: "A respondent cannot intervene to prevent a decree nisi being "made absolute. The authorities are clear upon the point. In "the case of *Stoate* v. *Stoate* [8] it was held that 'a respondent "'against whom a decree nisi for dissolution of marriage has been "'pronounced cannot show cause against the decree being made "'absolute under section 7 [of the Act of 1860].' And a co-"respondent is in no better position than a respondent. It seems "to me a novel idea that a co-respondent should seek to inter-"vene as a member of the public. . . . The decree nisi must be "made absolute. . . ."

In more recent times the matter has been canvassed in the case of *W.* v. *W.*,[9] in which Bucknill J. considered the three authorities to which I have already referred. It was a case in which a woman named in a wife's petition as having committed adultery with the husband was served with the petition but she did not enter an appearance or apply for leave to intervene. The husband appeared but filed no answer. A decree nisi was pronounced. Six months elapsed and the petitioner took no step to make the decree absolute. Eight months after decree nisi the woman named appeared as a member of the public to show cause against the decree being made absolute. On a summons to strike out her appearance raising the question whether she came within the description of "any person" within section 183 (2) of the Supreme Court of Judicature (Consolidation) Act, 1925 (which repealed and replaced section 7 of the Matrimonial Causes Act, 1860), it was held that the mere service of the petition upon the woman named did not make her a party to the suit. But in the course of discussing her position, Bucknill J. went through the authorities to which

[6] (1902) 86 L.T. 262.
[7] Ibid.
[8] 2 Sw. & Tr. 384.
[9] [1936] P. 187; 52 T.L.R. 639; [1936] 2 All E.R. 1112.

I have referred. He had before him in argument *Sloggett* v. *Sloggett*,[10] where Lord Merrivale P. said[11]: "Contrary to "the ordinary course of trial of civil proceedings the Court "is required not only to deal with issues raised by the parties, "but with independent matters deemed by the legislature "fit to be dealt with, in respect of a larger interest, that "namely of the community." The judgment of Bucknill J. proceeds on the basis that the woman named who sought to intervene was not a party to the suit, but it is quite plain that his decision must have been otherwise if he had come to the conclusion that she was a party. He says[12]: "If the pro-"ceedings for divorce were a personal matter between the parties "alone, it would, I think, be unjust and contrary to public "policy, which requires that litigation if possible should not "be unduly prolonged, that a woman in the position of the "intervener in this case should be allowed to intervene after "the hearing of the case. Her opportunity to apply for leave "to intervene arose as soon as the petition was brought to her "notice, and she should have acted then. But the legislature "by the various statutes that have been passed has clearly "indicated that proceedings for divorce are not merely a per-"sonal matter but are also a matter of public interest. Section "178 of the Judicature Act, 1925, states that on a petition "for divorce it becomes the duty of the Court to satisfy itself "so far as it reasonably can as to the facts alleged." And then, the learned judge quotes the words of Lord Merrivale P. in *Sloggett* v. *Sloggett*, to which I have already referred, and goes on[13]: "It is a matter of public interest that a decree "for dissolution of marriage should not be obtained on evidence "which has been manufactured so as to indicate adultery where "none in fact has taken place." So, the emphasis is there placed on the function of what is now section 12 (2) of the Matrimonial Causes Act, 1950, in protecting the public interest by seeing that a marriage is not dissolved contrary to the justice of the case or as a result of collusion or any of the other matters there specified.

On the other hand, it has been argued by Miss Bisschop, on behalf of the husband, that the view that has been put forward on behalf of the Queen's Proctor and the wife on the authorities to which I have referred, cannot be reconciled with the established practice of the court which permits a summons by consent to be issued and acted upon for the purpose of rescinding a decree nisi in a case where there has been a reconciliation between the parties. In that connection, my attention has been drawn to the case of *Miller* v. *Miller*.[14] That was a motion by a respondent husband for rescission of a decree of judicial separation, which was pronounced in favour of the

[10] [1928] P. 148; 44 T.L.R. 394.
[11] [1928] P. 148, 153.
[12] [1936] P. 187, 197.
[13] Ibid. 198.
[14] (1928) 72 S.J. 205.

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wife in June, 1926, on the ground of cruelty. Subsequent to the decree the parties had come together again and there had been a reconciliation, and counsel in moving the court for the rescission of the decree of judicial separation said that he knew of no precedent for such an application being made at the instance of a respondent against whom a decree was made although there was authority for such an application being made on motion on behalf of a petitioner, that there was nothing in the Supreme Court of Judicature (Consolidation) Act, 1925, which afforded definite guidance or direction in such a case, but he submitted that the court could make the order, provided the petitioner concurred. Lord Merrivale P. said [15]: "If there is "no precedent it is time there was. The Ecclesiastical Courts "dealt with such matters according to common sense. I do "not see that it matters which of the parties makes the appli-"cation, provided they both concur in it. I make the order."

It is to be observed first of all that that was an application by consent to rescind the decree on the ground of a reconciliation. Section 12 (2) in the present case contemplates a person showing cause why a decree should not be made absolute. The present summons is in form a summons to rescind the decree. No point has been taken that the form of this summons disqualifies it in itself from being considered as a possible proceeding under section 12 (2), but it is nevertheless a summons in form to rescind the decree and no application has been made to amend it. The case of *Saunders* v. *Saunders* [16] is another case where, following upon reconciliation, a decree nisi of divorce was, by consent, rescinded on the respondent's application.

I personally find no difficulty in distinguishing the court's practice of permitting decrees to be rescinded by consent, where there has been a reconciliation between the parties, from a contested application such as the present one which it is sought to base on section 12 (2). It has been suggested to me, and it may be right, that the courts' practice of permitting applications to rescind a decree by consent following upon a reconciliation subsequent to the decree nisi is really based on the inherent jurisdiction of the court to prevent what might otherwise become an abuse of the court's process. I do not know, and I express no view about that. It may well be that the inherent jurisdiction of the court to keep its records clean is in fact the basis on which, in practice, consent applications following a reconciliation are made. But, in my view, the existence of that practice does not afford a valid foundation for the argument that a respondent can, in a contested application to rescind a decree nisi, bring himself within the meaning and intention of section 12 (2).

The authorities to which I have referred, and the reasoning on which they are based lead me to the conclusion that the

[15] 72 S.J. 205.

[16] The Times, Dec. 8, 1936.

court has no jurisdiction to entertain this summons. I expressed doubt in the course of the hearing whether in any event such an application should not be on motion rather than by summons, but no point was taken on that.

I am satisfied, having considered this matter, that I must dismiss this summons.

Order accordingly.

Solicitors: *Seifert, Sedley & Co.; Lewis & Lewis & Gisborne & Co.; The Queen's Proctor.*

E. J.

[COURT OF CRIMINAL APPEAL.]

* PRACTICE DIRECTION (SENTENCE).

C. C. A.
1959
April 13.
Lord Parker C.J., Donovan and Salmon JJ.

Criminal Law—Sentence—Consecutive sentences—Subsequent sentence—Form.

LORD PARKER C.J. The court's attention has been drawn to a difficulty which sometimes arises when a sentence is expressed to begin "at the expiration of the term of imprisonment you are "now serving," or words to the same effect. If, as sometimes happens, the prisoner is already subject to two or more consecutive terms of imprisonment the effect of such a formula is that the new sentence will begin at the expiration of the term he is *then* serving, which may be the first of two consecutive terms. This will often not be the intention of the court giving the new sentence.

It is suggested that the simplest course would be to use some such formula as "consecutive to the total period of imprisonment "to which you are already subject." The only exception to the use of such a formula would be if the intention was that the new sentence should be concurrent with one of the previous sentences.

It has been arranged that prison governors should, in appropriate cases, add to the list of previous convictions supplied to the court a footnote indicating that the prisoner is already subject to consecutive sentences, and giving details of them.

E. M. W.

[PROBATE, ETC., DIVISION.]

1959
April 7.

Lord Merriman P.

* FILMER *v.* FILMER.

PRACTICE NOTE.

Husband and Wife—Practice—Discretion statement—Evidence, as—Contents inadmissible until put in evidence by party concerned—Matrimonial Causes Rules, 1957 (*S.I.* 1957, *No.* 619 (*L.* 4)), *r.* 28 (5).

LORD MERRIMAN P., referring to paragraph 5 of rule 28 of the Matrimonial Causes Rules, 1957,[1] directed attention to the fact that that rule only permitted a discretion statement to be put in evidence in open court by the party who had made it; it did not permit counsel appearing for a party who had lodged a discretion statement to furnish it as evidence of the adultery therein admitted without putting his client in the witness-box to give evidence on oath as to the contents.

[His Lordship accordingly refused to admit as evidence in support of a wife's charge of adultery in divorce proceedings the discretion statement lodged by the husband which was tendered by counsel for the verification by the wife of the husband's signature thereto.]

J. B. G.

[1] Matrimonial Causes Rules, 1957, r. 28: "(5) Neither the fact that a "discretion statement has been lodged "or that such notice as aforesaid "[i.e. as to allegations in a discre- "tion statement which are not refer- "able to any specific allegation in "the pleadings] has been given nor "the contents of the discretion state- "ment or notice shall be given as "evidence against the party lodging "or giving the same in any matri- "monial cause or matter except when "that party has put the discretion "statement or notice or the contents "thereof in evidence in open court."

[HOUSE OF LORDS.]

H. L. (E.)†

1959
April 9.

* G. L. BAKER LTD. . . . . PETITIONER;

AND

MEDWAY BUILDING AND SUPPLIES LTD. . RESPONDENT.

PETITION for leave to appeal to the House of Lords from the decision of the Court of Appeal in *G. L. Baker Ltd.* v. *Medway Building and Supplies Ltd.*[1]

The Appeal Committee dismissed the petition.

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† *Present*: LORD REID, LORD TUCKER and LORD DENNING.

[1] [1958] 1 W.L.R. 1216; [1958] 3 All E.R. 540.

[PROBATE, ETC., DIVISION.]

* LAMBIE *v.* LAMBIE.

1959
Feb. 16.

Lord Merriman P. and Stevenson J.

PRACTICE NOTE.

Husband and Wife—Justices—Application to Divisional Court for rehearing—Transcript to be submitted to Divisional Court—Matrimonial Causes Rules, 1957 (*S.I.* 1957, *No.* 619 (*L.* 4)), *r.* 36 (1).

The Divisional Court (Lord Merriman P. and Stevenson J.) directed attention to the laxity which had crept in on applications for a rehearing under rule 36 (1) of the Matrimonial Causes Rules, 1957, in failing to provide the court with transcripts of the proceedings in the court below.

LORD MERRIMAN P. said that, unless otherwise ordered, a transcript should be made available to the Divisional Court in all such cases, including all legal aid cases.

J. B. G.

[PROBATE, ETC., DIVISION.]

* WOODARD *v.* WOODARD AND CURD.

1958
June 27.

1959
Feb. 2, 3, 4.

Sachs J.

Husband and Wife—Adultery—Co-respondent—Position of—Duty of court to investigate charge of adultery—Petitioner's freedom to apply or not for costs.

At the hearing of a husband's suit, undefended by the wife, for divorce on the ground of her adultery with the co-respondent, counsel for the husband and the co-respondent respectively invited the court to dismiss the co-respondent from the suit, but without making an order for costs in his favour, on the basis that such matters were on an inter partes footing between the husband and the co-respondent, and that the court should therefore accede to such an invitation whether or not it considered that the adultery alleged against the co-respondent had been proved:—

Held, where a charge of adultery comes before the court, there is a duty upon it, in the public interest, to inquire into the facts and to pronounce upon them according to the evidence. There is also a duty upon counsel and solicitors acting for a spouse making a charge of adultery fairly and frankly to present the reasonably available evidence to enable the court to come to a proper decision.

Costs, on the other hand, are strictly an inter partes matter, on which the court is not called upon to interfere unless an application is made to it. This principle is not affected by a party being legally assisted.

Dictum of Lord Birkenhead L.C. in *Rutherford* v. *Richardson* [1923] A.C. 1, 8; 39 T.L.R. 42 applied.

Dictum of Atkin L.J. in *Rutherford* v. *Rutherford* [1922] P. 144, 158; 38 T.L.R. 353; *Edwards* v. *Edwards* [1958] P. 235; [1958] 2 W.L.R. 956; [1958] 3 All E.R. 179 considered.

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Undefended Petition by husband for divorce on the ground of the wife's adultery with the co-respondent. At the original hearing counsel for the husband, before calling evidence in support of the petition, indicated that he would invite the court to accede to any application which might be made at the conclusion of the evidence to dismiss the co-respondent from the suit. Counsel for the co-respondent then informed the court that in the event of the co-respondent being dismissed from the suit, no application for costs would be made on his behalf. The husband was an assisted person.

The evidence of the husband proved, as against the wife, that she had borne a child which could not have been his, and an oral confession to the effect that she had committed adultery with a Mr. Curd. The husband also gave evidence that he had personally approached Curd, with whom he was acquainted, and accused him of being the father of the child the wife was then carrying, but that Curd, although very agitated, neither admitted nor denied the accusation although he admitted meeting the wife at a dance. On the husband's behalf there was called an inquiry agent who proved a written confession by the wife to the same effect as the oral confession she had made to the husband. The inquiry agent went on to give evidence relating to an interview on December 9, 1956, between himself and a man identified to him by the wife as Curd. The effect of that evidence, which was accepted by the court as true, so far as it could reach a conclusion without hearing cross-examination of the co-respondent, which was reserved, was as follows: first, that the inquiry agent only identified Curd by what the wife had told him and what he, the man in question, had himself said; secondly, that no attempt had been made to obtain any better identification of the man interviewed by the inquiry agent; thirdly, that subject to the question of identification, and to anything that might emerge on cross-examination, the inquiry agent had given evidence which clearly provided a prima facie case against Curd, who had also admitted that he knew the respondent to be a married woman; and lastly, that if there were a gap in the chain of identification of the man interviewed on December 9, 1956, it could easily have been bridged and no explanation had been offered to the court as to why it was not bridged or why it was not proposed to take steps to bridge it.

After counsel for the husband had closed his case, he submitted that the correct course for the court to take was to dismiss the co-respondent from the suit, on the grounds that he had not adduced sufficient evidence to identify the man seen by the inquiry agent as the co-respondent and that the evidence was insufficient to justify a submission that the co-respondent should be found guilty of adultery. He further submitted that if he invited the court to dismiss the co-respondent from the suit it was for the court to act on that invitation without going further into the question, on the basis that such matters arising as they

did between the husband and the co-respondent were on an inter partes footing. Counsel for the co-respondent stated that he would not be asking for costs against the husband.

His Lordship, who was satisfied that there had been no collusion, pronounced a decree nisi and called for the assistance of the Queen's Proctor in argument upon the matters relating to the co-respondent's position, and suggested that the Law Society might wish to be represented.

Colin Sleeman for the husband.

R. Graham Dow for the co-respondent, who was represented at the first hearing only.

Colin Duncan for the Queen's Proctor.

A. H. Ormerod for the Law Society as amicus curiae.

The following cases were cited in argument in addition to those referred to in the judgment: *Spicer* v. *Spicer* (*Ryan intervening*) [1]; *Gilbert* v. *Gilbert and Abdon* (*Adams intervening*).[2]

SACHS J. referred to the evidence at the first hearing and said that it was clear from the statements made by counsel that neither counsel for the husband nor the co-respondent intended to seek an order for costs against the other. His Lordship continued: I was satisfied, taking the evidence of the husband and of the inquiry agent as a whole, that there was no collusion, and I am glad to say that Mr. Colin Duncan has informed me that the Queen's Proctor, after having made all due inquiries, has no reason to doubt the accuracy of that conclusion.

In those circumstances it seemed proper to grant the husband a decree but to leave all other matters, including all questions relating to the co-respondent's position, to be dealt with later. In that behalf I asked for the assistance of the Queen's Proctor, and in addition I suggested to the Law Society that they might wish to be represented by counsel acting as amicus curiae to help the court on points that might arise as to costs, in which they would clearly have at least an indirect interest. Both the Queen's Proctor and the Law Society were represented at the adjourned hearing by counsel, each of whom has placed me in his debt by his helpful address.

In these circumstances there has arisen in a particularly acute form the problem, that is nowadays not infrequent in undefended cases, where a husband seeks a decree against his wife on the ground of her adultery with a named co-respondent against whom evidence seems likely to be readily available, but the husband's counsel so conducts the case that no evidence, or very little evidence, is called that is admissible against the co-respondent, while adducing to the court a confession of adultery by the wife with the co-respondent which has every

[1] [1954] 1 W.L.R. 1051; [1954] 3 All E.R. 208.

[2] [1958] P. 131.

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appearance of being true. The problem is of relatively recent origin, because for a long time the courts were reluctant to grant a decree simply on a respondent's confession; nowadays, however, many decrees are granted on such confessions where it appears that there is difficulty in obtaining other evidence.

The problem is a practical one of some consequence, because the form of decree varies according to whether or not evidence admissible against the co-respondent proves adultery with him. If it does so prove adultery, the name of the adulterer normally appears in the decree; if not, the name does not so appear and he is entitled as of right to be dismissed from the suit, moreover, he is usually entitled, if he so claims, to be granted costs. Upon such a dismissal he emerges, so far as the court record is concerned, without any blemish on his character; and the court produces that set of findings which the layman finds a little incongruous, to the effect that the spouse has committed adultery with the co-respondent, but that the co-respondent has not committed adultery with the spouse.

In the present case the co-respondent wishes to benefit by thus being dismissed from the suit, and by his name not appearing in the decree as being an adulterer. What, then, is the function of the court in the class of case to which I have referred—assuming that the wife's confession appears to establish convincingly the facts contained in it, that is to say, her own adultery, and where it also appears right to reject any inference of collusion? In effect, the question is, on the one hand: should the court treat the question of the co-respondent's position as a matter that is simply one inter partes as between him and the husband, and thus one on which the court should in all circumstances unquestionably accede to whatever line the husband adopts when he seeks not to have a finding recorded against the co-respondent? Or, on the other hand: has the court some function either as regards inquiring into the facts touching the co-respondent or as to recording a proper verdict on the evidence as to whether the co-respondent has been guilty of the adultery charged?

If the answer is in the affirmative to the first question and in the negative to the second, so that the court has neither of the functions there posed, two things seem to follow. Firstly, that providing a husband can avoid a finding of collusion, he may at his unfettered will have the choice of either protecting the co-respondent from being recorded as an adulterer on the files of the court, or of causing him thus to be recorded; and that choice would be exercisable however plain and however readily available might be the evidence in his possession admissible against the adulterer. Secondly, whatever evidence emerged in the course of the trial, if the matter were purely one inter partes, the husband could ask that there be no finding of the court against the co-respondent, and then the latter would be dismissed the suit.

One cannot escape observing that such a state of affairs would

open the way to undesirable pressures being brought to bear behind the scenes throughout the whole course of proceedings by one party against another; and further, that it might well lead the court to the position of becoming a party to what in certain cases might appear as an attempt to shield the co-respondent. In addition, it would make available yet another door to collusion of rather an undetectable nature.

For my part, I have no doubt as to the answers to the above questions. So long as a charge of adultery is being pursued before the court by a husband it is wrong to regard any matter affecting the position of a co-respondent as being merely one that is inter partes between those two. It has been made abundantly clear for a very long time that on any charge of adultery that comes before the court there is a duty on the court's part, in the public interest, to inquire into the facts and to pronounce upon them according to the evidence. It is clear also that solicitors and counsel appearing for a petitioner have a duty to the court fairly and frankly to present the reasonably available evidence to enable the court to come to a proper decision. By "reasonably "available evidence" I refer, as did Mr. Duncan in his address, not merely to those matters which actually appear in the proofs of counsel, but I include at any rate those matters which would normally appear in such proofs if a solicitor had used reasonable diligence in relation to evidence which could readily and without undue expense be obtained to prove the case in the normal way against the co-respondent as well as against the wife.

(I pause to make it clear that nothing I have said in relation to the matters before me is intended to affect the conduct of those causes where either the husband is obviously unable to gather evidence admissible against the co-respondent, or where some genuine and reasonable explanation is tendered to the court as to why evidence against the co-respondent is not being presented. I am concerned with the case where proper evidence against the co-respondent was readily available.)

I reject the submission as to the existence of certain cramping limitations to the above general rule as to the functions of the court and the duties of those who represent petitioners. The first such suggested limitation was that, where the court is investigating a charge of adultery against a wife and a co-respondent, there are really two issues, one as between the husband and the wife, and one as between the petitioner and the co-respondent, and that the duty of the court to inquire into the facts is limited to the former. As soon as Mr. Duncan put forward that point for consideration it struck me as being an unreal way of looking at the matter; no less unreal than would be a submission that adultery was a unilateral and not a bilateral act. Later, when Mr. Ormerod, as amicus curiae, cited *Rutherford* v. *Rutherford* (*Richardson intervening*),[1] my initial view was fortified by that

[1] [1922] P. 144; 38 T.L.R. 353.

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part of the judgment of Atkin L.J. which includes a passage seemingly intended to apply generally and not merely to the particular and unusual facts of the case there under consideration. The passage is this [2]: "It is perfectly true that in accordance "with our rules of evidence an issue may be proved as against "one party and not proved against the other, because evidence "may be admissible against the one and not against the other. "It appears to me that that difference of proof does not amount "to raising two issues, but only to two different degrees of proof "of the same issue." That seems of itself to be authority against any proposition that the court's functions as regards inquiring into the facts is limited to one part only of the single plea, that "the respondent has committed adultery with A B." To my mind, it is none the less a single plea even though there are two parties entitled to contest it.

The second limitation suggested and rejected was that the functions and duties in question did not apply other than to cases where collusion or some similar matter was under investigation. It is true that in the majority of cases it may well be that the court is initially put upon inquiry by facts which, as here, appear in the first instance to point towards collusion. But clearly that does not mean that the functions and duties in question relate only to collusion or the like plea.

In argument, moreover, it was suggested that there might be a distinction between the position in a case in which the husband, having deliberately elected to call no evidence against the co-respondent, succeeded in so presenting his case that no such evidence emerged, and the position in a case where the evidence in fact adduced implicated the co-respondent but where the husband still wished him to be dismissed from the suit. In principle it does not seem to me that there is anything in the Matrimonial Causes Act, 1950, or in the above-mentioned and well-known general rule as to the duties of practitioners, to support such a distinction. The only difference is that, when once cogent evidence admissible against the co-respondent has emerged, it becomes more obviously and completely untenable to argue that the relevant finding by the court is simply a matter inter partes between the husband and the co-respondent, and that the court can be properly asked to make a pronouncement or order contrary to its view of the evidence as adduced.

If authority were needed as to the court's duty to act upon the evidence as opposed to the mere wishes of a party, it is inherent in the speech of Lord Birkenhead L.C. in *Rutherford* v. *Richardson*,[3] when the Court of Appeal's decision in *Rutherford* v. *Rutherford* (*Richardson intervening*) [4] was affirmed in the House of Lords. In that speech Lord Birkenhead L.C. stated as regards the duty of the Court of Appeal [5]: "Its duty must be "to pronounce the right decree in the whole matrimonial cause,

[2] [1922] P. 144, 158.
[3] [1923] A.C. 1; 39 T.L.R. 42.
[4] [1922] P. 144.
[5] [1923] A.C. 1, 8.

"and not merely to limit its conclusion to the issue raised "between the parties who have been served with notice of the "appeal or have chosen to appear before it."

Having thus rejected the suggested limitations upon the functions and duties of the court and practitioners respectively, it follows that those functions and duties relate, as I have already indicated, at all relevant stages of a matrimonial cause, to every aspect of a charge of adultery. The court is concerned with ascertaining the true facts relating to the single issue as a whole and does not lend itself to any device intended to confine it without good reason to one part only of an issue. As a corollary, the court can of course use its powers to make such inquiry as seems fit in any particular case, such as the present one.

Next to be dealt with comes the question of applications for costs by the husband and co-respondent respectively. For in the present case it was a clear inference from the way in which it was conducted—and it has now been confirmed by Mr. Sleeman—that the husband and the co-respondent had before coming into court exchanged information that neither would ask for costs against the other. As regards costs, I agree with the submission made on behalf of the Queen's Proctor that matters of costs are strictly questions which arise inter partes and on which the court is not called upon to interfere if no application is made. It is true that when one finds the position to be the one which has occurred in this case, the court may be the more inclined to investigate questions of collusion; but so long as there is no collusion, parties are free to make or to refrain from making such applications for costs as they may desire. It has long been the practice of the court not to interfere in the matter; and, moreover, rule 4 (4) of the Matrimonial Causes Rules, 1957, in so far as it provides for giving notice of any claim for costs, appears to postulate that a petitioner has an option in the matter.

I now turn to the question whether any of the points so far under consideration are affected by the fact that the husband was legally aided. On this question I have had the assistance of submissions by both Mr. Duncan and Mr. Ormerod. I agree with their submissions. This is, indeed, another case in which, as in *Edwards* v. *Edwards*,[6] the fact that legal aid has been granted does not affect the powers or the duties of the court either as regards the granting or the withholding of a decree or (save as provided by section 2 (2) (*e*) of the Legal Aid and Advice Act, 1949) as to applications for costs; but, on the other hand, it does throw into prominence some of the special factors which in practice arise in this class of case. Thus, where a husband is legally aided, he is less inclined to ask for an order for costs against the co-respondent, and may also be less inclined to present the facts which would entitle him to such an order. But this is not a matter on which it is for the court to intervene as

[6] [1958] P. 235, 249; [1958] 2 W.L.R. 956; [1958] 3 All E.R. 179.

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between party and party contrary to the general practice in this class of case. On the other hand, it may be a matter for the Law Society to consider in relation to what directives they may choose to issue: for, as falls to be mentioned later in this judgment, their position has in practice been adversely affected by the course taken in these particular proceedings.

In the light of the above conclusions, I now turn back to the present case as it stood at the end of the original hearing. So far as the inquiry agent's evidence as to the December 9, 1956, interview is concerned, I do not consider that the man with whom the inquiry agent spoke had then been sufficiently identified as being the co-respondent. The proof in such matters is of the same degree as is required in a criminal trial. As regards the evidence given by the husband, it seems to me that the co-respondent was sufficiently identified and that both his silence and his statements in reply to the accusations levelled against him provided some evidence of his guilt. The principle as laid down in the well-known case of *Bessela* v. *Stern*[7] applies. Whether, however, that evidence was of sufficient weight, in all the circumstances of this particular case, to enable a court to hold against the co-respondent that his adultery was proved to the requisite degree is not a question which it is necessary for me to decide, in view of what has now transpired.

Yesterday, after the addresses of Mr. Colin Duncan and Mr. Ormerod had been completed, this cause took a somewhat unexpected turn. Counsel for the husband made it clear to me that he had advised at an early stage in the litigation that the man who spoke to the inquiry agent on December 9, 1956, should be identified at the hearing by appropriate evidence as being the co-respondent. He further stated, with the frankness that one always expects from a member of the Bar, that at the original hearing, evidence was, unknown to him, available in court for completing the chain of identification. The inquiry agent had, in fact, served the petition on the co-respondent and could by so stating in court have made it plain that it was the co-respondent to whom he had spoken on December 9, 1956. In those circumstances, counsel for the husband tendered the inquiry agent for the purpose of giving further evidence. This was taken de bene esse so that effect could be given to it if I came to the conclusion that the court's function of inquiring into facts was not limited in one or other of the ways to which I have referred to above. Having held that the court's functions are not so limited, I have now decided to treat this further evidence as having been properly received by the court in pursuance of its functions to inquire into the facts as a whole.

It remains only to consider the weight of that evidence. Mr Sleeman was not prepared to argue that once the identification was complete the inquiry agent's evidence did other than provide

[7] (1877) 2 C.P.D. 265.

a prima facie case against the co-respondent. To my mind, this testimony, taken in conjunction with that of the husband, raised a strong case against him, and one which ought to be acted upon. It follows that the finding must now be made against the co-respondent that he has committed adultery. I direct accordingly that his name be inserted in the appropriate place in the order granting the decree nisi.

I need hardly add that, had I come to the conclusion that the evidence of the husband had of itself sufficiently established the guilt of the co-respondent, it would, in my view, have been for the court, without recourse to the further evidence of the inquiry agent, to have made, at the original hearing, the appropriate finding against the co-respondent, despite any submission to the contrary.

I now turn to the question of costs. When the further evidence of the inquiry agent had been given yesterday, and it had been conceded that it raised a good prima facie case against the co-respondent, counsel for the husband applied for costs to be awarded against the co-respondent. In my view, however, once the prayer for costs in the petition had in effect been abandoned in open court on the occasion of the first hearing, it would not be proper to condemn the co-respondent in costs without his having first been given notice that such an application was going to be made at the adjourned hearing. No such notice has, in fact, been given to him.

The co-respondent has, perhaps wisely, chosen not to appear at this adjourned hearing, although he had the benefit of solicitors being on the record until January 13, 1959, and despite the fact that the usual proper steps were taken to acquaint him of the date of the adjourned hearing. But that does not enable a once-abandoned application for costs to be renewed without notice. It is, accordingly, for the court to reject that application, which would naturally have been acceded to but for its having been previously abandoned. The fact that the legal aid fund may thus be put at a disadvantage cannot, to my mind, affect the court's decision on this point.

That leaves only one further matter to mention, and that is the question of the costs of this adjourned hearing. Neither the Queen's Proctor nor the Law Society ask for costs; indeed, they are not in a position to do so. On the other hand, in view of the fact that this adjourned hearing appears, on the information now before the court, to have been due at any rate in part to the circumstances that readily available evidence was not placed within the knowledge of counsel, I cannot see how the petitioner's solicitors can properly expect to be paid their profit costs of the adjourned hearing. It follows that under the court's inherent jurisdiction I must, in the usual order for a taxation under the Third Schedule to the Legal Aid and Advice Act, 1949, make it clear that those costs are to be excluded. I do not, however, think that this is a case where it is necessary to make any other

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exceptional order in relation to costs, as, in my view, there has been no intentional disregard of the duties of legal practitioners.

Solicitors: *Bernard W. Main for Baily & Goff, Dartford; Kinch & Richardson; Queen's Proctor; Secretary, Law Society.*

J. B. G.

[CHANCERY DIVISION.]

1959
Feb. 20;
Mar. 20.

Vaisey J.

* *In re* OAKES' SETTLEMENT TRUSTS.

[1959 O. 127.]

Trust and Trustee—Variation of trusts—Act of 1958—*Practice—Application for approval of variation of trust—What statements required in applicant's affidavit—Reasons—Variation of Trusts Act,* 1958 (6 & 7 *Eliz.* 2, *c.* 53), *s.* 1 (1).

The power given to the court by section 1 (1) of the Variation of Trusts Act, 1958,[1] is a discretionary power and, therefore, where application is made for the approval by the court of a variation of a trust, the affidavit of the applicant should contain a statement of the reasons why the variation is desired. A bare statement that the variation is desired is insufficient.

ADJOURNED SUMMONS.

A settlor, Mrs. Helen Lucy Gallia (née Oakes), applied to the court for an order under section 1 of the Variation of Trusts Act, 1958, approving an arrangement varying the trusts of her marriage settlement, executed by her on July 13, 1930, under which she had a life interest in the income of the settled funds. On February 20, 1959, Vaisey J. adjourned the application for the settlor to file an affidavit explaining why she now asked that the trusts be varied.

Peter Oliver, for the settlor, read the affidavit.
G. B. H. Dillon for the trustees.

[1] Variation of Trusts Act, 1958, s. 1: "(1) When property, whether "real or personal, is held on trusts "arising, whether before or after the "passing of this Act, under any will, "settlement or other disposition, the "court may if it thinks fit by order "approve on behalf of—(*a*) any per-"son having, directly or indirectly, "an interest, whether vested or con-"tingent, under the trusts who by "reason of infancy or other incapa-"city is incapable of assenting . . . "(*c*) any person unborn . . . any "arrangement . . . varying or revok-"ing all or any of the trusts, or "enlarging the powers of the trustees "of managing or administering any "of the property subject to the "trusts: Provided that . . . the court "shall not approve an arrangement "on behalf of any person unless the "carrying out thereof would be for "the benefit of that person."

VAISEY J. Section 1 (1) of the Variation of Trusts Act, 1958, provides: "The court may if it thinks fit by order approve . . . "any arrangement . . . varying . . . the trusts. . . ." That is a discretionary power. In applications for the variation of trusts the court must not be asked to assume that what was done in the past was all wrong. The Act provides that the court "may if it "thinks fit" approve a variation, not that it must do so. People who wish to vary trusts should state briefly in an affidavit why they now wish to vary them. It is not enough simply to state that the applicant now desires that certain restrictions be removed. The reasons why it is desired that they be removed should be stated. In *In re Chapman's Settlement Trusts (No. 2)*,[1] it was obvious why it was desired that the trusts be varied: claims for duty were anticipated.

In this case I am satisfied that the applicant has reasonable grounds for asking the court to exercise its discretion and I will make the order.

Order accordingly.

Solicitors: *Iliffe, Sweet & Co.*

K. R. A. H.

[1] [1959] 1 W.L.R. 372; [1959] 2 All E.R. 47.

[CHANCERY DIVISION.]

* *In re* GREATER LONDON PROPERTIES LTD.'S LEASE. TAYLOR BROS. (GROCERS) LTD. *v.* COVENT GARDEN PROPERTIES CO. LTD.

1959
Mar. 11, 12.
Danckwerts J.

[1958 G. No. 1068.]

Landlord and Tenant—Assignment of lease or underletting—Consent—Not to be unreasonably withheld in case of "responsible assignee"—Proposed assignee subsidiary company—Consent subject to condition of guarantee by parent company—Large loan by parent company outstanding — Repayment on demand at any time — Whether "responsible assignee" — Whether refusal of consent unreasonable.

A lease of shop premises contained a covenant that the tenant should, not without consent of the landlords, assign the lease, "but "such consent shall not be unreasonably withheld in the case of "an assignment . . . to a respectable and responsible assignee . . ."

The landlords were willing to consent to an assignment to a subsidiary of a large and wealthy trading company, provided that the latter guaranteed the performance of the covenants under the lease. The landlords contended that as repayment of loans, amounting to some £225,000, made to the subsidiary respectively by the parent company and fellow subsidiaries could at any time be demanded by the parent company, with the consequent ruin of the subsidiary, the latter was not a "responsible assignee" within

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the meaning of the covenant. The subsidiary was, however, trading at a profit and the loans had been spent on the acquisition of fixed assets.

On a summons by the tenants asking for a declaration that the landlords' consent to the proposed assignment of the lease was unreasonable, and that they were, notwithstanding such refusal, entitled to assign it:—

Held, that the question whether an assignee was "responsible" was not an abstract question, but one which had to be related to the facts of the particular case, and on the facts in the present circumstances the parent company could have no interest but to preserve the subsidiary as part of its trading activities, and was therefore quite unlikely to demand repayment of the loan, which had not been dissipated but used to improve the position of the subsidiary. The landlords' refusal to consent to the assignment was, accordingly, unreasonable and the tenants were entitled to the declaration sought.

Willmott v. *London Road Car Co. Ltd.* [1910] 2 Ch. 525; 27 T.L.R. 4 applied.

Adjourned summons.

Taylor Bros. (Grocers) Ltd., tenants of a shop at No. 76, High Street, Yiewsley, in the County of Middlesex, under a lease dated February 15, 1938, by this summons asked for the following relief: 1. a declaration (a) that on the true construction of the lease and in the events which had happened, the refusal of the landlords, Covent Garden Properties Co. Ltd., to grant a licence to assign the lease to Coombe Bakery (Teddington) Ltd. was unreasonable, and, (b) that, notwithstanding such refusal, the tenants were, without any such licence from the landlords entitled to assign the lease to Combe Bakery (Teddington) Ltd.

The following statement of facts is taken from the judgment of Danckwerts J.: The lease of February 15, 1938, was made between the predecessors in title of the present landlords and tenants for a term of 35 years from September 29, 1937. The rent payable was £225 per annum, and the lease contained the usual repairing covenants, the tenant being liable for the rates.

The covenant against assignment—the material covenant in this summons—was in the following terms: "that the lessees "shall not nor will assign underlet or part with the possession "of the premsies hereby demised or any part thereof (save a "letting of the upper part for a term not exceeding three years "at a rack rent for which no consent or licence shall be necessary) "without the consent in writing of the lessors first had and "obtained but such consent shall not be unreasonably withheld "in the case of an assignment or underlease of the whole of "the premises hereby demised to a respectable and responsible "assignee or underlessee whose references shall have been first "submitted to the lessors for approval."

The proposed assignee was a company with a nominal capital of £50,000 and an issued share capital of £14,000, of which substantially the whole was held by Greater London Bakeries Ltd., whose capital was in turn wholly owned by Allied Bakeries

Ltd., the last company being a very large combine in this particular field of trade and very well known. Coombe Bakery (Teddington) Ltd. was in their substance a wholly owned subsidiary of Allied Bakeries Ltd., although there was an intermediate company.

References were duly submitted by the proposed assignee to the landlords and no point was raised in regard to them. When, however, application was made to the landlords on October 11, 1957, for their consent to the assignment, their solicitors wrote: "... we have now heard from our clients with their instructions regarding your clients' application for a licence to assign the above premises to The Coombe Bakery (Teddington) Ltd. Subject to the licence being in a form approved by the clients and to Allied Bakeries Ltd., guaranteeing the payment of the rent and performance of the covenants and conditions contained in the lease, our clients are prepared to consent to the proposed assignment."

On December 18, 1957, the tenants' solicitors wrote: "... we have now obtained some further information from our clients. For the year ended March 30, 1957, the profits of the company before tax were £33,407, after tax £24,186, leaving, after deduction of a loss carried forward, £16,471 net profits after tax. If necessary, evidence could be produced of even greater profit in the course of the current year."

The position of the company as shown in the balance sheet and profit and loss account down to March 30, 1957, was as follows: The balance sheet showed very considerable fixed assets, the current assets amounting to £52,493. As against that "current liabilities" were stated to amount to £257,153, which included as "due to holding company, £215,028," and some £7,000 "due to fellow subsidiary companies." The profit and loss account, subject to certain items of £31,312, showed a surplus on operating for the year in question which was a surplus obtained after discharging all their liabilities, including rents payable by the company which had a number of shops. Certain rents receivable and sundry revenue were £4,359; proceeds of consequential loss insurance claim £42,357; surplus on fire insurance claim, £1,030, and income from investment £35; making a total of £79,093. From this was deducted the sum of £41,448 for depreciation and certain sums for auditors' remuneration, directors' emoluments and a pension, reducing the net balance of profits to £33,407. Income tax on profits for the period, less an adjustment, was then deducted, which reduced the net figure after taxation to £24,186. A loss brought forward from the previous period further reduced the sum to £16,471; and the sum of £4,878 written off in respect of goodwill resulted in the amount of £11,593 which was paid over to the shareholders in the form of a dividend.

The tenants were not willing to agree to the guarantee demanded by the landlords from their parent company, Allied

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Bakeries Ltd., and the present summons, asking for the relief set out above, was issued on June 13, 1958.

Heathcote-Williams Q.C. and *J. W. Wellwood* for the tenants.
Lionel Blundell for the landlords.

The following cases, other than those referred to in the judgment, were cited in argument: *Young* v. *Ashley Gardens Properties Ltd.*[1]; *Bates* v. *Donaldson*[2]; *Shanley* v. *Ward*[3]; *In re Gibbs & Houlder Bros. & Co. Ltd.'s Lease*[4]; *Ideal Film Renting Co. Ltd.* v. *Nielsen*[5]; *Parker* v. *Boggon*[6]; *Town Investments Ltd.'s Underlease*[7]; *Lee* v. *K. Carter Ltd.*[8]; *Vienit* v. *Williams*[9]; *Evans* v. *Levy.*[10]

DANCKWERTS J., having stated the facts, continued: The tenants were unwilling to agree to a guarantee by Allied Bakeries Ltd. as they considered it was unjustified and they felt, rightly or wrongly, a question of principle was involved; because if the landlords of all subsidiaries were entitled to ask for guarantees by the holding company, they conceived that it could produce much extra complication.

The information available to the landlords at the date of the application and down to the issue of this summons was first, such information as they could obtain from an examination of the company's particulars in the Companies' Register; secondly, a balance sheet and profit and loss account down to March 30, 1957, and, thirdly, the information supplied in the letter of December 18, 1957, in which, it should be observed, they stated that even greater profits had been obtained in the course of the current year (which ended on March 30, 1958) and they offered, if necessary, to produce evidence of that fact.

There is no suggestion that Coombe Bakery Ltd. is not a respectable company, but the landlords' contention is that it is not a "responsible" company. A great many cases have, quite properly, been cited to me, but, I have no doubt as to the principles applicable in a case of this kind, and it will be sufficient for my purposes if I refer to some statements in the judgments of the Court of Appeal in *Willmott* v. *London Road Car Co. Ltd.** The point in that case was whether a company could be a respectable and responsible person and the court held, of course, that it could.

Lord Cozens-Hardy M.R. said†: "Suppose the words had "simply been that consent should not be withheld in the case of

[1] [1903] 2 Ch. 112.
[2] [1896] 2 Q.B. 241; 12 T.L.R. 485.
[3] (1913) 29 T.L.R. 714.
[4] [1925] 1 Ch. 198, 575; 41 T.L.R. 487.
[5] [1921] 1 Ch. 575.
[6] [1947] K.B. 346; 63 T.L.R. 4; [1947] 1 All E.R. 46.
[7] [1954] Ch. 301; [1954] 2 W.L.R. 355; [1954] 1 All E.R. 585.
[8] [1949] 1 K.B. 85; 64 T.L.R. 536; [1948] 2 All E.R. 690.
[9] [1958] 1 W.L.R. 1267; [1958] 3 All E.R. 621.
[10] [1910] 1 Ch. 452.
* [1910] 2 Ch. 525; 27 T.L.R. 4.
† [1910] 2 Ch. 531.

"a responsible person, I cannot bring myself to doubt that in "that case a company which was admitted to be responsible in "the sense of being able to discharge all obligations in respect "of rent and covenants under the lease would be a responsible "person within the meaning of that covenant, and, therefore, a "person with respect to whom consent could not be refused."

Fletcher Moulton L.J. said [3]: "I cannot see why the words "'respectable' and 'responsible' should not have been inserted "in order to exclude corporations that did not carry on business "in a reputable manner or were not equal to the burdens of the "covenants and therefore not responsible, and not with any "intention to exclude corporations generally."

The matter was very succinctly put by Farwell L.J., who said [4]: "The responsibility relates to financial capacity, and it "has hardly been argued, and I think it is not arguable, that that "is not as applicable to a corporation or limited company as "to an individual."

It is plain from those passages that the responsibility in question is not an abstract one, but is related to the particular circumstances of the case and, above all, to the amount of the obligations which the company is going to undertake; that is to say, the amount of the rent and the burden of the covenants and other obligations contained in the lease. It is not a theoretical matter. Mr. Heathcote-Williams is perfectly correct in saying that the matter must be approached having regard to the circumstances, and in a practical and realistic manner. That is, in my judgment, the way in which the matter has to be approached and decided, and not with regard to what I would, without any offensive intent, describe as a point which might be taken by a pedantic chartered accountant.

[His Lordship considered the balance sheet and profit and loss account of the proposed assignee, as set out above, and continued:] It was contended on behalf of the landlords that, in view of this company's financial position, it was not a "respon-"sible assignee" in its own right. One of the criticisms was the payment over of the whole of the profit in dividends to the shareholders, Allied Bakeries Ltd., and the other was the current liability of £215,000-odd which the holding company, to whom it is owed, could demand at any time. It is indeed admitted it is possible for the holding company to demand payment of that sum and wreck the company.

The first observation with regard to that criticism is that this subsidiary company could obviously discharge its obligations, although it might have to resort to raising money on the security of its fixed assets, which, as shown on the balance sheet, much exceed in value the total of the obligations. Further, it has been explained to me that this method of financing the company (which was admitted on behalf of the landlords) was largely for

[3] [1910] 2 Ch. 531, 536. [4] Ibid. 537.

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the purpose of acquiring fixed assets, and the money has not been squandered away in consumable things which are no longer represented as an asset; and that it is a convenient method of financing the company because it avoids the payment of interest on mortgages or debentures or, indeed, on bank loans. It is therefore an economical method which this association of companies apparently regards as more satisfactory than any other way of financing. Theoretically, of course, it is possible that the demand might be made. A demand might, at any moment, be lawfully made to this subsidiary for payment of the whole of this large sum but, since the company is a subsidiary of the creditor, as a practical matter, it seems to me quite out of the question that any such demand would be made. The holding company, Allied Bakeries Ltd., can have no interest but to keep this company going as part of its trading activities, and it is quite unthinkable that as a practical matter the subsidiary company is going to be brought to an end suddenly by a demand for this debt. Such a position seems to me quite unrealistic, although, no doubt, a perfectly clear point can be argued on the basis of the accounts by treating the figures as a theoretical exercise without any regard to probable facts.

Actually, this method of financing the company and its ownership by Allied Bakeries Ltd., so far from being a source of weakness to the proposed assignee, are a source of strength; because if the matter is looked at in a practical way the company has all the resources of Allied Bakeries and its prestige behind it and is able, therefore, to trade satisfactorily in a manner in which, probably, it would not otherwise be able to do. Control is, in one sense, in the hands of Allied Bakeries Ltd. because, apart from the ownership of the shares, three of the directors (including one who is very well-known in this field of trade) are directors of Allied Bakeries Ltd. There are two working directors, but the majority can obviously secure the will of Allied Bakeries Ltd., who have, therefore, control additional to that which they can exercise through ownership of the shares. If one considers the financial situation of this company in a practical and reasonable manner, having regard to the fact that it is trading at a profit, and that its profits are applied after the discharge of all current outgoings such as rent, it seems to me absurd to pretend that this company is not a reliable tenant in respect of the discharge of a rent of £225 a year and the performance of the covenants in the lease. It would no doubt be very nice for the landlords to have the additional support for their rent of a guarantee from Allied Bakeries Ltd., but, in my view, they are not entitled so to demand. Accordingly, the landlords in refusing their consent except upon the condition of a guarantee have refused their consent unreasonably, and the tenant company are entitled to disregard that requirement in the lease.

They are entitled to a declaration that the landlords' refusal

of consent was unreasonable and that, notwithstanding such refusal, they are entitled to assign the tenancy.

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Declaration accordingly.

Solicitors: *Claude Barker & Partners; Simmons & Simmons.*

I. G. R. M.

[QUEEN'S BENCH DIVISION.]

* SEABROOK *v.* BRITISH TRANSPORT COMMISSION.

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Practice and Procedure — Discovery — Privilege — Documents made in contemplation of litigation—Reports of accident made by defendants' servants—Reports made as part of long standing system and in course of statutory duty — Whether such reports privileged — Whether submission to solicitor must be dominant or substantial purpose of reports—R.S.C., Ord. 31, *r.* 1.

S. was killed by a train passing between two railway stations along the main line on which he was working while employed by the British Transport Commission. In an action brought by his widow under the Fatal Accidents Acts, 1846 to 1908, and the Law Reform (Miscellaneous Provisions) Act, 1934, against the commission for negligence and breach of statutory duty as his employers, she sought production on discovery of accident returns and reports relating to S.'s accident. In accordance with long standing practice, these documents were required by and forwarded to the district engineer for submission through the chief civil engineer at Euston Station to the general manager, who was under a statutory duty to make a report of the accident to the Minister of Transport. One of the purposes for which these documents were made was their submission to the commission's solicitor, in the event of a claim for damages being made, to enable him to advise the commission on their liability and to conduct their defence in any action that might result.

The commission claimed privilege from production of these documents as documents made after litigation was contemplated and in view of such litigation wholly or mainly for the purpose of enabling their solicitor to conduct their defence in any legal proceedings.

The widow contended that the documents were not sufficiently identified to be entitled to any privilege without inspection by the court, and that to be privileged their dominant or substantial purpose must be their submission to the commission's solicitor.

On appeal from an order of the master refusing to order their production:—

Held, dismissing the appeal, (1) that the description of the documents as "correspondence between and reports made by the "defendants' officers and servants" was a sufficient identification.

(2) That it was sufficient, for documents to be privileged, if one

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[Reported by NORMAN PRIMOST, Esq., Barrister-at-Law.]

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of their purposes was their submission to a solicitor for use in anticipated litigation, even if that purpose was not the dominant or substantial one for their existence.

Birmingham and Midland Motor Omnibus Co. v. *London and North Western Railway* [1913] 3 K.B. 850 applied.

Appeal from Master Clayton.

The plaintiff, Grace Annie Seabrook, was the widow and administratrix of William Cyril Seabrook, who was killed in an accident during the course of his employment when he was engaged in drilling holes in the running rail and check rail of the cross-over from the sidings to the main line between West End Lane Station and Finchley Road Station. Whilst so employed, he was run into, knocked down and killed by a train passing along the line.

The plaintiff brought this action for damages under the Fatal Accidents Acts, 1846 to 1908, and for the benefit of the deceased's estate under the Law Reform (Miscellaneous Provisions) Act, 1934, against the defendants, the British Transport Commission, alleging negligence and breach of statutory duty as the deceased man's employers. The defendants in their defence put these matters in issue.

On the summons for directions an order was made for a list of documents. In the second part of the first schedule of the defendants' list there was this description: "Correspondence between "and reports made by the defendants' officers and servants." In paragraph 2 of their list the defendants said: "The defendants "object to produce the documents in the second part of the First "Schedule on the grounds that they are privileged from produc- "tion either from their nature as disclosed or as being documents "which came into existence and were made by the defendants or "their officers after this litigation was in contemplation, and in "view of such litigation wholly or mainly for the purpose of "obtaining for and furnishing to the solicitor of the defendants "evidence and information as to the evidence, which will be "obtained or otherwise for the use of the said solicitor to enable "him to conduct the defence in this action and to advise the "defendants."

By an affidavit dated February 4, 1958, Mr. Leslie Sayers, the assistant general manager of the London Midland Region of the commission, formally claimed privilege on behalf of the commission in respect of the documents for which it had been claimed in the list of documents. To clarify the exact position of these documents, he swore a further affidavit dated April 25, 1958, in which, after deposing to his authority and employment he stated: ". . . 4. After the amalgamation of the railway companies in "1924, instructions were issued that when accidents occurred to "members of the railway companys staff, accident returns were "to be filled up by the local officer in charge, who would forward "copies to the district officer, the divisional officer and the head "of department. These returns were (inter alia) for the purposes

"of considering claims for payment of workmen's compensation "under the Workmen's Compensation Acts, 1897–1925, or antici- "pated common law claims, when workmen elected not to take "workmen's compensation, and for submission if necessary to "the company's solicitors to enable them to advise as to legal "liability or conduct any legal proceedings which may arise. "5. This system of reporting accidents and the instructions to the "relevant staff to submit reports and returns of accidents for the "purposes aforesaid has continued since 1924 and exists today. "6. The general manager of the London Midland Region is "required by statute to report to the Minister of Transport details "of all accidents to the commission's servants, where such "servants as a result thereof are off duty for more than three "days, reports have also to be made to the Inspector of Factories, "where the servants are injured on premises to which the pro- "visions of the Factories Act apply. 7. Such reports and the "statements of witnesses to such accidents to servants of the "commission are made for the purposes mentioned in paragraph 6 "of this affidavit and, also, for the purpose of being submitted to "the commission's solicitor as material upon which such solicitor "can advise the commission upon its legal liability, and for the "purposes of conducting on behalf of the commission any pro- "ceedings arising out of such accidents. It is commonly antici- "pated by the commission that where a servant of the commission "suffers personal injury or death at work, a claim for damages "will be made, and that proceedings will ensue if liability is "repudiated. 8. The documents in this action, namely, the "correspondence between and reports made by the defendants' "officers and servants, for which the defendants have claimed "privilege in the First Schedule, Part II, of the affidavit sworn "to by me on February 4, 1958, came into existence by reason of "the fact that the appropriate officer, in this case the district "engineer, in accordance with long-standing practice was required "to and did so call for such reports and statements for submission "through the chief civil engineer at Euston to the general "manager in order that, amongst other things, in the event of a "claim for damages being received, they could be passed to the "commission's solicitor to enable him to advise the commission "on their legal liability and, if necessary, to conduct their defence "to these proceedings. 9. This action is the result of a fatal "accident at work to the husband of the plaintiff and it was "anticipated that a claim for damages might ensue."

Production of these documents being refused by the master, the plaintiff appealed to the judge in chambers, who adjourned the case into open court.

W. G. Wingate for the plaintiff.

Marven Everett Q.C. and *Tudor Evans* for the defendants, the British Transport Commission.

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HAVERS J. stated the facts and continued: Mr. Wingate, who has conducted this appeal on behalf of the plaintiff, has contended, first of all, that these documents are not sufficiently identified. When one looks, as one must, at the list of documents and the original affidavit, and then at the further affidavit of Mr. Sayers, Mr. Wingate contends that the description which is given there is not sufficient to identify these documents with any degree of precision. Alternatively, he says that any claim for privilege is so dubious that I ought to look at the documents myself in order to see whether the claim has been properly established. It is now clear from the authorities that, although one party may ask the judge to look at the documents, there is no compulsion upon him to do so if he is satisfied that they are sufficiently identified and that the claim is made in respect of documents which come within the privilege principle, and that the affidavit is in proper form. On the other hand, it is entirely a matter for the judge to exercise his discretion upon the facts of any particular case.

I did at one time think that the description which was given in this case of those documents was rather meagre, and that, perhaps, it might be that on looking at all the documents together I should be more certain as to what their actual identity was. But I have had the advantage, through the industry of both counsel, of examining a considerable number of authorities and seeing the description which has been given in the affidavits in those particular cases. I have come to the conclusion, bearing in mind the description in those cases which satisfied the court, and looking at the facts of those cases, that these documents are sufficiently identified. It is clear that there is never any necessity for the deponent to the affidavit to set out in detail each item with its date; it is sufficient to put them into their proper class of document, provided that the description is sufficient to identify them with reasonable certainty. I think this description does sufficiently identify the documents, which are prima facie within the privileged area.

The remaining contention of Mr. Wingate was that this affidavit does not establish a claim for privilege with regard to these documents. His contention is that all that the defendants have done is to show that they have had for many years a well-established system of inquiry and report in respect of accidents, that this system comes into operation whenever an accident occurs, and is irrespective of the question whether or not a claim is made. He invites me to say, looking at the affidavit in this case, that all that the defendants have shown is that these documents came into existence as the result of and in the course of this well-established system, and that there might well have been a subsidiary purpose for which the defendants would use the reports and statements, if and when litigation was anticipated or threatened; but he contends that it is not enough for the defendants to show that the documents merely came into existence

as a result of the system, with the addition that they might be usefully utilised if and when litigation was threatened. He contends that the defendants, in order to establish privilege, must show that the documents came into existence for the dominant or, at any rate, the substantial purpose of being placed before the solicitor for the purpose of advising or conducting the possible defence of the defendants against any claim which might arise.

The practice with regard to discovery and the production and inspection of documents, and the objections which can be made on the ground of privilege, are really a reconciliation between two principles. The first principle is that professional legal advice and assistance is at times essential in the interests of justice, and without the assistance of some protection it could not be obtained safely or effectually. Accordingly, the principle has become established that confidential communications passing between a person and his legal advisers are absolutely privileged. On the other hand, there is another principle of law that it is in the interests of justice that all material and relevant documents should be before the court to enable it to arrive at a true and proper conclusion, and also in order that the parties should not be taken by surprise. The practice which has developed is, as I have said, a reconciliation between those two principles.

Mr. Wingate has called my attention to a number of authorities going back as far as 1869. On looking at these authorities, I think the earlier ones do seem to lay greater emphasis upon the principle that it is highly desirable that all material and relevant documents should be at the disposal of the court. That trend seems to have continued until about 1913, and then the trend from that date onwards appears to be rather in the opposite direction, and to have laid greater emphasis upon the claim for privilege, provided that the deponent to the affidavit can bona fide claim that the documents came into existence for the purpose of being laid before his solicitor and in anticipation of litigation.

The earliest case to which I have been referred is *Woolley* v. *North London Railway Co.*[1] It is interesting to see that the documents in that case are very similar to the documents for which inspection is sought in the present case. The headnote of the report reads: "In an action against a railway company for a "personal injury sustained by a passenger on their railway, the "court allowed inspection of the following documents: 1. A report "of one of the defendants' inspectors to the general manager, as "to the accident in respect of which the action was brought. 2. A "report of the guard of the train to which the accident happened. "3. A report of the defendants' locomotive superintendent, to "the general manager, as to the accident, upon the ground that "they were reports or communications made by agents of the "company in the ordinary course of their duty, for the purpose "of conveying to the company information upon the subject, "and were not opinions obtained confidentially with a view to

[1] (1869) L.R. 4 C.P. 602.

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"litigation; and this without reference to whether they were made "before or after the commencement of litigation"—and then there is a reference to some further documents to which I need not refer. Bovill C.J. said, in his judgment [2]: "It is extremely "difficult to lay down in precise terms a rule which will meet "every case that may be brought under our consideration; but "I will endeavour so to deal with the matter as to make this "decision some guide for future applications of the like kind." Then he referred to the particular documents, and he continued [3]: "I am of opinion that where a report is made by an "officer of a company to the manager for the purpose of convey-"ing information to him upon the subject to which it relates, it "is not privileged, whether made before or after litigation has "been commenced or threatened, and whether it contains matters "of fact or of mere opinion: and that applies to all three of these "reports. If opinions are obtained confidentially with a view to "litigation, they are privileged on the ground laid down by the "Court of Queen's Bench in *Chartered Bank of India* v. *Rich.*" [4] Then a little further down he said [5]: "I think, therefore, we may "safely lay it down that, where information and opinions are "obtained with a view to litigation, they are to be considered as "privileged. It is not necessary to go through all the cases which "have been decided in the equity courts upon this subject. It "is clear there are many cases where it has been held that "information, which may have been obtained in the ordinary "course in apprehension of litigation, must be disclosed." Byles J. said [6]: "I entirely concur in the general principles "stated by my Lord. The result is that, where reports of this "kind are made in the course and as part of the duty of the "officer, whether an action is pending or not, and whether it "contains facts or opinions, they must be produced; but, if they "are made confidentially and for the purpose of litigation, and "not in the ordinary course of the duty of the person making "them, they are privileged." Montague Smith J. agreed with these judgments, and there follows the judgment of Brett J., who said [7]: "The question before us is, what is the general rule "which is to regulate our discretion as to granting inspection of "a certain class of documents, viz., reports and communications "made by agents or servants, in the ordinary course of their "duty, to their principals. It seems to me that the rule may be "thus stated: Any report or communication by an agent or "servant to his master or principal, which is made for the pur-"pose of assisting him to establish his claim or defence in an "existing litigation, is privileged, and will not be ordered to be "produced; but, if the report or communication is made in the "ordinary course of the duty of the agent or servant, whether "before or after the commencement of the litigation, it is not

[2] L.R. 4 C.P. 602, 608.
[3] Ibid. 609.
[4] (1863) 4 B. & S. 73.
[5] L.R. 4 C.P. 602, 609.
[6] Ibid. 611.
[7] Ibid. 613.

"privileged, and must be produced. The time at which the "communication is made is not the material matter, nor whether "it is confidential, nor whether it contains facts or opinions. The "question is whether it is made in the ordinary course of the "duty of the servant or agent, or for the instruction of the master "or principal as to whether he should maintain or resist litiga-"tion. The documents numbered 1, 2 and 3 in this case are "reports made by officers or servants of the company to the "manager in the ordinary course of their duty; therefore, whether "litigation had begun or was contemplated or not, they must be "produced." That case is relied upon very strongly by Mr. Wingate, and he suggests that in this case these reports were made in the ordinary course of this system which the railway company had established.

The next case to which my attention was directed was *Parr* v. *London, Chatham and Dover Railway Co.*[8] The headnote reads: "In an action against a railway company for injuries to a passen-"ger from an accident, the court made an order for the plaintiffs "to have liberty to inspect reports as to the accident made by "servants and officers of the company to their employers shortly "after it took place, although the defendants stated in their "affidavit that the document contained statements made by "various persons for the purpose of giving the defendants such "information as would enable them to judge whether or not "they could be made responsible to the plaintiffs or any other "persons by reason of the matters stated therein, and were "made in consequence of a custom requiring such statements "to be made in all cases of any accident causing or being likely "to cause personal injury to any passenger, and that the same "constituted the instructions to the defendants' advisers as to "defending the action, and could not be produced to the plain-"tiffs without disclosing the grounds of their defence." Kelly C.B. said when dealing with the documents[9]: "They consist "of statements of the engine driver, a guard, porter, a signal-"man and a station master, and two reports made by the "station master to the defendants' superintendent and general "manager, and a statement by the guard of another com-"pany's train for the information of the defendants. The "affidavit states the grounds on which the defendants object "to the production of these documents, but what is stated "amounts to little more than this, that they contain matters "which may affect the defence, and that is insufficient. It is "impossible that inspection could ever be allowed if we were "to hold that this was a good ground of privilege. I do not "say that particular parts of these documents might not be "privileged from inspection, but these exceptional parts, if such "there be, have not been pointed out in the affidavit. I am "clearly of opinion that the rule should be made absolute." Channell B., who agreed, added[10]: "The principle is one and

[8] (1871) 24 L.T. 558. [9] Ibid. 559. [10] Ibid. 559.

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"the same throughout. In the present case, the plaintiffs have "obtained the ordinary rule, calling upon the defendants to "state what documents they have in their possession relating "to the matters in dispute in the action, and whether they "object to their production, and if so, on what grounds. As "to certain specified documents, an objection is offered on the "ground that they contain statements, etc., made 'for the pur-"'pose of giving to the directors and managers of the defendants "'such information as would enable them to judge whether or "'not they should be made responsible to the plaintiffs or any "'other persons by reason of the matters stated therein, and "'made in consequence of a custom or practice requiring such "'statements to be made in all cases of any accident causing "'or being likely to cause personal injury to any passenger, and "'that they constituted the instructions to the defendants' "'advisers as to defending the action, and could not be pro-"'duced to the plaintiffs without disclosing the grounds of the "'defence.' But this is very different from the principles on "which such reports have been held to be privileged. We must "do the defendants the justice to suppose that the documents "comprise a reference to some statement made to the company "by strangers or others which the officers of the company might "or might not have incorporated in their report. But the "defendants have not limited their objection to such part of "the statements as were made by various persons, not officers "of the company, but have objected wholesale. We must "therefore take it that these were not reports made in conse-"quence of any special application by the company." It will be noticed that the effect of the affidavit was merely to say that the documents in question contained "matters which may affect "the defence," and that was held by the court not to be sufficient.

The next case to be cited was *Fenner* v. *London and South Eastern Railway Co.*[11] The headnote states: "Communications "between a person and his solicitor or counsel, or any person "acting as their deputy, with a view to obtain legal assistance "and advice, are privileged and the court cannot compel them "to be disclosed. Communications with any other person, al-"though taking place after litigation is contemplated, are not "necessarily privileged; but it is in the discretion of the court "to compel or abstain from compelling their production. If "such communications are substantially rough notes for the "case to be laid before the legal adviser, or to supply the proof "to be inserted in the brief, the discretion of the court ought "as a general rule to be to refuse inspection. Where they "fall short of this it should, as a general rule, be granted." I do not think I need go into that decision in further detail, in view of the later decisions upon inspection.

[11] (1872) L.R. 7 Q.B. 767.

In 1876 there was *Anderson* v. *Bank of British Columbia.*[12] That is a decision which I think does fairly represent the high water mark to which the courts have gone in favour of those who seek to obtain inspection of documents of this character. The headnote reads: "A bill was filed against a banking company to compel them to replace a sum of money alleged to have been improperly transferred by them from one account to another at their branch bank in Oregon. Before the bill was filed, but after litigation had become highly probable, the manager in London telegraphed to the manager in Oregon to send full particulars of the whole transaction. On an application by the plaintiffs in the suit for production of documents, the bank resisted production of the letter sent in answer, as being privileged. Held (affirming the decision of Jessell M.R.), that the letter was not privileged, and must be produced." Lord Jessell M.R. said[13]: "Now, there is not a syllable there which shows that any communication, direct or indirect, expressed or implied, was made to the agent to the effect that his communication was to be a confidential one for the purpose of being submitted to the professional man—that is, the solicitor—for advice. If it had been so, I apprehend that it would have been protected upon principles well understood. If you ask your agent to draw out a case for the opinion of your solicitor, or for the opinion of your counsel, that is a confidential communication made for that purpose. Here there is nothing of the sort. Nor is it suggested or alleged that, without being requested, the agent did make the communication with the object of its being laid before the solicitor for advice. He therefore did not make it as a confidential communication in any other sense than that in which every communication from an agent to his principal, or from a sub-agent to the chief agent of the principal, is confidential. Every such communication, no doubt, is in a sense confidential, but not in the sense in which we call a communication to a professional man confidential. This communication, then, as regards the sender, was not made or sent for the purpose of being laid before a professional adviser, nor was there any intimation of such purpose sent by the person who required the communication. All that you have got is a statement of the person who sent the telegram as to the state of his feelings at a particular time, which is not sufficient for the purpose of the point I have to determine. I therefore feel no difficulty whatever in saying that this clearly was not a confidential communication made within the rule which protects confidential communications from discovery as regards the other side. . . . The object and meaning of the rule is this: That as, by reason of the complexity and difficulty of our law, litigation can only be properly conducted by professional men, it is absolutely necessary that a man, in order to prosecute his

[12] (1876) 2 Ch.D. 644.

[13] Ibid. 648.

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"rights or to defend himself from an improper claim, should "have recourse to the assistance of professional lawyers, and "it being so absolutely necessary, it is equally necessary, to "use a vulgar phrase, that he should be able to make a clean "breast of it to the gentleman whom he consults with a view "to the prosecution of his claim, or the substantiating his "defence against the claim of others; that he should be able "to place unrestricted and unbounded confidence in the profes-"sional agent, and that the communications he so makes to him "should be kept secret, unless with his consent (for it is his "privilege, and not the privilege of the confidential agent), that "he should be enabled properly to conduct his litigation. That "is the meaning of the rule." The matter then went to the Court of Appeal, and James L.J. said,[14] after dealing with the practice in Chancery: "As to the cases at law, it is not necessary "to go through them, as they seem to have been brought, "apparently now at least, very much into conformity with the "principle of the cases in equity, and it is needless to go through "them for the purpose of seeing whether in each of them, if "the same state of circumstances came before the court, the "same decision would be arrived at. Looking at the dicta and "the judgments cited, they might require to be fully considered. "but I think they may possibly all be based upon this, which "is an intelligible principle, that as you have no right to see "your adversary's brief, you have no right to see that which "comes into existence merely as the materials for the brief. "But that seems to me to have no application whatever to a "communication between a principal and his agent in the matter "of the agency, giving information of the facts and circum-"stances of the very transaction which is the subject-matter of "the litigation. Such a communication is, above all others, the "very thing which ought to be produced." Mellish L.J. stated the law thus[15]: "To be privileged, it must come within one "of two classes of privilege, namely, that a man is not bound "to disclose confidential communications made between him and "his solicitor, directly, or through an agent who is to com-"municate them to the solicitor; or, secondly, that he is not "bound to communicate evidence which he has obtained for "the purpose of litigation."

Then on the other side of the line, in 1878 there was *Southwark and Vauxhall Water Co.* v. *Quick*,[16] the headnote of which reads: "Documents prepared in relation to an intended action, "whether at the request of a solicitor or not, and whether "ultimately laid before the solicitor or not, are privileged if "prepared with a bona fide intention of being laid before him "for the purpose of taking his advice; and an inspection of such "documents cannot be enforced." Cockburn C.J. said[17]: "The "relation between the client and his professional legal adviser

[14] 2 Ch.D. 644, 656.
[15] Ibid. 658.
[16] (1878) 3 Q.B.D. 315.
[17] Ibid. 317.

"is a confidential relation of such a nature that to my mind "the maintenance of the privilege with regard to it is essential "to the interests of justice and the well-being of society. Though "it might occasionally happen that the removal of the privilege "would assist in the elucidation of matters in dispute, I do not "think that this occasional benefit justifies us in incurring the "attendant risk." Mellish L.J. agreed, and Brett L.J. put it in this way [18]: "Now reading that passage"—that is the passage to which I have already referred in the judgment of Mellish L.J. in *Anderson* v. *Bank of British Columbia* [19]—"with what was "said by Mellish L.J. in the course of the argument, it is clear "that if a party seeks to inspect a document which comes into "existence merely as the materials for the brief, or that which "is equivalent to the brief, then the document cannot be seen, "for it is privileged. It has been urged that the materials, or "the information obtained for the brief, should have been ob-"tained 'at the instance' or 'at the request' of the solicitor; "but I think it is enough if they come into existence merely "as the materials for the brief, and I think that phrase may be "enlarged into 'merely for the purpose of being laid before the "'solicitor for his advice or for his consideration.'" Those words "merely for the purpose of being laid before the solicitor "for his advice" were referred to by Scrutton L.J. in another case to which I will refer later. Brett L.J. went on [20]: "If "this is the correct rule, the only question is whether the "affidavits in the present case bring the documents under dis-"cussion within that rule. . . . The object for which the notes "were taken, and the transcript made, was that they might be "furnished to the solicitor for his advice. If that is so, then "it stands on the same footing as the others, except that it "was not sent to the solicitor; that cannot make any difference. "If at the time the document is brought into existence its "purpose is that it should be laid before the solicitor, if that "purpose is true and clearly appears upon the affidavit, it is "not taken out of the privilege merely because afterwards it "was not laid before the solicitor." Cotton L.J. said [21]: "That, "I think, is the true principle, that if a document comes into "existence for the purpose of being communicated to the solicitor "with the object of obtaining his advice, or of enabling him "either to prosecute or defend an action, then it is privileged, "because it is something done for the purpose of serving as "a communication between the client and the solicitor."

The next case cited to me was *Collins* v. *London General Omnibus Co.* [22] The headnote reads: "An accident, upon which "the plaintiff subsequently founded an action for negligence "against the defendants, occurred about 6 o'clock in the evening, "and on the following day a written report thereof was made "by the defendants' servant at a time when no action had been

[18] 3 Q.B.D. 315, 320.
[19] 2 Ch.D. 644, 658.
[20] 3 Q.B.D. 315, 320.
[21] Ibid. 322.
[22] (1894) 68 L.T. 831.

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"commenced or even threatened. Privilege from inspection was "claimed for this report, on the ground that it had been made or "had come into existence solely for the use of the defendant com-"pany's solicitor, in anticipation of this action, to advise the "company in reference thereto. Held, that though there was at "the time of the making of the report no action begun or even "threatened, the circumstances of the case were such as to raise a "high probability, amounting almost to a certainty, that litigation "would ensue and that the report, having come into existence, "in view of litigation reasonably apprehended, for the purpose "of being laid before the defendants' professional adviser, was "privileged from inspection by the other side." Wills J., when dealing with the affidavit, said [23]—and I merely pick out the salient words from his judgment: "There was [abundant evi-"dence] in the present case to indicate that this document came "into existence for no purpose other than for the use of the "solicitor, in anticipation of this action." Then there is this other passage: "If the circumstances were such that no reason-"able person could doubt that an action would follow, they "might lay the foundation of privilege for such a document as "this." Charles J. agreed and said [24]: "The affidavit says "that the report was made 'for no purpose other than for the "'use of the defendants' solicitor in anticipation of litigation,' "and that is a most important allegation."

In *Jones* v. *Great Central Railway Co.*[25] the rule stated by Lord Jessel in *Anderson* v. *Bank of British Columbia*[26] was cited with approval. The headnote reads: "A member of a trade union "who had been dismissed by his employers furnished the trade "union authorities, as required by the rules, with information "in writing to enable the authorities to decide whether he was "entitled to bring an action for wrongful dismissal at the "expense of the union and with the assistance of their solicitor. "The information comprised the evidence available in support of "the action and the names of the witnesses. The union autho-"rities sanctioned an action brought by the member, with their "solicitor acting as solicitor for the plaintiff. Upon a summons "for discovery taken out by the defendants, held that the letters "containing the information did not fall within the established "rule as to the privilege between solicitor and client and must "be produced." Lord Loreburn L.C. said [27]: "My Lords, the "rule on this branch of the law of discovery is that, in order "to enable a man to confide unreservedly in his legal adviser, "all communications between solicitor and client are protected. "The rule is expressed by James L.J. in the case of *Anderson* "v. *Bank of British Columbia*[28] as follows. He says 'The "'old rule'—meaning the ancient and venerable rule which

[23] 68 L.T. 831, 832.
[24] Ibid. 833.
[25] [1910] A.C. 4.
[26] 2 Ch.D. 644.
[27] [1910] A.C. 4, 5.
[28] 2 Ch.D. 644.

"still exists—'was that every document in the possession of a "'party must be produced if it was material or relevant to the "'cause, unless it was covered by some established privilege. "'It was established that communications which had passed "'directly or indirectly between a man and his solicitor were "'privileged, and the privilege extended no further.' Both "client and solicitor may act through an agent, and therefore "communications to or through the agent are within the privi-"lege. But if communications are made to him as a person "who has himself to consider and act upon them, then the "privilege is gone, and this is because the principle which "protects communications only between solicitor and client no "longer applies. Here documents are in existence relating to "the matter in dispute which were communicated to someone "who was not a solicitor, nor the mere alter ego of a solicitor. "Disclosure is constantly required of letters between partners "or between a firm and its agents. It is rare in litigation when "communications are confined to letters passing between solicitor "and client. And every large concern, whether a railway company "or a trade union or whatever it be that must needs con-"duct its business by correspondence is amenable to the same "rule, a rule in itself wholesome, for it favours the placing "before a court of justice of all material circumstances that "may lead to a just decision." So as late as 1910 the principle established in *Anderson's* case [28] was being cited with approval by the House of Lords.

Then there came a case to which great importance is attached by both parties: namely, *Birmingham & Midland Motor Omnibus Co. Ltd.* v. *London & North Western Railway Co.*[29] In that case the judge in chambers did actually inspect the documents, and the affidavit contained this passage: "The documents "came into existence and were made after this litigation was "in contemplation and in view of such litigation for the purpose "of obtaining for and furnishing to the solicitor of the defendant "company evidence and information as to the evidence which "could be obtained and otherwise for the use of the said solicitor "to enable him to conduct the defence in this action and to "advise the defendants." That is language very similar to, although not identical with, the language used in the affidavit in this case. The headnote states: "Held, first, that the judge "at chambers and the Court of Appeal were entitled under "Ord. 31, rule 19A (2), to inspect the documents for the "purpose of deciding on the validity of the claim of privilege. ". . . It is not necessary that the affidavit should state that "the information was obtained 'solely' or 'merely' or 'pri-"'marily' for the solicitor, if it was obtained for the solicitor "in the sense of being procured as materials upon which pro-"fessional advice should be taken in proceedings pending, or "threatened, or anticipated."

[28] 2 Ch.D. 644.

[29] [1913] 3 K.B. 850.

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This case is of considerable importance when applied to the facts of the present case, because it is contended by the defendants that the documents in question were obtained for two purposes, one of which was for the purpose of their being placed before their solicitor in order to take his professional advice in view of "proceedings pending, or threatened, or anticipated." Vaughan Williams L.J.[30] said that he had read the judgments of Buckley and Hamilton L.JJ. and agreed with the result of both judgments. All three of the Lords Justices agreed in the result, but Vaughan Williams L.J. said[31]: "Dealing with the "details I would like to say I rather prefer the way in which "Buckley L.J. has put his judgment to that in which Hamilton "L.J. has put his, but I entirely agree with the result." Then Buckley L.J. said[32]: "An affidavit of documents is sworn testi-"mony which stands in a position which is in certain respects "unique. The opposite party cannot cross-examine upon it and "cannot read a contentious affidavit to contradict it. He is "entitled to ask the court to look at the affidavit and all the "documents produced under the affidavit, and from those mate-"rials to reach the conclusion that the affidavit does not disclose "all that it ought to disclose." Then he went on to consider what can be done by way of obtaining a further affidavit of documents, and he said[33]: "The question for determination "here is I think whether the documents in question fall within "the principle of *Anderson* v. *Bank of British Columbia*[34] or "within that of *Southwark and Vauxhall Water Co.* v. *Quick*,"[35] and he goes on: "The language in which the affidavit in the "present case is framed is, in my opinion, such as to bring "the case outside *Anderson* v. *Bank of British Columbia*[36] and "within *Southwark and Vauxhall Water Co.* v. *Quick*.[37] It is "not I think necessary"—and I think this is an important passage in his judgment—"that the affidavit should state that "the information was obtained solely or merely or primarily for "the solicitor, if it was obtained for the solicitor, in the sense "of being procured as materials upon which professional advice "should be taken in proceedings pending, or threatened, or "anticipated. If it was obtained for the solicitor, as above "stated, it is none the less protected because the party who has "obtained it intended if he could to settle the matter without "resort to a solicitor at all." Hamilton L.J., although he concurred in the result, put his judgment in a slightly different form. He said[38]: "It has been argued for the respondents "that the claim of privilege is bad in form, because, when "stating that the documents came into existence for the purpose "of being submitted to the defendants' legal advisers, it does "not say that they did so 'primarily' or 'substantially' or

[30] [1913] 3 K.B. 850, 855.
[31] Ibid. 855.
[32] Ibid. 855.
[33] Ibid. 856.
[34] 2 Ch.D. 644.
[35] 3 Q.B.D. 315.
[36] 2 Ch.D. 644.
[37] 3 Q.B.D. 315.
[38] [1913] 3 K.B. 850, 859.

"'specially.' It is not contended that the affidavit must state "that they did so 'solely.' The contention in reply that 'for "'the purpose' means in itself as a matter of construction that "such purpose is the principal if not the only purpose is, I "think, unsound. The affidavit as sworn in my opinion makes "the purpose of submission to the solicitor equally one of many "purposes, and is consistent with that purpose being the least "important and the most unusual of them all. It is then argued "by the appellants that even so the claim is good in form, but "upon this argument every document that ever comes into "existence in the ordinary course of business would be "effectually covered by the claim. The larger the business "and the better its organisation the more necessary it is that "written records should be regularly made of every detail and "every occurrence, common and uncommon. In a sense not "altogether illusory every one of these records, from the office "boy's postage book to the chief cashier's ledger, comes into "existence for the purpose, if peradventure there should be "litigation or fear of it, of putting the legal advisers in a "position to advise fully and to conduct the case successfully, "though in nine hundred and ninety-nine cases out of a thousand "no such use of the entries will ever be made. To hold such "documents privileged merely because it can be shown of them, "not untruthfully, that the principal, who made them part of "the regular course of business and of the duties of his sub-"ordinates, foresaw and had in mind their utility in case of "litigation, feared, threatened, or commenced, would in my "opinion be unsound in principle and disastrous in practice." Mr. Wingate relies very strongly upon that passage. Hamilton L.J. went on to say[39]: "I think it is a dangerous proposition "that any particular formula must as such be conclusive even "against the evidence of the scheduled documents themselves. "The clause of the affidavit is a hybrid, made up by combining "a variety of phrases which have passed muster in decided "cases. It is dangerous to rely on these artificial creations. "Claiming privilege in an affidavit of documents is not like "pronouncing a spell, which, once uttered, makes all the docu-"ments taboo. The draftsman should draw each affidavit with "reference to the actual facts of the case and bearing them in "mind. The selection of well-tried formulae from a precedent "book only leads to that inconsiderate swearing which is the "bane of the practice as to discovery. The only authority cited "to us for the proposition that the formula need not contain "the statement that submission to the solicitor was the primary "or the substantial purpose with which the document was "brought into existence, and may even negative it, is *London "and Tilbury Railway Co.* v. *Kirk & Randall*,[40] a decision which, "if correctly reported, I think is wrong." Then there was one further passage to which my attention was directed, where

[39] [1913] 3 K.B. 850, 860.

[40] 28 S.J. 688.

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Hamilton L.J. said[41]: "Hence I should not have been disposed "to interfere with the order which Bucknill J. in his discretion "made as to particular documents, but on examining them I "think he has proceeded on a wrong principle. He has drawn "his distinguishing line by the date at which the defendants "first received a letter of claim from the plaintiffs, a test which, "though often unexceptionable, and particularly so in mercan-"tile disputes, is inappropriate in such a case as the present, "where, as in *Collins* v. *London General Omnibus Co.*[42] at the "very moment when the accident occurs an ordinary employee "can anticipate that litigation in respect of it will probably "ensue."

The next case which has been cited was *Adam Steamship Co.* v. *London Assurance Corporation.*[43] Buckley L.J., having referred to the description of the documents in the affidavit, said[44]: "Now come the relevant words: 'Such cables and cor-"'respondence being with regard to the subject-matter of this "'litigation and expressing or for the purpose of obtaining advice "'or evidence to be used in it or for the purpose of leading to the "'obtaining of evidence to enable the defendants' solicitors "'properly to conduct the action on their behalf.' To my mind, "that is a complete and satisfactory claim of privilege based "upon the grounds recognised in *Birmingham and Midland Motor* "*Omnibus Co.* v. *London and North Western Railway Co.*[45] "The question to be answered is this: Is the judge satisfied that "the documents, which are sought to be protected, were bona "fide obtained for the solciitor, though not actually by him?" and that is the question to which I have to direct my mind. Kennedy L.J. agreed[46]: "It seems to me that the *Birmingham* "case[47] is directly in point."

The Hopper No. 13[48] was of some special interest because the party who was seeking to obtain the privilege had a regular system under which reports of collisions were received. The head-note reads: "In obedience to general instructions issued by the "Port of London Authority to the masters of their vessels that, "in the event of a casualty, the circumstances of the occurrence "were to be reported on a printed form supplied for the purpose, "the master of one of the authority's dredgers reported the "details of a collision with a sailing barge belonging to the plain-"tiffs. The form was headed 'Confidential report for the "'information of the Authority's solicitor . . .' The report was "sent to the master's superior officers, who passed it on to the "manager of the authority's insurance department, and he in "turn sent it to the solicitors who acted for the authority's under-"writers. The plaintiffs contended that the report must be

[41] [1913] 3 K.B. 850, 861.
[42] 68 L.T. 831.
[43] [1914] 3 K.B. 1256.
[44] Ibid. 1259.
[45] [1913] 3 K.B. 850.
[46] [1914] 3 K.B. 1256, 1260.
[47] [1913] 3 K.B. 850.
[48] [1925] P. 52; (1925) 41 T.L.R. 189.

"produced. Held, that there having been a collision it was to "be anticipated that there would be litigation, and that, although "the report went through various hands, it was made for the "purpose of being put before the solicitors; that the report there-"fore complied with the test laid down by Buckley L.J. in "*Birmingham and Midland Motor Omnibus Co.* v. *London and* "*North Western Railway Co.*[49] and was privileged from "production." It is not necessary for me to refer in detail to the system which was adopted in that case, but the decision is of special interest when dealing with the present case because the British Transport Commission have a system of inquiry and reports in cases of accidents to their employees. Sir Henry Duke P. referred in detail to the system adopted by the Port of London Authority, and said[50]: "I take those to be the facts; and it "seems to me that when the facts are ascertained the case clearly "comes within the principle which is enunciated by Buckley L.J. "in *Birmingham and Midland Motor Omnibus Co.* v. *London and* "*North Western Railway Co.*"[51] Then he referred to the test to which I have already drawn attention, namely, by asking those two questions: "Was the document obtained for the solicitors in "the sense of being procured as materials upon which profes-"sional advice should be given in proceedings pending, or "threatened or anticipated; was this report obtained for the "solicitors?"

In *City of Baroda*[52] Lord Merrivale P. said[53]: "The defen-"dants' prima facie obligation is to disclose those documents with "such particularity that an order for production and inspection "can be made. But the prima facie obligation which exists is "limited by a principle of law which does not need to be "expounded today, which is summed up in the judgment of "Cotton L.J. in the case of *Southwark and Vauxhall Water Co.* "v. *Quick*[54] in these words: 'That, I think, is the true principle, "'that if a document comes into existence for the purpose of "'being communicated to the solicitor with the object of obtain-"'ing his advice, or of enabling him either to prosecute or "'defend an action, then it is privileged.' That is the broad "principle upon which exemption from a prima facie right is "allowed in the case of communications with solicitors. The "matter has been expounded often at great length. . . . If I "could come to the conclusion that the affidavit here was a mere "routine mode of stating the conclusion upon which privilege is "properly founded, and if the correspondence provided support "for a conclusion to that effect, I might see my way to sustain "the decision of the learned deputy registrar. But I have read "the correspondence which has been produced. The documents "in question, naturally enough, have properly not been produced, "but the correspondence which has been produced seems to me

[49] [1913] 3 K.B. 850.
[50] [1925] P. 52, 57.
[51] [1913] 3 K.B. 850.
[52] (1926) 134 L.T. 576.
[53] Ibid. 577.
[54] 3 Q.B.D. 315, 322.

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"to show that the documents in question are not within the "privilege when it is properly understood. There are no docu-"ments which came into existence for the purpose of being "communicated to the solicitor with the object of obtaining his "advice or enabling him either to prosecute or defend an action, "and they do not come within the description of the documents "obtained for the solicitor."

Then came *Ogden* v. *London Electric Railway Co.*,[55] where Scrutton L.J. reviewed a great many of the authorities. It is interesting to observe that the claim for privilege was made in respect of: "Reports by servants of the defendants made for the "information of the company's solicitors only and in anticipation "of litigation." At the beginning of his judgment Scrutton L.J. said[56]: "The appeal in this case is in a class of case which I "have long thought had been laid to rest, because the law had "been settled, but apparently facts may arise which do not make "quite the same class of case as I had thought was settled." That was in 1933, and we are now in 1958 with this question still in dispute. Scrutton L.J. went on[57]: "Some trouble was caused "about 50 years ago by the judgment in *Anderson* v. *Bank of* "*British Columbia*,[58] in which a principal writing to his agent, "not a solicitor, said: 'Tell me what has happened?'—with no "statement at all by either side—'this is for the purpose of "'consulting my solicitors.' The facts are quite simple, but, "unfortunately, in the judgments, language was used which went "far beyond those facts. The difficulty occasioned by *Anderson* "v. *Bank of British Columbia*[58] was met by the judgments in "*Southwark and Vauxhall Water Co.* v. *Quick*,[59] which dealt "with the case where you are taking statements for the purpose "of submission to your solicitor, although no writ had yet been "issued. Even that case raised some difficulties, because while "Cotton L.J.'s judgment showed that it was not necessary that "the only purpose of your taking the statements should be for "submission to your solicitor, Lord Esher M.R., in at least three "sentences, said that the statements should be taken merely for "the purpose of submission to your solicitor. That difficulty was "resolved and settled in the case of *Birmingham and Midland* "*Motor Omnibus Co.* v. *London and North Western Railway* "*Co.*,[60] where Buckley L.J.—in whose judgment Vaughan "Williams L.J. concurred, preferring Buckley L.J.'s way of "expressing the matter to that of Hamilton L.J., who concurred "in the result—said[61]: 'It is not, I think, necessary that the "'affidavit should state that the information was obtained solely "'or merely or primarily for the solicitor, if it was obtained for "'the solicitor, in the sense of being procured as materials upon "'which professional advice should be taken in proceedings

[55] (1933) 49 T.L.R. 542.
[56] Ibid. 542.
[57] Ibid. 543.
[58] 2 Ch.D. 644.
[59] 3 Q.B.D. 315.
[60] [1913] 3 K.B. 850.
[61] Ibid. 856.

"'pending, or threatened, or anticipated. If it was obtained for "'the solicitor, as above stated, it is none the less protected "'because the party who has obtained it intended if he could to "'settle the matter without resort to a solicitor at all.'" Then further on in his judgment he said[62]: "In my view, this case "comes exactly within the principles stated by Buckley L.J. in "*Birmingham and Midland Motor Omnibus Co.* v. *London and* "*North Western Railway Co.*[63] Consequently, it being agreed "that the second statement goes too far, in my opinion the first "heading, heading (a), requiring the report of the accident to "the plaintiff to be produced, was erroneous, and the order of "the master should be restored on that head."

[Both Greer and Romer L.JJ. agreed with the judgment of Scrutton L.J.]

Mr. Everett says that the important principle to be extracted from *Feuerheerd* v. *London General Omnibus Co. Ltd.*[64] is that it is quite immaterial what was the intention or what was in the mind of the person who made the statement; the important thing is what was the purpose for which the statement was made. The headnote there reads: "In an action claiming damages for "negligence the defendants by their affidavit of documents "claimed privilege in respect of a certain statement which they "said was obtained for the purpose of being laid before their "solicitors for the defence of the action. The document in "question was a joint statement made and signed by the plaintiff "and her sister-in-law, both of whom, in making it, were under "the impression that the person to whom they made it was the "representative of the plaintiff's solicitor. In fact the person to "whom they made the statement was the defendants' claims "inspector, but the misapprehension in the minds of the plain-"tiff and her sister-in-law was not induced by any deceit on his "part: Held, that the statement was privileged from discovery." Pickford L.J. said[65]: "It has been contended that a statement "of this kind is privileged only if it was intended to be made by "the person making it for the benefit of the principal of the "person to whom it was made. I cannot accept that as the "ground of the privilege. In Bray on Discovery, under the head-"ing 'As to distinguishing between the protection attaching to "'materials for evidence and the doctrine of professional privi-"'lege,' the learned author correctly states the principles under-"lying these questions, but I cannot find there or elsewhere "anything suggesting that protection depends upon the intention "of the person making a statement. The privilege is that of the "litigant, and, whether it is sought on the ground that it is "something communicated to his solicitor or as materials of his "evidence, the privilege is quite independent of the intention of "the person making the statement."

[62] 49 T.L.R. 542, 544.
[63] [1913] 3 K.B. 850.
[64] [1918] 2 K.B. 565.
[65] Ibid. 568.

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Then there was the more recent case decided in 1951 of *Westminster Airways Ltd.* v. *Kuwait Oil Co. Ltd.*[66] The important part of that decision for my present purpose is that there it was held: "Prima facie, the correspondence was of a "character in respect of which the claim to privilege was justified. "The insurers were concerned in the matter only because they "had agreed to indemnify the defendants against a claim in the "nature of that which the plaintiffs were making, and, that "being so, the fact that the defendants had communicated with "the insurers indicated that a claim was anticipated. In such "circumstances, a communication between the defendants and "their insurers, whether directly or through their brokers, would "be directed to whether the claim should be disputed or admitted, "and, if disputed, how best to conduct the defence. The com-"munications, being of that character, were well within the "privileged area; the affidavit on its face made out a prima facie "case of privilege; and in the circumstances the court would not "look at the correspondence." There is this passage in the judgment of Jenkins L.J.[67]: "The question whether the court should "inspect the documents is one which is a matter for the discretion "of the court, and primarily for the judge of first instance. Each "case must depend on its own circumstances; but if, looking at "the affidavit, the court finds that the claim to privilege is "formally correct, and that the documents in respect of which "it is made are sufficiently identified and are such that, prima "facie, the claim to privilege would appear to be properly made "in respect of them, then, in my judgment, the court should, "generally speaking, accept the affidavit as sufficiently justifying "the claim without going further and inspecting the documents" —and that is the view which I take on the facts of the present case.

There has also been called to my attention a decision by McNair J. in *Smith* v. *British Transport Commission*,[68] in which the documents for which privilege was claimed were: "(1) File "of papers marked 'B' of the British Transport Commission "Police, York, containing reports and statements and corre-"spondence subsequent thereto, and (2) Notebook of P.C. Moss, "British Transport Commission Police." There, of course, there was quite a short description of the documents, which is certainly not more precise than in this case. In the course of his judgment McNair J. said: "Today it is almost invariable that when "personal injury occurs on the docks a claim may be made, and "the reasonable anticipation of the commission is of the prob-"ability or possibility of a claim being made"—and, I think, that is equally true of the railways; one has only to sit in these courts for a comparatively short time to find out that that is the position. McNair J. then considered the system which was referred to in that case, and said: "No doubt these reports are prepared for

[66] [1951] 1 K.B. 134; [1950] 2 All E.R. 596.

[67] [1951] 1 K.B. 134, 146.

[68] Unreported, March 7, 1958.

"other purposes as well"—that is equally true in this case; these reports and statements are prepared for other purposes as well, they are prepared because the commission is under a statutory duty to make a report to the authorities, and they are also produced partly for their own purpose. McNair J. goes on: "No "doubt these reports are prepared for other purposes as well in "order that the commission can see that their employees are "carrying out their work satisfactorily, or for statistics. The "only question on these affidavits is whether (I being satisfied "that the affidavits set out the true position) it is sufficient to "obtain protection to say that the documents were made for the "purpose 'inter alia' of being sent to the commission's solicitor," and then he pointed out that that precise point was involved in *Birmingham and Midland Motor Omnibus Co.* v. *London and North Western Railway Co.*,[69] and he concluded his judgment by saying: "If the affidavit honestly says that the purpose of sub-"mission to the solicitor is one of the purposes, that is sufficient."

That seems to me to cover this case, where it is said that the documents in this action "came into existence and were made by "the defendants or their officers after this litigation was in con-"templation and in view of such litigation wholly or mainly for "the purpose of obtaining for and furnishing to the solicitor of "the defendants evidence and information as to the evidence "which will be obtained or otherwise for the use of the said "solicitor to enable him to conduct the defence in this action "and to advise the defendants." If I apply the two tests which the Court of Appeal have said should be applied, I think those two questions must be answered in the affirmative. These documents did come into existence for the purpose of being put before the solicitor, and for the purpose of being used not necessarily in existing litigation, but in anticipated litigation. I think that, in these days, the British Transport Commission are entitled to say that, whenever a man is fatally injured in the course of his work on the railway line, there is at least a possibility that litigation will ensue. In those circumstances, there is no material upon which I can come to the conclusion that there is any ground for challenging the correctness or conclusiveness of the affidavit, and I feel constrained to hold that the claim for privilege has been established, and this appeal must, therefore, be dismissed.

Appeal dismissed.

Solicitors: *Pattinson & Brewer; M. H. B. Gilmour.*

[69] [1913] 3 K.B. 850.

[QUEEN'S BENCH DIVISION.]

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Oct. 3.

Diplock J.

*LONGTHORN v. BRITISH TRANSPORT COMMISSION.

Practice and Procedure—Discovery—Privilege—Affidavit of documents—Reports stated to be made inter alia in view of anticipated litigation—Whether conclusively establishing claim for privilege—Reports of private inquiry to investigate causes of accident—Purpose of inquiry to prevent further accidents—Whether submission to solicitor must be appreciable purpose of reports—R.S.C., Ord. 31, r. 1.

The plaintiff was injured in an accident at a railway goods station in January, 1955. The British Transport Commission set up a private court of inquiry in March, 1955, to investigate the causes of the accident with a view to preventing further accidents, and the plaintiff gave evidence at the inquiry. In the course of his action against the commission claiming damages for negligence and breach of statutory duty, the plaintiff sought production on discovery of the report of the inquiry. The commission claimed privilege in respect of the documents relating to the report of the inquiry and in their affidavit of documents stated that the ground on which they claimed privilege was that the documents came into existence and were made "for the purpose (inter alia) of obtaining "for and furnishing" to their solicitor "evidence and informa-"tion as to the evidence which will be obtained."

On appeal from an order of the Master ordering the production of the documents:—

Held, dismissing the appeal, (1) that merely to claim, as had been done in the affidavit of documents, that the documents were made, inter alia, with a view to anticipated litigation was insufficient to establish a conclusive claim of privilege and the court had therefore to look at their nature.

(2) That, although a document could be privileged even if its submission to a solicitor was not a dominant or substantial purpose for its existence, yet it must be an appreciable purpose and a document was not privileged merely because such a submission was an improbable contingency.

(3) That even if its submission to a solicitor was an appreciable purpose of the report of the inquiry, the plaintiff was misled into giving his evidence and the defendants would be estopped from claiming privilege in respect of that part of it.

Scabrook v. *British Transport Commission*, ante, p. 509, distinguished.

Birmingham and Midland Motor Omnibus Co. v. *London and North-Western Railway Co.* [1913] 3 K.B. 850 considered.

Appeal from Master Diamond.

The plaintiff, R. S. Longthorn, suffered injuries in an accident at Aston Goods Station on January 21, 1955, and by writ issued on February 29, 1956, he claimed damages for negligence and breach of statutory duty against the defendants, the British Transport Commission, as his employers.

Originally a list of documents was filed and privilege was claimed for documents described in part two of the first schedule

[Reported by Norman Primost, Esq., Barrister-at-Law.]

as "correspondence between and reports made by the defendants' officers and servants and correspondence between the "defendants and their solicitor" on the ground that they were: "documents which came into existence and were made by the "defendants or their officers after this litigation was in contemplation and in view of such litigation wholly or mainly for "the purpose of obtaining for and furnishing to the solicitor of "the defendants evidence and information as to the evidence "which will be obtained or otherwise for the use of the said "solicitor to enable him to conduct the defence in this action "and to advise the defendants."

Subsequently an affidavit of documents was substituted for the list of documents and privilege was claimed by the commission in a significantly different form, the words "wholly or "mainly for the purpose of obtaining for and furnishing to the "solicitor" being replaced by the words "for the purpose (inter "alia) of obtaining for and furnishing to the solicitor of the "defendants evidence and information as to the evidence which "will be obtained." The documents were described in part two of the first schedule as "correspondence between and reports "made by the defendants' officers and servants and correspondence between the defendants and their solicitor which came "into existence after this claim was anticipated and for the "purposes inter alia of obtaining and furnishing to the solicitor "of the defendants evidence and information for the use of the "said solicitor."

Included among these documents were the reports of an inquiry into the causes of the accident by a court of inquiry set up by the commission, in which inquiry the plaintiff had given evidence.

Production of these documents being ordered by the master, the defendants appealed to the judge in chambers, who adjourned the case for judgment only into open court.

Marven Everett Q.C. and *Tudor Evans* for the defendants, the British Transport Commission.

John Macgregor for the plaintiff.

DIPLOCK J. stated the facts and continued: There have been within the last six or eight months other cases in which the courts have considered the question of the transport commission's right to claim privilege for reports in respect of accidents about which civil litigation has subsequently arisen; there was the decision of McNair J. in *Smith* v. *British Transport Commission*,[1] in which on the evidence before him he held that a right to privilege existed in respect of reports made by the railway police on an accident which occurred on railway premises. In *Smith's* case [1] there was a detailed affidavit as to the circumstances in which such reports are made and an affidavit stating

[1] Unreported, March 7, 1958.

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that, in cases where a legal claim may be made against the commission in respect of such accident, the said notes and reports are for the purpose (inter alia) of instructing the commission's solicitor as to the circumstances to enable him to advise the commission. McNair J. held that privilege applied to the reports with which he was concerned.

In the course of his judgment, of which I have been given a note, he examined certain of the authorities and, in particular, *Birmingham and Midland Motor Omnibus Co. Ltd.* v. *London and North-Western Railway Co.*[2] A little later, in July, 1958, Havers J., in *Seabrook* v. *British Transport Commission*,[3] had a similar point in relation to a report on an accident which had occurred to a plate-layer. In that case the affidavit claimed that the reports of which inspection was sought had been made by the defendants or their officers "after this litigation was in "contemplation and in view of such litigation wholly or mainly "for the purpose of obtaining for and furnishing to the solicitor "of the defendants evidence and information," etc.

Havers J. adjourned the matter into open court to deliver his judgment, of which I have a shorthand note, in which he considered in detail many of the authorities in the long string of authorities on this subject dating from some ninety-odd years ago. His judgment is a valuable authority on this branch of the law of procedure. Although I am not bound by the judgment of another judge of nisi prius, I have no hesitation in saying that I agree with every word that Havers J. said in his judgment.

That does not dispose of the present case, because in that case there was an affidavit, which Havers J. accepted, that the documents were prepared wholly or mainly for the purpose of furnishing to the solicitor. In the present case there is no such claim on affidavit and indeed there was a change from that claim which was made in the list of documents to a claim that the reports were prepared (inter alia) for the appropriate purpose. Mr. Marven Everett has urged that it is sufficient if one of the purposes of the preparation of the report, even though it were a minor purpose—I think even though it were a very minor purpose—is that it is to be shown to the solicitors if litigation follows that that is sufficient to establish the claim of privilege, and that an affidavit in that form is one behind which I ought not to go, and that I ought not to look at the document itself.

I do not think that the cases go so far as to establish that. Mr. Everett relies on *Birmingham & Midland Motor Omnibus Co. Ltd.* v. *London and North-Western Railway Co.*[4] and on *Ogden* v. *London Electric Railway Co.*[5] The *Birmingham* case[6] was one in which the form of the affidavit was that the documents came into existence and were made after the litigation was in

[2] [1913] 3 K.B. 850.
[3] Ante, p. 509.
[4] [1913] 3 K.B. 850.
[5] (1933) 49 T.L.R. 542.
[6] [1913] 3 K.B. 850.

contemplation and in view of such litigation, for the purpose of obtaining for and furnishing to the solicitor for the defendant company evidence and information, etc. It was argued that the failure to put in the affidavit the words "wholly or mainly" entitled the plaintiff to inspection of the documents. The Court of Appeal held that that was not so, that the matter did not depend upon the exact form of the documents, and having looked at the documents, held that that was a case in which privilege was properly claimed.

I do not think I need read any more of the judgment than this. In his judgment, which was preferred by Vaughan Williams L.J.,[7] Buckley L.J. said[8]: "It is not I think necessary that the affidavit should state that the information was obtained solely or merely or primarily for the solicitor, if it was obtained for the solicitor, in the sense of being procured as materials upon which professional advice should be taken in proceedings pending, or threatened, or anticipated. If it was obtained for the solicitor, as above stated, it is none the less protected because the party who has obtained it intended if he could to settle the matter without resort to a solicitor at all. Having inspected the documents, as I think we are entitled to do, I am satisfied that this affidavit has not been made with a view to sheltering under a form of words, which in itself covers the ground, documents which ought to be produced. Were I of a contrary opinion I should not hesitate to make an order to defeat that intention."

I do not read Buckley L.J. as laying down any rule that if one of the purposes, however insubstantial, is that it may be shown to the solicitor if litigation ensues, that in itself gives a right to claim privilege. Hamilton L.J., whose judgments are always entitled to the greatest possible respect, expressly disclaimed any such view. He said[9]: "In a sense not altogether illusory every one of these records, from the office boy's postage book to the chief cashier's ledger, comes into existence for the purpose, if peradventure there should be litigation or fear of it, of putting the legal advisers in a position to advise fully and to conduct the case successfully, though in nine hundred and ninety-nine cases out of a thousand no such use of the entries will ever be made. To hold such documents privileged merely because it can be shown of them, not untruthfully, that the principal, who made them part of the regular course of business and of the duties of his subordinates, foresaw and had in mind their utility in case of litigation, feared, threatened, or commenced, would in my opinion be unsound in principle and disastrous in practice."

In *Ogden's* case[10] the passage on which Mr. Everett relies is a passage in the judgment of Scrutton L.J., in which the other members of the court concurred, and I think I must read

[7] [1913] 3 K.B. 850, 855.
[8] Ibid. 856.
[9] Ibid. 859.
[10] 49 T.L.R. 542.

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the whole paragraph, because the context of the particular words on which Mr. Everett relies throws, I think, some light on the true meaning of those words. I should add that the reports were very similar to the sort of report which is described in the affidavit of documents in this case. Scrutton L.J. said this [11]: "Mr. Eastham, as I understand, argues that they are not"—that is to say, not prepared for solicitors—"because the reports "were made to a company to enable it to conduct its own "business—namely, to carry on its business without accidents—"without any regard to litigation. That may be so. It may "be that that is part of the purpose of making the reports, "but there is also the substantial purpose that if a writ is "issued these are the materials that will be wanted by the "solicitor conducting the litigation, and they are obtained for "that purpose, among others, and as appears from the form "at which we look—because the judge below has looked at "these documents—the reports are made on a form headed: "'For the information of the company's solicitors only,' which "is a very important heading to have, because if you know "that you are making a confidential report to the solicitor "you are much more likely to state accurately what has "happened than if you are afraid that somebody presently seeing "that report may take proceedings against you in respect of "the statements that you have made, which may be defamatory."

I do not think it is necessary in the present case for me to seek to lay down to what extent the purpose of furnishing the documents to the solicitors must be a main or substantial purpose, and at what point it becomes so subsidiary to other purposes that privilege cannot be claimed in respect of the documents. I am not satisfied on the authorities that the mere fact that it may be one of the purposes, however insubstantial and however improbable, is a ground for a claim of privilege.

I think, therefore, that whereas the form in which privilege was claimed in the list of documents would have been sufficient of itself to claim privilege, the form in which it was claimed in the affidavit, merely that it was for the purpose inter alia, is insufficient, of itself, to establish conclusively a claim for privilege. I accordingly have to look at the nature of the documents in respect of which privilege was claimed, in the first instance, I think, to see whether they are documents which in their nature are likely to be documents prepared or obtained for the purpose of showing to solicitors, such as the correspondence between the company and its insurers in *Westminster Airways Ltd.* v. *Kuwait Oil. Co. Ltd.*[12] When I looked at the affidavit, when I saw the description of "correspondence between "and reports made by the defendants' officers and servants and "correspondence between the defendants and their solicitor "which came into existence after this claim was anticipated

[11] 49 T.L.R. 542, 543.

[12] [1951] 1 K.B. 134; [1950] 2 All E.R. 596.

"and for the purposes inter alia of obtaining and furnishing "to the solicitor of the defendants evidence and information," it seemed to me that the description "correspondence between "and reports made" was too wide to assist me to say whether the nature of the documents was such that a sufficiently substantial purpose would be that of showing to the solicitor. The actual document of which inspection is sought is described as "The report of the private inquiry held by the defendants "shortly after March 19, 1955, . . . including statements of "witnesses made in and for the said inquiry." I must say that the nature of the document very nearly persuaded me that it was such that it was likely to fall within privilege without the necessity for my looking at it. But I decided, in my discretion, that I ought to look at it because there may be different reasons for an inquiry to be made after an accident, and accordingly it was produced. It is the report of "a court "of inquiry set up to investigate the circumstances of an "accident to R. S. Longthorn, capstanman, Aston Goods "Station, January 21, 1955." After two preliminary paragraphs it goes on as follows: "It was then explained to the injured "man the purpose of the inquiry, that it was not so much "convened to establish guilt or attach blame to either himself "or any other person who may have been concerned, but rather "to ascertain the cause of the accident with a view to safe-"guarding against any possible similar happening in the future. "Longthorn's co-operation was invited to this end, this being "willingly promised by him."

Mr. Everett has argued that that is not only consistent with but shows that the inquiry and the report were for the purpose of being furnished to the defendant's solicitor in the event of litigation, relying on the words that it was not so much convened to establish guilt but rather to ascertain the cause of the accident. I asked him if those words could properly be construed as meaning it was partly convened to establish guilt and attach blame and partly to ascertain the cause of the accident with a view to safeguarding against any possible similar happening in the future. I think Mr. Everett was inclined to say that it was. I do not accept that; I think on the face of this document it shows that the purpose of the inquiry was not for the purpose of furnishing to the solicitor, and I read it as an express disclaimer by the chairman of the inquiry that that was its purpose. Whether they had at the back of their minds that it could be furnished to the solicitors at that time I do not know. I hope not, because if they had, it seems to me a most deceptive way of describing the purpose of an inquiry at which the plaintiff was being asked to give evidence as to how the accident happened in order to protect his workmates in the future.

I hold, therefore, that on the facts of this case neither this document nor any part of it is privileged, because the inquiry was not to any appreciable extent for the purpose of obtaining

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for or furnishing to the solicitor to the defendants evidence and information as to the evidence which will be obtained.

I would add one other matter. If I am wrong as to that, it seems to me that the plaintiff was misled into giving the evidence that he did, and I would hold, even if I were wrong on the main ground of my decision, that the defendants were estopped from claiming privilege in respect of that part of the document which contains the plaintiff's evidence. This appeal is dismissed with costs.

Appeal dismissed.

Solicitors: *M. H. B. Gilmour; Tuck & Mann for D. G. Barnett & Co., Birmingham.*

[COURT OF APPEAL.]

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1959 *Feb.* 18; *Mar.* 4, 5, 23.

Jenkins, Romer and Ormerod L.JJ.

* *In re* HOLLEBONE'S AGREEMENT. HOLLEBONE *v.* W. J. HOLLEBONE & SONS LTD.

[1957 H. No. 1793.]

Vendor and Purchaser—Business—Contract—Construction—Tax liability—Purchasers to indemnify vendor against all liabilities—Whether income tax and surtax included in indemnity.

Contract—Construction—Extrinsic evidence—Ambiguity—Sale of business—Tax liability.

By an agreement dated July 14, 1952, the plaintiff vendor agreed to sell to the defendant purchaser company the whole of the assets of a wholesale wine and spirit business, the consideration being such that, having regard to the balance sheet, the vendor would make a profit of some £20,000 on the sale of the stock, which sum, by virtue of section 143 (1) of the Income Tax Act, 1952, fell to be computed as part of the vendor's profits or gains for income tax purposes.

The agreement, adopting the language of well-known precedents, provided by clause 4: "The company shall undertake to pay satisfy "discharge and fulfil all the debts liabilities contracts and engage-"ments of the vendor in relation to the said business and indemnify "him against all proceedings claims and demands in respect "thereof."

By clause 8: "Possession of the premises hereby sold shall be "retained by the vendor until the date of actual completion of "this agreement and in the meantime he shall carry on the said "business in the same manner as heretofore so as to maintain the "same as a going concern but he shall be deemed as from April 1 "last to have been carrying on and he shall henceforward carry "on the said business as agent for the company and he shall account "and be indemnified accordingly."

Completion took place on July 14, the date of the agreement; between April 1 and that date profits were made. After completion disputes arose between the vendor and the purchasers regarding the liability of the purchasers to indemnify the vendor in respect of income tax and surtax to which he became liable by reason of the transaction:—

Held, (1) that under clause 4, the purchasers were liable to reimburse to the vendor the income tax, but not surtax, to which he became liable (a) in respect of the profits made by the business between April 1 and the date of completion, and (b) in respect of the liability arising under section 143 on the sale of the stock.

(2) That under clause 8 the purchasers were liable to indemnify the vendor in respect of income tax and surtax (to come out of the "top slice") chargeable on the trading profits made on behalf of the company in the said period, but not in respect of income tax or surtax arising under section 143 on that profit on the sale of the stock, which accrued to him as a principal and not as an agent for the purchasers.

Stevens v. *Britten* [1954] 1 W.L.R. 1340; [1954] 3 All E.R. 385 applied.

Adams v. *Morgan* [1924] 1 K.B. 751; 40 T.L.R. 70 (C.A.); affirming [1923] 2 K.B. 234; 39 T.L.R. 473 distinguished.

Decision of Upjohn J. varied.

APPEAL from Upjohn J.

By an agreement in writing dated July 14, 1952, the plaintiff agreed to sell to the defendant company the whole of the assets and goodwill of a wholesale wine merchant's business. By clause 4 of the agreement the defendants agreed to satisfy and discharge all the liabilities of the vendor in relation to the business; by clause 8 the vendor was to be deemed to have carried on the business as from April 1 until completion as agent of the defendants, and was to account and be indemnified accordingly.

After completion a dispute arose regarding the extent of the defendants' liability to indemnify the plaintiff in respect of the sums to which he became chargeable for income tax and surtax purposes in respect of the profits made by the business while he was carrying it on as the defendants' agent, and in respect of a profit on the value of the stock which accrued to him on the sale. The facts are fully set out in the judgment of Jenkins L.J.

Upjohn J. held that under clause 4 the vendor was entitled to be indemnified as to income tax but not as to surtax on both the items of profit; and that, under clause 8 he was entitled to be indemnified as to both income tax and surtax in respect of the trading profits, and as to surtax in respect of the stock profit. The defendants appealed.

F. N. Bucher Q.C. and *E. I. Goulding* for the defendants.

Charles Russell Q.C. and *Peter Rowland* for the plaintiff.

The following cases were cited in argument but are not referred to in the judgments: *In re Duffy* [1]; *In re Pettit* [2]; *In re Reckitt* [3]; *In re Maclennan* [4]; *In re Bowring* [5]; *United Kingdom Advertising Co. Ltd.* v. *Whiting.* [6]

[1] [1949] Ch. 28; 64 T.L.R. 545; [1948] 2 All E.R. 756.

[2] [1922] 2 Ch. 765; 38 T.L.R. 787.

[3] [1932] 2 Ch. 144.

[4] [1939] 1 Ch. 750; 55 T.L.R. 830; [1939] 3 All E.R. 81.

[5] [1918] W.N. 265; 34 T.L.R. 575.

[6] (1931) 47 T.L.R. 420.

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March 23. The following judgments were read:

Jenkins L.J. This is an appeal by the defendant company, W. J. Hollebone & Sons Ltd. (hereinafter called "the company") from a judgment of Upjohn J., dated July 11, 1958, whereby he decided substantially in favour of the plaintiff, Ernest Charles Hollebone (hereinafter called "the vendor") a dispute concerning the incidence as between the vendor and the company of certain income tax and surtax on the sale by the vendor to the company under the agreement, to which I am about to refer, of the stock-in-trade and other assets of the business of a wholesale wine and spirit merchant theretofore carried on by the vendor.

Also before the court is a respondent's notice served by the vendor, stating his intention to contend that the judge's order should be varied in certain respects in which, as it stands, it is adverse to the vendor.

By an agreement dated July 14, 1952, and made between the vendor of the first part, the company of the second part, and Shorts Ltd. (who are not concerned in the present dispute) of the third part, after recitals (inter alia) (a) that the vendor had for many years past carried on business as a wholesale wine and spirit merchant at 19, Southampton Place, Bloomsbury, in the County of London, under the style or firm of W. J. Hollebone & Sons, and (b) that the company had been formed under the Companies Act, 1948, with a view, amongst other things, to the acquisition of the property thereby agreed to be sold, it was (so far as material for the present purpose) agreed as follows: (by clause 1) "The vendor shall sell and the company shall purchase "the whole of the tangible assets (including without prejudice "to the generality of that expression) all the stock-in-trade imple-"ments utensils plant fixtures and fittings and vehicles and the "leasehold premises known as 19, Southampton Place and 21, "Barter Street (adjoining) (and including cash in hand or at the "bank as on March 31, 1952) belonging to the vendor in connec-"tion with the said business and all the book and other debts "due to him in connection therewith and the full benefit of all "securities therefor together with the exclusive right to use the "name W. J. Hollebone & Sons as part of the name of the com-"pany and the exclusive right to represent the company as "carrying on business in continuation of and as successor to the "vendor and all trade marks connected with the said business "and the full benefit of all pending contracts engagements and "orders in connection therewith." (By clause 2) That part of the consideration for the said sale should be the sum of £52,536 0s. 4d., which should be paid and satisfied (a) as to the sum of £22,536 0s. 4d. in cash payable (together with interest thereon at the rate of 5 per cent. per annum from April 1, 1952, to the date of actual payment) forthwith on the signing of the agreement, and (b) as to the balance of £30,000 by the issue of certain debentures carrying interest at the rate of 5 per cent. per

annum as from April 1, 1952. (By clause 4) That as the residue of the consideration for the said sale "the company shall undertake to pay satisfy discharge and fulfil all the debts liabilities contracts and engagements of the vendor in relation to the said business and indemnify him against all proceedings claims and demands in respect thereof." (By clause 6) That the purchase should be completed on August 14, 1952. (By clause 8) That "Possession of the premises hereby sold shall be retained by the vendor until the date of actual completion of this agreement and in the meantime he shall carry on the said business in the same manner as heretofore so as to maintain the same as a going concern but he shall be deemed as from April 1 last to have been carrying on and he shall henceforward carry on the said business as agent for the company and he shall account and be entitled to be indemnified accordingly." (By clause 10) That the whole of the consideration aforesaid was the consideration for the sale of the goods, chattels and other effects capable of manual delivery and forming part of the purchased property.

The sale was actually completed on July 14, 1952, that is to say, on the same day as the signing of the agreement. Whoever was responsible for the preparation of that unfortunate document appears to have performed his task by the wholesale adoption of a well-known common form without due regard to the circumstances of the particular case. The result has been to involve the parties in an interminable dispute, which nearly seven years after the signing of the agreement, is still unresolved. It is clear from the terms of the agreement that, as between the vendor and the company, the sale was to be treated as taking effect as from March 31, 1952, and I think it is legitimate and, indeed, necessary to have regard to the contents of the balance sheet of the business as at that date as part of the surrounding circumstances by reference to which the agreement is to be construed.

That balance sheet shows the following assets at the following amounts or values respectively: Stock at cost £28,196 15s. 6d. (including a small item of £11 10s. stock of fodder in stables); fixtures £250; cash at office and at bank £3,909 6s. 2d.; and book debts £774 12s. 7d.; total £33,130 14s. 3d. On the liabilities side the items to be noticed are: Debts owing at March 31, 1952, £594 13s. 11d.; income tax due July 1, 1952, £960 16s. 6d., and executors of the late H. W. Hollebone £11,200. The purchase price appears on these figures to have been arrived at by deducting from the total assets of £33,130 14s. 3d. the amount owing to creditors £594 13s. 11d. (which left £32,536 0s. 4d.), and then adding £20,000 to the balance sheet value of the stock, thus making the value of the stock £48,196 15s. 6d., and the total assets £52,536 0s. 4d., this last figure, together with the company's undertaking contained in clause 4 (which, admittedly, extended to the debts of £594 13s. 11d. above referred to), being taken as the consideration for the sale.

The purchase consideration so arrived at clearly included a

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profit to the vendor of £20,000 on the figures appearing in the balance sheet of March 31, 1952, by reason of the addition of that amount to the value placed on the stock in such balance sheet. The item of £950 16s. 6d. in respect of income tax appearing in the balance sheet of March 31, 1952, was described by the vendor in his affidavit in support of the originating summons as the second instalment of the income tax on the profits of the business for the year of assessment ended April 5, 1952, based on the profits for the year ended March 31, 1951. This sum the vendor paid out of his own pocket on July 15, 1952, having already paid the first instalment of the income tax in question on a date prior to March 31, 1952.

The statement of the consideration for the sale attached by the company to the agreement when sent to the Stamp Duty Office for stamping contained no reference to the £960 16s. 6d. or to any other liability for income tax or surtax.

Mr. Bucher, for the company, relied on the payment by the vendor of the £960 16s. 6d. out of his own pocket, and on the omission of any reference to income tax or surtax in the statement to which I have just referred as showing that neither party regarded income tax or surtax as included in the liabilities which the company by clause 4 of the agreement undertook to discharge. These matters undoubtedly point to that conclusion, though it is to be remembered that the sum due for income tax was a debt for which the vendor was personally liable to the Revenue. There is, however, no claim for rectification. The case, accordingly, depends entirely upon the true construction of the agreement, and I agree with the judge that for the purposes of construction, these matters must be regarded as wholly irrelevant.

The notional back-dating of the sale to March 31, 1952, provided for by the agreement, of course had no foundation in fact, though it was an arrangement which the vendor and the company could, as between themselves, readily carry out by appropriate adjustments in their accounts. It was, however, an arrangement which could not affect the position as between the vendor and the Revenue with respect to income tax and surtax. From the point of view of the Revenue the liability of the vendor to income tax on the profits of the business is to be computed in accordance with the actual facts of the case. In actual fact, the vendor carried on the business as his own from March 31, 1952, down to July 14, 1952, and discontinued it on the latter date when the sale to the company was completed. In these circumstances the tax position as between the vendor and the Revenue was that the vendor was liable under section 130 of the Income Tax Act, 1952, to be charged with tax on the amount of the profits or gains of the period beginning on April 6 in the year of assessment 1952/53, and ending on the date of discontinuance (viz., July 14, 1952). Moreover, the vendor, on such discontinuance, in fact sold the stock-in-trade of the business as it then stood for £48,196 15s. 6d., as compared with the figure of £28,196 15s. 6d. at which the

stock-in-trade as at March 31, 1952, appeared in the balance sheet of that date. The importance of this appears from section 143 of the Income Tax Act, 1952, which provides by subsection (1) as follows: "In computing for any income tax purpose the profits "or gains of a trade which has been discontinued, any trading "stock belonging to the trade at the discontinuance thereof shall "be valued as follows: (*a*) in the case of any such trading stock— "(i) which is sold or transferred for valuable consideration to a "person who carries on or intends to carry on a trade in the "United Kingdom; and (ii) the cost whereof may be deducted by "the purchaser as an expense in computing for any such purpose "the profits or gains of that trade, the value thereof shall be "taken to be the amount realised on the sale or the value of "the consideration given for the transfer; (*b*) in the case of any "other such trading stock, the value thereof shall be taken to be "the amount which it would have realised if it had been sold in "the open market at the discontinuance of the trade." The relevant part of the subsection for the present purpose is subsection (1), sub-paragraph (*a*).

The effect of those provisions appears to be, that in the computation of the vendor's tax liability for the period from April 6, 1952, to July 14, 1952, the stock-in-trade at the end of the period falls to be brought into account at the value of £48,196 15s. 6d., so as to produce a trading profit for tax purposes of £20,000 plus the proceeds of sales of stock made during the period, less purchases of stock made during the period. Thus, in view of the method of computation prescribed by section 143, the profit of £20,000 realised by the vendor on the sale of the stock to the company, less any excess in value of purchases over sales during the period, must constitute an addition to the taxable profit for the period. For convenience I will refer to this addition as "the £20,000 profit." The inclusion of the £20,000 profit in the computation for tax purposes of the vendor's income for the period from March 31 to July 14, 1952, increases his liability for income tax and, consequentially, for surtax, in respect of that period to a formidable total, and the question whether upon the true construction of the agreement the vendor is entitled to require the company to discharge wholly or in part the tax for which the vendor is, or is ultimately found to be liable in respect of the profits of the business down to July 14, 1952 (including the amount shown as outstanding in the balance sheet of March 31, 1952), has been strenuously argued before the judge and in this court.

The question turns entirely on the construction of the agreement and, in particular, clauses 4 and 8 thereof. Under clause 4 the company undertook to "pay satisfy discharge and fulfil all "the debts liabilities contracts and engagements of the vendor in "relation to the said business," and to "indemnify him against "all proceedings claims and demands in respect thereof."

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Mr. Bucher, for the company, says that this language, considered in the context of this agreement, does not include income tax and, a fortiori, does not include surtax. He refers us to the cases of *Inland Revenue Commissioners* v. *Dowdall O'Mahoney & Co. Ltd.*[1] and *Reg.* v. *Vaccari*,[2] as showing that the income tax exigible on the profits of a trade is a liability attaching to those profits when made, and not an expense of the trade or a debt contracted for the purposes of the trade. He says that in the present context the "debts, liabilities, contracts and engagements of the vendor in relation to the said business," to which clause 4 refers, are confined to debts, liabilities, contracts and engagements incurred or contracted by the vendor in the course of carrying on the business, and that, on the authorities to which I have just referred, income tax does not answer that description. It is not, says Mr. Bucher, a liability incurred in the carrying on of the business, but a liability attaching to any profits resulting from the carrying on of the business.

With some reluctance, I find it impossible to accept this argument. The words "all the . . . liabilities of the vendor in relation to the said business" are of wide import. The income tax for which the vendor is liable to the Revenue in respect of the profits of the business is undoubtedly a liability of the vendor, and, inasmuch as it is a liability attributable to the profits of the business, I do not see how it can escape inclusion in the category of liabilities of the vendor "in relation to" the business. I think the language used is, according to its ordinary meaning, apt to include income tax on the profits of the business, and I apprehend that any sum due in respect of such tax would ordinarily be included as a liability in the accounts of a business, as, indeed, the £960 16s. 6d. due in respect of the second instalment of income tax for the year 1951/52 was included in the balance sheet of March 31, 1952, in the present case.

Some support for the view that clause 4 includes the vendor's liability to income tax on the profits of the business is to be found in the case in this court of *Stevens* v. *Britten*,[3] to which reference was made by the judge. That was, it is true, a partnership case and the words to be construed, which were contained in a deed of dissolution, were: "The continuing partner will (a) duly pay and satisfy all debts and liabilities of the said partnership and will at all times hereafter keep the retiring partner indemnified against the said debts and liabilities. . . ." Evershed M.R. said[4]: "In those circumstances, the question is whether this sum which the plaintiff paid was within the ambit of clause 4 of the deed? I find it impossible to come to any other conclusion than that it was, for the amount due to the Crown for income tax was . . . a liability of the two partners jointly, and as such

[1] [1952] A.C. 401; [1952] 1 T.L.R. 560; [1952] 1 All E.R. 531.
[2] [1958] 1 W.L.R. 297; [1958] 1 All E.R. 468.
[3] [1954] 1 W.L.R. 1340; [1954] 3 All E.R. 385.
[4] [1954] 1 W.L.R. 1340, 1343.

"it was a partnership debt in the ordinary usage of words. It "seems to me, therefore, to follow that the phrase 'all debts and "'liabilities of the said partnership' must comprehend a debt of "this kind for which both partners were liable and which, let it "be added, was a debt which owed its existence wholly and "exclusively to the trading operations of the two partners without "regard to what their private resources might have been." Later, on the same page, he said[5]: "I am, however, satisfied "that it is impossible, whatever may have been in the mind of the "defendant, to read clause 4 so as not to include an indemnity "for this sum. I think it could be done only by reading into the "clause the words 'other than income tax,' and it need not be "said that, according to ordinary principles of construction, only "the most cogent and powerful reasons to be derived from an "examination of other parts of the deed and the surrounding "circumstances could possibly justify such an insertion into the "written terms of the document. I think there is no basis which "would justify such a reading into the plain language." Then I would also refer to this passage from the judgment of Romer L.J.[6]: "Indeed, [counsel] for the defendant himself was some-"what impressed, as the discussion proceeded, with that view "and attempted to take the point that as a matter of construction "of the dissolution agreement one could read the phrase 'all "'debts and liabilities of the partnership' as being confined to "ordinary trading debts and liabilities, or, at all events, such "debts and liabilities as do not depend in any way in their "ultimate evaluation on any personal characteristic or qualifica-"tion of an individual partner. But that is taking liberties with "the terms of the document which no canon of construction that "I have heard of can justify. Where one finds language which is "plain and unequivocal, as in my opinion clause 4 is plain and "unequivocal, in relation to the debts and liabilities of the "partnership, no court has any right to inject into the language "used something which is not there merely because one of the "partners against whom the clause according to its ordinary "language operates thinks it operates harshly and unfairly."

In view of the differences between the two cases it cannot well be said that the present case is actually governed by *Stevens* v. *Britten*,[7] but the passages I have quoted do, I think, afford some support for the conclusion that in the absence of words indicative of an intention to exclude income tax, "the liabilities "of the vendor in relation to the said business" referred to in clause 4 of the present agreement should be construed as including income tax.

I have already referred to Mr. Bucher's argument based on the payment by the vendor of the £960 16s. 6d. income tax out of his own pocket on July 15, 1952, and the absence of any reference to tax in the statement sent to the Stamp Duty Office. As

[5] [1954] 1 W.L.R. 1340, 1343.
[6] Ibid. 1344.
[7] Ibid.

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I have said, I agree with the judge in regarding these matters as irrelevant, in the absence of any claim for rectification. In support of this part of his argument Mr. Bucher referred us to *Watcham* v. *Attorney-General of the East Africa Protectorate*,[8] and *Radio Pictures Ltd.* v. *Inland Revenue Commissioners*,[9] in support of the proposition that any ambiguity in a written agreement could legitimately be resolved by recourse to extrinsic evidence of the intention of the parties as manifested in their conduct or course of dealing. But I do not think the circumstances of this case are such as to warrant the application of that principle. There is to my mind no ambiguity here, and I think the vendor's action in paying out of his own pocket the £960 16s. 6d. was, to say the least, equivocal, in that this was a debt due from the vendor personally to the Revenue which he was obliged to pay irrespective of its ultimate incidence as between himself and the company. I would, moreover, advert to the observations of Cohen L.J. in *Gaisberg* v. *Storr*,[10] as to the caution with which the principle now invoked by Mr. Bucher should be applied.

Mr. Bucher's strongest argument on clause 4 of the agreement to my mind lies in his submission to the effect that, even if contrary to his contentions clause 4 includes income tax, it only extends to tax the liability which arises in respect of profits made by the carrying on of the business and not to tax the liability to which arose from the sale and discontinuance of the business. He points out that the vendor sold the stock to the company at a profit of £20,000 and that the effect of section 143 of the Income Tax Act, 1952, was in substance to bring this profit into account in the computation of the profits of the business for the purposes of the vendor's assessment to income tax for the period from April 6, 1952, to July 14, 1952. Therefore, says Mr. Bucher, the tax exigible as between the vendor and the Revenue in respect of the terminal period, so far as attributable to the £20,000 profit, is in effect as between the vendor and the company tax on the profit made by the vendor on the sale to the company, the liability to which arose solely by virtue of the fact that the price agreed upon included a profit to the vendor of £20,000. Thus, says Mr. Bucher, the company on this basis will be paying not merely the tax arising from the carrying on of the business at a profit, but also tax on the profit included in the price which the company had to pay for the business. He says it is unreasonable to place on clause 4 a construction which results in giving the vendor the profit of £20,000 on the sale while saddling the company with the tax attributable to the element of profit in the purchase price, thereby in effect increasing the price agreed upon.

This argument to my mind is fallacious. Once it is held that upon the true construction of clause 4 the liabilities of

[8] [1919] A.C. 533.
[9] (1933) 22 T.C. 106.
[10] (1949) 65 T.L.R. 485; [1949] 2 All E.R. 411.

the vendor to which it extends includes his liability for income tax on the profits of the business down to July 14, 1952, it appears to me that the income tax for which the company assumes liability under clause 4 can be nothing more nor less than the whole of the income tax outstanding or remaining to be assessed upon the vendor on July 14, 1952, in respect of the profits of the business down to that date ascertained in accordance with the relevant statutory provisions, and in particular section 143 of the Income Tax Act, 1952. It is not right to say that this involves casting upon the company a liability for income tax on the profit realised by the vendor on the sale. It is true that the statutory method of calculating the profits of the business down to the discontinuance brought about by the sale does bring into account the stock-in-trade at the date of discontinuance at the price at which it was then sold, but the figure arrived at by applying this method of calculation is simply the profit attributable for income tax purposes to the carrying on of the trade, calculated as the statute says it is to be calculated. Once clause 4 is construed as casting on the company the liability for income tax on the profits of the business down to discontinuance it seems to me impossible to hold that the income tax for which the company is made liable is to be ascertained otherwise than in accordance with the statutory method of calculation. Once that basis is departed from, I fail to see how any other basis can be adopted without reading into clause 4 qualifications and restrictions upon its comprehensive language which simply are not there, and which cannot be read into it without departing from the elementary principles of construction. I would again refer to the observations of Romer L.J. in *Stevens* v. *Britten*.[11]

Accordingly, I agree with the judge that clause 4 does extend to income tax and I also agree with him that this conclusion is not to be displaced by the argument adduced by the company to the effect that inasmuch as the payment of tax by the company would be tantamount to an addition to the price of the stock attracting tax in its turn, and so on ad infinitum. I am not persuaded that this result would ensue, and I do not think the theoretical possibility that it might is relevant to the construction of clause 4.

As to the question whether clause 4 extends to surtax, I find myself again in agreement with the judge, who held that it does not; and I am content to adopt the reasoning, including the observations, of Singleton L.J. in *Conway* v. *Wingate*,[12] which led him to that conclusion.

I turn next to clause 8 of the agreement. On this part of the case Mr. Bucher says in effect that the obligation to account and right to be indemnified are imposed and conferred with reference to the notional agency under which the vendor is to be deemed

[11] [1954] 1 W.L.R. 1340, 1344.

[12] [1952] W.N. 171; [1952] 1 All E.R. 782.

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to have been carrying on the business. To refer again to the language of clause 8, it provides: "Possession of the premises "hereby sold shall be retained by the vendor until the date of "actual completion of this agreement and in the meantime he "shall carry on the said business in the same manner as hereto-"fore so as to maintain the same as a going concern but he shall "be deemed as from April 1 last to have been carrying on and "he shall henceforward carry on the said business as agent for "the company and he shall account and be entitled to be "indemnified accordingly."

Mr. Bucher points out that the notional agency constitutes the vendor the agent of the company for the purpose of carrying on the business so as to maintain it as a going concern, and that the vendor's obligation to account and right to be indemnified are limited to transactions within the scope of that notional agency. The vendor is to be "deemed to have been carrying on the said "business as agent for the company and he shall account and be "entitled to be indemnified accordingly." Mr. Bucher stresses the word "accordingly" as indicating that the obligation to account and right to be indemnified are thus limited. Mr. Bucher concedes that the indemnity extends to all income tax and surtax properly attributable to the carrying on of the business as a going concern, but says it does not extend to any income tax or surtax attributable to the element of profit included in the price at which the business was sold to the company. The purchase price was not a sum received by the vendor as agent for the company under clause 8. It was a sum received by the vendor as principal and for his own use and benefit. Obviously he was under no obligation to account for it to the company. Conversely, the addition to the vendor's tax liability attributable to the element of profit in the purchase price was not a liability incurred by him as agent for the company under the notional agency.

I think this argument is well founded. It takes a point which did not arise in *Adams* v. *Morgan*.[13] Except to the extent of Mr. Bucher's admission so far as it relates to surtax, I do not think clause 8 adds anything to the company's liability under clause 4.

In the result, I think that the judge's conclusion as regards the company's liability for the vendor's income tax under clause 4 is right. I think he is also right in holding that the company's liability under clause 4 does not extend to the vendor's surtax; I differ from him, however, as regards the effect of clause 8, which in my judgment is narrower than, and adds nothing to the company's liability under, clause 4, save in so far as it brings in the surtax for which Mr. Bucher admits liability, and which in my judgment is not included in clause 4 inasmuch as that clause does not in my view extend to surtax. I see no reason to dissent

[13] [1923] 2 K.B. 234; 39 T.L.R. 473; [1924] 1 K.B. 751; 40 T.L.R. 70 (C.A.).

from the judge's view that such surtax as is included in clause 8 should, as regards its rate, be treated as provided out of the "top "slice" of the vendor's income.

The order under appeal should, accordingly, in my view be varied so as to give effect to the conclusions above expressed so far as they differ from those of the judge.

ROMER L.J. I agree. The first question which arises in this case is whether the expression in clause 4 of the agreement—"all "the debts liabilities contracts and engagements of the vendor "in relation to the said business"—includes within its scope income tax payable by the plaintiff in respect of the profits which the business earned whilst he himself was carrying it on. The judge took the view that "as a matter of ordinary language" that question requires an affirmative answer and regarded the decision of this court in *Stevens* v. *Britten* [14] as supporting that view.

It seems to me that the question is purely one of construction of the agreement as a whole and of clause 4 in particular. The subject-matter of the agreement for sale was the business of a wholesale wine and spirit merchant which was being carried on as a going concern at the date of the agreement. The consideration for the sale was (a) £52,536 0s. 4d. to be satisfied as provided by clause 2 of the agreement, and (b) the undertaking and indemnity contained in clause 4. The precision with which the monetary consideration under clause 2 was assessed shows clearly enough that it was calculated in accordance with some statement of assets and liabilities, and there can be little doubt but that that statement was, in fact, the balance sheet of the business as at March 31, 1952. The judge thought that that was so, and I agree with him. The assets of the business, as shown in that balance sheet, amounted to £33,130 14s. 3d., and on the debit side appeared a sum of £594 13s. 11d. for trade debts, and it would seem that the parties arrived at the figure of £52,536 0s. 4d. by deducting the trade debts from the assets and adding a sum of £20,000 as profit to the vendor. The purchasers were clearly liable under clause 4 to indemnify the plaintiff against the £594 13s. 11d. trade debts, but he claims to be indemnified also against all income tax which was referable to the profits of the business and for which he was or would become liable, including the sum of £960 16s. 6d. shown in the balance sheet as "Income "tax due July 1, 1952."

If the intention of the parties was that the purchasers should assume liability for the vendor's relevant income tax as well as for his trade debts, it is perhaps surprising that the latter were deducted from the value of the balance sheet assets for the purpose of calculating the £52,536 0s. 4d. consideration, whereas the sum of £960-odd for tax was not. It is not, however, permissible to attribute much weight to this fact because the balance

[14] [1954] 1 W.L.R. 1340.

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sheet was not a contractual document, nor was any reference made to it in the agreement itself. Nor do I attach any weight to the further fact, to some extent relied upon by Mr. Bucher for the purchasers, that after the agreement was signed, the vendor paid out of his own moneys the sum of income tax shown in the balance sheet as due on July 1, 1952, a sum which as between himself and the Revenue he was legally bound to pay. Accordingly, as I have already said, the issue between the parties arising on clause 4 is simply one of construction of the agreement itself.

Mr. Russell, on behalf of the vendor, contended that the words "all liabilities of the vendor in relation to the business" extend in their natural and ordinary meaning to income tax which, but for the vendor's relation with the business, he would not have been liable to pay. He submitted that such decisions as *Inland Revenue Commissioners* v. *Dowdall, O'Mahoney & Co. Ltd.*[15] and *Reg.* v. *Vaccani*[16] are irrelevant to the construction of clause 4. Those cases decided that income tax is not a liability incurred in the course of operating a business but is money spent out of profits which have been earned, the Crown's share of those profits after they have been ascertained. Mr. Russell contended that clause 4 is not confined to trade debts and liabilities, but is concerned in wide terms with all liabilities which the vendor incurred in relation to his business; and that the income tax to which he was assessed in respect of profits of the business cannot be excluded from that category of liabilities. I see no way of rejecting Mr. Russell's submissions without introducing into clause 4 a limitation or qualification which is not to be found in its language; and I therefore accept them, though they bring about a result which I am far from satisfied was present to the minds of either of the contracting parties when they entered into the agreement. I would add that the judgments in *Stevens* v. *Britten*[17] seem to support Mr. Russell's argument on this matter, though the decision itself was principally directed to the terms of section 144 of the Income Tax Act, 1952, in relation to the covenant to discharge partnership liabilities which the court was considering. As, therefore, the vendor's income tax is, in my judgment, within the scope of clause 4, it seems to me necessarily to follow that the tax which became payable under the provisions of section 143 of the Income Tax Act, 1952, cannot be excluded. That section is only one part of the fiscal machinery for ascertaining the global profit of a business for a given period, and it is difficult to see any intelligible ground for disregarding that part of the machinery whilst giving effect to the rest. I think myself that the result is in substance to pass on to the purchasers the tax on a profit which belonged solely to the vendor as vendor, but it is a result which cannot, in my opinion, logically be avoided.

I am in agreement with the judge that clause 4 does not

[15] [1952] A.C. 401.
[16] [1958] 1 W.L.R. 297.
[17] [1954] 1 W.L.R. 1340.

extend to the surtax which the vendor had to pay in respect of the profits of the business, and I have nothing to add to what he said on that point. With respect, however, I differ from him with regard to the effect which he attributed to clause 8 of the agreement. As to this, it is quite clear to my mind that the indemnity which the purchasers agreed to give the vendor by that clause was limited to such liabilities as he might have incurred on the hypothesis that from April 1, 1952, until completion of the sale he had been and would be carrying on the business as agent for the purchasers. He was bound to account to them for such profits as he might make during that period, and the natural corollary of this would be that he should be indemnified by the purchasers against the liabilities which he incurred in earning them. Mr. Bucher concedes that if the vendor became liable, vis-à-vis the Crown, to pay income tax and surtax upon these profits, such liability would fall within the indemnity; and this must clearly be so. But, says Mr. Bucher, the profit which the vendor made on the sale of the business to the purchasers was a profit which he made as principal and not as agent, and he is not accountable for that profit to the company; and accordingly the tax referable to such profit and exigible under section 143 of the Income Tax Act, 1952, is altogether outside the ambit of clause 8 of the deed.

It seems to me that Mr. Bucher is right in this contention. The sale transaction between the vendor and the purchasers was a transaction as between principal and principal, and no question of agency entered into it at all. The liability of the company to indemnify Mr. Hollebone was essentially linked with his own liability to account to the company for profits made by him as their agent and on his behalf. The liability of the purchasers cannot, in my judgment, be regarded as extending to tax on profit which he made, not as agent but as principal, and which he was entitled to retain for himself. The case of *Adams* v. *Morgan & Co.*[18] was wholly different from the present; for the super tax for which the plaintiff was liable to the Crown in that case was assessed on profits for which he was accountable to the defendants as their agent, and, as I have said, the vendor is in no way accountable to the purchasers for the profit which he made on the sale to them of the business. I am, therefore, of opinion that the vendor cannot render the purchasers liable under clause 8 for the surtax referable to that profit.

I accordingly agree that the order of the judge should be varied in the manner which my Lord has indicated.

ORMEROD L.J. I agree. The question which arises in this appeal is whether on the proper construction of clauses 4 and 8 of the agreement between the parties, made on July 14, 1952, for the sale of his business by the plaintiff to the defendants, the

[18] [1924] 1 K.B. 751.

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liability for the payment of income tax and surtax should fall on the purchaser or the vendor. So far as the construction of clause 4 is concerned, I have nothing to add to what has already been said by my Lords. The relevant words "all the debts "liabilities contracts and engagements of the vendor in relation "to the said business" must in my judgment include a liability for income tax on profits arising from carrying on the business, and *Stevens* v. *Britten*,[19] if not conclusive, does certainly offer considerable guidance on the point. But I agree, for the reasons already given, that the terms of the clause are not sufficiently wide to include the liability to surtax.

With regard to clause 8, it is clear that the plaintiff is entitled to be indemnified against any liability for income tax on the profits of the business for the period from April 1 to July 14, 1952, when he was to be deemed to be carrying on the business as agent for the defendants. The judge, relying on the decision in *Adams* v. *Morgan & Co. Ltd.*,[20] has found that he should also be indemnified against liability to surtax on the sum of £20,000. Mr. Bucher on behalf of the appellants argued that this should not be so. He agrees that his clients should accept liability for any tax on profits arising from transactions in which the plaintiff was acting as their agent, but not for a profit arising from the sale of the business. In this transaction, says Mr. Bucher, the plaintiff was acting as principal and not as agent, and such profit as he made on the transaction was not one for which he was liable to account to the vendors. This argument is in my view well founded, and affords a distinction between this case and *Adams* v. *Morgan & Co. Ltd.*[21]

I agree that the appeal should be allowed in respect of this claim, and that the order of the judge should be varied accordingly.

Appeal allowed in part.

Solicitors: *Slaughter & May; Trower, Still & Keeling.*

F. R. D.

[19] [1954] 1 W.L.R. 1340.
[20] [1924] 1 K.B. 751.
[21] Ibid.

[PROBATE, ETC., DIVISION.]

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April 16.

* PRACTICE DIRECTION (PETITION).

Husband and Wife — Practice — Pleading — Petition — Children of the family.

If a petition for divorce, nullity or judicial separation filed on or after January 1, 1959, refers to "issue," "children of the

"marriage," etc., without saying that there are no other children of the family, the registrar's certificate will in future be refused until the petition has been suitably amended. A certificate from the petitioner's solicitors will no longer be accepted.

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PRACTICE DIRECTION (PETITION).

B. LONG,

Senior Registrar.

April, 16, 1959.

[CHANCERY DIVISION.]

* OLVER *v.* HILLIER.

[1959 O. 201.]

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Roxburgh J.

Arbitration—Stay of judicial proceedings—Partnership—Dissolution—Partnership agreement containing arbitration clause — Action by one partner for decree of dissolution—Claim for appointment of receiver — Application for stay of proceedings — Claim involving exercise of judicial discretion—Whether action should be stayed—Partnership Act, 1890 (53 *&* 54 *Vict. c.* 39), *s.* 35 (*d*) (*f*)—*Arbitration Act,* 1950 (14 *Geo.* 6, *c.* 27), *s.* 4 (1).

Arbitration — Partnership — Action for dissolution — Claim involving exercise of judicial discretion—Whether matter should be transferred to arbitrator.

By section 35 of the Partnership Act, 1890: "On application by "a partner the court may decree a dissolution of the partner-"ship . . . (*f*) Whenever in any case circumstances have arisen "which, in the opinion of the court, render it just and equitable "that the partnership be dissolved."

By section 4 (1) of the Arbitration Act, 1950: "If any party to "an arbitration agreement, . . . commences any legal proceedings in "any court against any other party to the agreement . . . in respect "of any matter agreed to be referred, any party to those legal "proceedings may . . . apply to that court to stay the proceedings, "and that court . . . if satisfied that there is no sufficient reason "why the matter should not be referred in accordance with the "agreement, . . . may make an order staying the proceedings."

One of two partners carrying on business under a partnership agreement which contained a clause providing for the reference of all disputes to arbitration, brought an action for a decree of dissolution of the partnership and, inter alia, the appointment of a receiver and manager, alleging that "In the circumstances it is "just and equitable that the . . . partnership be dissolved." On a motion by the defendant partner under section 4 of the Arbitration Act, 1950, for an order staying the action:—

Held, that the words of the arbitration clause were wide enough to cover all the disputes and issues arising in the action.

[Reported by MARGARET THOMAS, Barrister-at-Law.]

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Olver
v.
Hillier.

The court, in the exercise of its discretion under section 4 of the Arbitration Act, 1950, refused to stay the action.

Joplin v. *Postlethwaite* (1889) 61 L.T. 629 applied.

Vawdrey v. *Simpson* [1896] 1 Ch. 166 considered.

Motion.

By a partnership agreement dated March 30, 1954, it was agreed that the plaintiff, Richard Olver, and the defendant, Francis William Hillier, should become partners in a dairy-farming business carried on at Highfields Farm and Hollybush Farm in the county of Hertford for a period of seven years, subject to determination as therein provided. The agreement contained the following arbitration clause: "All disputes and "questions whatsoever which shall either during the partnership "or afterwards arise between the parties or their respective "representatives or between either partner and the representa-"tives of the other partner touching this agreement or the "construction or application thereof or any clause or thing herein "contained or any account valuation or division of assets debts "or liabilities to be made hereunder or as to any act deed or "omission of either partner or as to any other matter in any way "relating to the partnership business or the affairs thereof shall "be referred to a single arbitrator. . . ."

The plaintiff brought an action against the defendant claiming dissolution of the partnership, accounts and inquiries, and the appointment of a receiver and manager alleging, by his statement of claim, that the defendant had so conducted himself in matters relating to the partnership business that it was not reasonably practicable for the plaintiff to carry on the business in partnership with him, and that "In the circumstances it is just and equitable "that the said partnership be dissolved." [1]

By this motion the defendant applied under section 4 of the Arbitration Act, 1950,[2] for an order staying the action, and asked

[1] Partnership Act, 1890, s. 35: "On application by a partner the "court may decree a dissolution of "the partnership in any of the follow-"ing cases: . . . (*d*) When a partner, "other than the partner suing, wil-"fully or persistently commits a "breach of the partnership agree-"ment, or otherwise so conducts "himself in matters relating to the "partnership business that it is not "reasonably practicable for the other "parties . . . to carry on the business "in partnership with him: . . . "(*f*) Whenever in any case circum-"stances have arisen which, in the "opinion of the court, render it just "and equitable that the partnership "be dissolved."

[2] Arbitration Act, 1950, s. 4 (1): "If any party to an arbitration agree-"ment, . . . commences any legal "proceedings in any court against any "other party to the agreement, . . . "in respect of any matter agreed to "be referred, any party to those legal "proceedings may at any time after "appearance, and before delivering "any pleadings or taking any other "steps in the proceedings, apply to "that court to stay the proceedings, "and that court or a judge thereof, if "satisfied that there is no sufficient "reason why the matter should not "be referred in accordance with the "agreement, and that the applicant "was, at the time when the proceed-"ings were commenced, and still "remains, ready and willing to do all "things necessary to the proper con-"duct of the arbitration, may make "an order staying the proceedings."

that the disputes and questions between the parties be referred to arbitration in accordance with the terms of the agreement.

J. M. Hoare for the defendant.

A. H. Ormerod for the plaintiff.

The following cases, in addition to those referred to in the judgment, were cited in argument: *Walmsley* v. *White* *; *Denton* v. *Legge* †; *Melgrave* v. *Finer*.‡

ROXBURGH J. This is a motion to stay a partnership action on the ground of an arbitration clause in the partnership agreement. [His Lordship stated the facts set out above and continued:] The plaintiff's claim in the action appears to be under both section 35 (*d*) and section 35 (*f*) of the Partnership Act, 1890. The arbitration clause is very wide, although not wider than that in the leading case of *Joplin* v. *Postlethwaite*.[1] [His Lordship read the arbitration clause in the present case and continued:] It is quite plain that those words, on their true construction, are ample to cover everything that arises in this action. Therefore, under section 4 of the Arbitration Act, 1950, the burden is on the plaintiff to justify the continuance of his action. His obligation is not to persuade the court that he has a right to continue, but that he ought to be allowed to continue. In other words, in the last resort, the question is one of discretion, which must be exercised, as all discretions conferred upon judges, judicially.

I desire to stress that because it is not a matter of authority at all, but of judicial discretion exercised in relation to the facts of the particular case. But there are two cases which, read subject to that important proviso, are material to the present case. The first is the decision of the Court of Appeal in *Joplin* v. *Postlethwaite*.[2] The arbitration clause there was very wide, but none the less Bowen L.J., delivering the second judgment, said [3]: "Now, one of the matters to be determined here is, "whether or not the partnership should be dissolved. It does "seem to me that that is a matter which should not be deter-"mined by arbitration," and Fry L.J. said [4]: "I entirely agree." In fact, though Kay J. had gone further and said [5] that there was no power to stay in such an action, and the Court of Appeal did not accept that view, they did, nevertheless, affirm the order of Kay J. that the action should not be stayed.

Against that, counsel for the defendant cited *Vawdrey* v. *Simpson*,[6] where Chitty J. granted a stay. It does not seem to me, though the position is not clear, that the relief in that case was sought under section 35 (*f*) of the Partnership Act, 1890, but

* (1892) 67 L.T. 433.
† (1895) 11 T.L.R. 267.
‡ The Times, February 18, 1959.
[1] (1889) 61 L.T. 629.
[2] Ibid.
[3] Ibid. 632.
[4] Ibid.
[5] Ibid. 631.
[6] [1896] 1 Ch. 166.

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only under section 35 (*d*). At any rate, Chitty J. did not advert to a difficulty which troubles me, namely, the difficulty of transferring to the arbitrator the power expressly conferred upon the court of deciding, not what the facts are, but whether, on the facts as found, it is just and equitable to decree a dissolution.

I do not say that, as a matter of construction, the contract may not have that effect, or it may be that the contract has ousted subsection (*f*) altogether as a matter of pure construction; but where section 35 (*f*) is involved, the view which Bowen L.J.[7] and Fry L.J.[8] took is particularly persuasive. Moreover, there is here a request for a receiver and manager; and it may well be that the parties have, by their contract, excluded the possibility of a receiver or manager ever being appointed in connection with this partnership. It appears to me that the dissolution of a partnership which involves the exercise of a judicial discretion under section 35 (*f*), and which may involve the appointment of a receiver and manager, is again a matter which perhaps is more conveniently left in the hands of the court.

On these grounds, exercising a discretion, because I think that the matter is entirely open to me, I decide not to grant a stay in this case.

Motion dismissed.

Solicitors: *Maples, Teesdale & Co. for Benning, Hoare & Drew, Dunstable; W. J. Fraser & Sons.*

[7] 61 L.T. 629, 632. [8] Ibid.

[COURT OF APPEAL.]

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Lord Evershed M.R. and Pearce L.J.

* JENNER *v.* ALLEN WEST & CO. LTD.

[1956 J. No. 3566.]

Building—Safety regulations—Delegation of duties to foreman—Injury to foreman—Roofs covered with fragile materials—"Ladders, duck "ladders or crawling boards to be provided and used"—Meaning of "crawling boards"—Construction of trade terms in statutory regulations — Crawling boards not provided — Experienced workman killed—Building (Safety, Health and Welfare) Regulations, 1948 (*S.I.* 1948, *No.* 1145), *reg.* 31 (3) (*a*).

Statute—Construction—Meaning of word—Trade term—Enactment with reference to particular trade—Trade evidence—"Crawling board" —Building (Safety, Health and Welfare) Regulations, 1948, *reg.* 31 (3) (*a*).

Statutory Duty—Breach—Contributory negligence—Breach due to fault of person injured.

Fatal Accidents Acts—Damages—Voluntary payment—Receipt by widow of voluntary pension from employers of deceased husband—Whether payment resulting from husband's death—Fatal Accidents Act, 1846 (9 *&* 10 *Vict. c.* 93), *s.* 2.

Negligence—Safe system of work—General precautions—Experienced workman—Knowledge of risk—Employer's duty of reasonable care.

The plaintiff's husband was killed by falling through an asbestos ceiling whilst he was engaged in repairing a roof at the defendants' factory. The deceased had worked for the defendants for 39 years and was in charge of three other men engaged in repairing the roof. The evidence showed that he was aware of the risk of falling through the fragile ceiling but he was not using the scaffold boards which were provided. There was no evidence that the deceased had been told of the regulations requiring the use of crawling boards, or that he was given any instructions on how he should do the work. The plaintiff brought proceedings claiming that the defendants were in breach of, inter alia, regulation 31 (3) of the Building (Safety, Health and Welfare) Regulations, 1948,[1] in failing both to provide and to use suitable crawling boards. Further, they were negligent in failing to supervise and instruct the deceased to use crawling boards. After the accident the defendants made a voluntary weekly payment to the plaintiff, which by the date of the hearing totalled £914 (and by the date of the hearing of the appeal £1,100). Judgment was given in her favour but she was awarded only one-quarter of the assessed damages on the ground that the deceased had been guilty of contributory negligence. On appeal, and cross-appeal:—

Held, (1) that, on the facts, even if there had been only a breach of the duty to use and not to provide crawling boards, the defendants could not show that their breach was entirely vicarious on account only of the default of the deceased, and they could not be wholly absolved from responsibility.

Manwaring v. *Billington* [1952] W.N. 467; [1952] 2 T.L.R. 689; [1952] 2 All E.R. 747 distinguished.

(2) That the defendants were guilty of negligence in relying solely on the skill and experience of the deceased to carry out an awkward task involving some danger.

General Cleaning Contractors Ltd. v. *Christmas* [1953] A.C. 180; [1953] 2 W.L.R. 6; [1952] 2 All E.R. 1110 applied.

(3) That the regulations were addressed to a particular trade and the trade meaning should be given to expressions used in them. Applying that test, "crawling boards" meant boards with transverse battens across them and, accordingly, the defendants were guilty of a breach of the duty to provide such boards.

Observation of Lord Esher M.R. in *Unwin* v. *Hanson* [1891] 2 Q.B. 115, 119 applied.

(4) That in assessing the injury it was proper to deduct the weekly payment made to the plaintiff because this was a payment resulting from the death of her husband.

Baker v. *Dalgleish Steam Shipping Co.* [1922] 1 K.B. 361; 38 T.L.R. 245 and *Mead* v. *Clarke Chapman & Co. Ltd.* [1956] 1 W.L.R. 76; [1956] 1 All E.R. 44 applied.

Peacock v. *Amusement Equipment Co. Ltd.* [1954] 2 Q.B. 347; [1954] 3 W.L.R. 288; [1954] 2 All E.R. 689 distinguished.

[1] Building (Safety, Health and Welfare) Regulations, 1948, reg. 4: "It shall be the duty of every person "employed to comply with the re-"quirements of such regulations as "relate to the performance of an act "by him and to co-operate in carrying "out Parts II to VII of these regula-"tions and if he discovers any defect "in the scaffolding plant or appliances "to report such defect without un-"reasonable delay to his employer or "foreman."

Reg. 31 (3): "Where work is be-"ing done on or near roofs or ceilings "covered with fragile materials "through which a person is liable to "fall a distance of more than 10 feet "(*a*) where workmen have to pass "over or work above such fragile "materials suitable and sufficient "ladders, duck ladders or crawling "boards which shall be securely sup-"ported shall be provided and used."

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(5) That the share of the blame attributable to the defendants should be increased from one-quarter to one-third, but that a sum of £1,100 should be deducted from the total before apportionment, in respect of the voluntary payment which had been made to the plaintiff.

Decision of Gorman J. varied.

Appeal from Gorman J.

The following statement of the facts is taken substantially from the judgment of Pearce L.J.

On June 23, 1955, E. A. Jenner (hereinafter called the deceased), a plumber employed by the defendants Allen West and Co. Ltd., was fatally injured when he fell from the roof of a building at the defendants' factory at Lewes Road, Brighton. The deceased worked in the maintenance department which employed about 100 men and at the time of the accident he was in charge of three men. He was 53 years of age and had worked for the defendants for 39 years.

The building from which he fell was about 20 feet high at the apex and was roofed with corrugated iron. One side of the roof sloped down at an angle of 20 degrees and ended in a gutter running between that roof and the next. On the other side of the gutter was a steep adjoining roof set with glass fanlights. The gutter, which was about 10 feet above the ground, had had to be removed and repaired. In order to do that it had been necessary to remove the sheets of corrugated iron immediately above it. The roof consisted of three rows of corrugated iron sheets each 10 feet 6 inches by 2 feet 3 inches and weighing 64 lb. The bottom row of sheets had been removed, while the two top rows were left in position. The removal of sheets exposed and laid bare the beams, purlins, and wooden stretchers, and the asbestos ceiling or inner skin of the building. On the day of the accident the work of the deceased with his three helpers was to replace the row of corrugated iron sheets that had been removed. They would naturally start by putting in the sheet nearest to the side-edge of the roof. Sheets could be handed to a man standing in the gutter by another man standing on a low lean-to roof of corrugated iron that ran up to that side of the building. A man standing in the gutter would have glass fanlights behind him, and in front of him would be the 10-foot strip of exposed timbering on which they had to replace the corrugated iron sheets.

The asbestos and stretchers were obviously unsafe to tread on, but the top two-thirds of the roof (from which the corrugated iron had not been removed) would bear their weight safely. They could reach the safe part of the roof either by a ladder set against the side of the building or by putting boards across the unprotected 10-foot gap, or (very precariously), by crossing on the stout beams and purlins and taking care not to tread on the stretchers and asbestos.

It was not possible for the sheets to be wholly manipulated by men standing in the gutter because the upper end of the 10-foot

sheets of corrugated iron had to be inserted underneath the row of sheets higher up on the roof (that is to say, between the edges of those sheets and the purlins on which they rested) so as to create an overlap of about a foot to keep out the water. Therefore, while one man in the gutter was taking the sheet over the side of the building and pushing it up into position, taking care not to break the glass fanlights behind him, another man had to hold up the edge of the higher sheet in order that the new sheet could be slid under it. If the man who was holding up the edge of the higher sheet was stationed on the higher sheets, he would obviously have to make some arrangement by which he was not sitting on the actual sheet whose edge he was trying to raise. He would have to do it by placing himself on a sheet to the side of the sheet he was trying to raise. Or he could place planks across the bare beams and purlins and from that plank he could raise the edge, always provided that the plank did not by its weight hold down the edge of the sheet he was trying to raise. Or he could stand on a ladder against the side of the building and so raise the higher sheet while the lower was slid into position by the man standing in the gutter. When the first sheet of the bottom row was in position he could then kneel or lie on that sheet in order to hold up the edge for the next, and so forth. Several possible methods were discussed in evidence at the trial.

The deceased was well-accustomed to the roofs of the defendants' premises and it was to him that they looked when repairs had to be done on them. He was in the habit of using boards for roof work and had himself on that day warned his assistants to keep their weight off the exposed asbestos and stretchers.

He went up on to the gutter by means of a ladder. When next seen he was on the second row of sheets, that is, immediately above the exposed strip. As there were no boards on the roof he had presumably reached that position by the precarious method of crossing on one of the beams.

He had sent one of the men for a ladder but had apparently become impatient and thought he could manage without it. The first sheet was then passed up and a man standing in the gutter tried to push it up into position underneath the edge of the sheet on the higher row. The deceased was trying to help the manoeuvre by lifting that edge. He moved in order to get a better grip. He had his weight on his left foot, which was on the solid second row of sheets, but his right foot was overhanging the sheets and rested lightly on a stretcher in the exposed part of the roof. He slipped or placed too much weight on the stretcher, fell through the asbestos ceiling and was killed.

His widow and administratrix, Mrs. D. M. Jenner (hereinafter called "the plaintiff") claimed damages for breach, inter alia, of regulation 31 (3) of the Building (Safety, Health and Welfare) Regulations, 1948, in failing to provide and to use suitable and sufficient ladders, duck-ladders or crawling boards. She further claimed damages for negligence on the ground, inter alia, that

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the defendants had failed to supervise the deceased adequately or at all, and had failed to instruct and require him to use "crawl "boards."

At the trial of the action Gorman J. found that regulation 31 (3) applied to the case, but that the obligation to provide, in particular, suitable crawling boards had not been broken, as boards were available to the knowledge of the deceased, though he did not use them. The boards provided by the defendants had no transverse battens, and with one possible exception the trade evidence called showed that "crawling boards" within the meaning of the regulation meant boards with battens. The defendants' maintenance foreman said that the boards available were scaffold boards, that battens could have been fixed to them but that that would not normally be done, and that duck boards with battens had sometimes been used. The sole dissentient was the defendants' architect, who said that a crawling board was any board laid over a roof on which one could crawl. It was, he said, synonymous with a duck board and was not necessarily slatted, though if it was used on steep slope, it would be unsuitable unless it had slats.

The judge then went on to find that the obligation to use the boards was broken, but that the blame for that breach was mainly but not entirely on the deceased.

[The relevant part of Gorman J.'s judgment with a consideration of the evidence on which it was based is contained in the judgment of Pearce L.J.]

The judge found, further, that the defendants had been guilty of negligence, though, again, the fault of the deceased was greater than their's. He gave judgment in favour of the plaintiff and assessed the damages at £4,440 but reduced the award to her to £1,110 because of the contributory negligence of the deceased.

He refused to take into account the benefit received by the widow from a pension paid to her by the defendants after her husband's death. Evidence as to this voluntary payment was given by the widow. She said in examination that the defendants had paid her £10 10s. each week from the date of death until February, 1956, and thereafter £5 each week. In cross-examination she admitted that the defendants had done their best to look after her and had paid the sum not on any sort of life insurance but because of her husband's death and because he had died in their service.

There was no evidence as to the defendants' practice with regard to the widows of old employees, and in particular with regard to those (if any) whose husbands had died as the result of some accident during their work. By the date of the trial the defendants had paid to the widow £914.

The defendants appealed and the plaintiff cross-appealed.

Martin Jukes Q.C. and *John May* for the defendants.
F. W. Beney Q.C. and *Hugh Griffiths* for the plaintiff.

In addition to the cases referred to in the judgments the following were cited in argument: *Wilson* v. *Tyneside Window Cleaning Co.* [2]; *Bonnington Castings Ltd* v. *Wardlaw* [3]; *Ginty* v. *Belmont Building Supplies* [4]; *Davies* v. *Powell Duffryn Associated Collieries Ltd. (No. 2)* [5]; *London and North Eastern Railway Co.* v. *Berriman* [6]; *Drummond* v. *British Building Cleaners* [7]; *Hadley* v. *Baxendale* [8]; *Johnson* v. *Hill* [9]; *Greenwood* v. *Martins Bank Ltd.* [10]

LORD EVERSHED M.R. I have asked Pearce L.J. to deliver the first judgment.

PEARCE L.J. This is the defendants' appeal from a judgment of Gorman J. in favour of the plaintiff, a widow, awarding her £1,110 damages under the Fatal Accidents Acts, 1846–1908, in respect of the defendants' breach of statutory duty and negligence at common law, whereby the plaintiff's husband met his death. The total damages were assessed at £4,440, but that amount was reduced by three-quarters owing to the contributory negligence of the deceased.

The defendants appeal on two grounds: First, they contend that the judge should have entered judgment for the defendants on the facts as he found them or as he should have found them. Secondly, they contend that in estimating damages the judge wrongly refused to take into account the benefit received by the widow from a pension given to her by the defendants by reason of the husband's death.

The plaintiff contends that the judge should have found yet a further breach of statutory duty against the defendants, and that the deceased was guilty of no contributory negligence, or, alternatively, that the judge assessed his proportion of it too highly. [His Lordship stated the facts, referred to regulation 31 (3) and (4) and continued:] Mr. Beney contends that the judge was in error in acquitting the defendants of a breach of duty to provide crawling boards, in that they only provided scaffold boards. I will deal with that point later. It is of some importance since, if correct, it would, in my opinion, demand some not very large consequential alteration in the proportions of blame.

The judge did, however, find that the obligation to use crawling boards was broken. "Unfortunately," he said, "those "boards were not used and it is the twofold obligation upon the "defendants here to provide and to use. It is quite clear that "Mr. Jenner knew quite well that those boards were there, and

[2] [1958] 2 Q.B. 110; [1958] 2 W.L.R. 900; [1958] 2 All E.R. 265.
[3] [1956] A.C. 613; [1956] 2 W.L.R. 707; [1956] 1 All E.R. 615.
[4] [1959] 1 All E.R. 414.
[5] [1942] A.C. 601; [1942] 1 All E.R. 657.
[6] [1946] A.C. 278; [1945] 2 All E.R. 1.
[7] [1954] 1 W.L.R. 1434; [1954] 3 All E.R. 507.
[8] (1854) 9 Exch. 341.
[9] (1945) 61 T.L.R. 398; [1945] 2 All E.R. 272.
[10] [1932] 1 K.B. 371.

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"in so far as there is a failure on the part of the defendant company to carry out their obligation under the regulation of using "these boards, the fault is upon Mr. Jenner."

The judge then gave anxious consideration to the question whether the facts came within the authority of *Manwaring* v. *Billington*.[1] In that case the plaintiff had been given definite instructions as to the fixing of ladders, but in breach of the regulations he failed to carry them out. It was held that he could not recover damages for an injury that resulted from this breach. Mr. Jukes relies on that case and the words of Morris L.J.[2]: "I "would deem it incongruous and irrational if, on the facts as "found by the learned judge, the plaintiff could, in effect, success-"fully say to his employer: 'because of my disregard of your "'reasonable instructions I have brought about the position that "'you are in breach of your statutory obligations and so I claim "damages from you because of such breach.'" Not without some doubt the judge concluded on this point: "While some of "the liability here must fall upon Mr. Jenner, I feel myself unable "to say that the whole of the responsibility must fall upon Mr. "Jenner, as the defendants urge. It seems to me that by far the "greater responsibility in these circumstances is upon Mr. Jenner. "but not the whole of it."

I think that the judge was right in reaching that conclusion, even on the basis that there was only a breach of the duty to use and no breach of the duty to provide. It is true that the deceased was, and had been for years, very experienced in making minor repairs on roofs and repairs to gutters; the deceased was the man to whom the defendants turned when work had to be done on roofs; but the evidence does not show that he had done a task of these dimensions before. It shows rather that years might go by without a task involving the removal of iron sheets. The deceased was the leading plumber but he was not the foreman of the maintenance department. It appears that he was given no instructions or help as to how this awkward task should be performed, although he apparently knew that, in general, boards should be used on roofs as a matter of practice. There was no evidence that he had been informed of the regulations by anybody. It appears that the foreman did not know them. The letter written by the defendants after the accident is perhaps illuminating. It does not suggest that the deceased had been informed of the regulations at any time and had disregarded them. It contains the rather elusive paragraph: "As you are aware it is "our safety officer's first duty to ensure that all requirements of "the Factory Acts are met and these are constantly borne in "mind by the company's executive." But the important question is whether the executive informed the workman of, or enforced, the regulations. The safety officer was in court, we are told, but he was not called.

[1] [1952] W.N. 467; [1952] 1 T.L.R. 689; [1952] 2 All E.R. 747.

[2] [1952] 2 All E.R. 747.

There is no evidence to suggest that the defendants ever made any efforts by instruction or otherwise to see that the regulations were communicated to the deceased, or that any person with knowledge of the regulations devoted any consideration to the work in question. I appreciate that this may not be easy where men are skilled and old employees; but one would have thought that the safety officer would have some knowledge on the point.

In each case it is a question of fact whether or not a breach of the regulations by an employer through the fault of an employee gives rise to any claim by that employee. An employer can defeat such a claim if he can say: "I am in breach of the "regulations because of, and only because of, your default. I, "myself, have not failed in any respect (apart from my vicarious "default through your wrongful act) and my breach is co-"terminous with yours."

I think the judge was right in holding that this was not such a case, and that some fault in the matter lay with the defendants, even on the basis that there was only the breach of the duty to use.

In considering the case at common law, I think he was also right in coming to the conclusion that the defendants were guilty of negligence, although the fault of the deceased was greater than theirs. It is said that he wrongly regarded *General Cleaning Contractors Ltd.* v. *Christmas*[3] as binding him to find that in all cases, even where an employee is highly skilled and experienced, the employer must independently apply himself to problems regarding that employee's safety. I do not think he so regarded that case. The facts of it were admittedly different from those in this case. In that case the servant was engaged in work involving great and constant peril. That case was decided on its own facts, but it shows clearly that in cases where perils are involved, which thought or planning might avoid or lessen, it may not be enough for the employer to trust that thought and planning to the skill and experience, however great, of the man who carries out the work, since there is always a duty upon the employer to take all reasonable steps for the safety of his servants. The considerations involved are lucidly expressed in the often-quoted passage from Lord Oaksey's opinion. But in each case it is a question of fact whether the employer failed in his duty by doing no more than trust to the skill and experience of his servant.

In this case the task was an awkward one which involved some degree of danger. It needed careful thought, as is shown by the varying evidence on what was the appropriate method of doing it. There is no sufficient evidence that it was within the experience and competence of the deceased. They relied solely on him. He was admittedly a man of skill and experience, but he failed. That does not, in my opinion, on the facts of this case absolve them wholly from any part in that failure. In my view, the

[3] [1953] A.C. 180; [1953] 2 W.L.R. 6; [1952] 2 All E.R. 1110.

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judge was right in holding that some part of the fault lay with the defendants. Had the judge found that there had been a breach of the duty to provide as well as a breach of the duty to use crawling boards, the defendants' argument based on *Manwaring* v. *Billington*,[4] which, even on the basis of a breach of duty to use, he rightly rejected, would have had less force. Moreover, the indications are, I think, that he would in that case have probably assessed the deceased's contributory negligence at a lower, but not very much lower, figure. For the lack of proper crawling boards, if such there was, may well have contributed very little to the accident, since scaffold boards were provided and those were not used. Nevertheless, it would, to some small extent, I think, have affected the proportions. For the provision of special gear is, in itself, some incentive to its use. It is necessary, therefore, to see whether Mr. Beney's contention that the defendants failed to provide crawling boards is made out.

These regulations, he argues, are addressed to the trade, and must be construed in the light of that fact. Lord Esher M.R. said in *Unwin* v. *Hanson*[5]: "If the Act is directed to dealing "with matters affecting everybody generally, the words used "have the meaning attached to them in the common and ordinary "use of language. If the Act is one passed with reference to a "particular trade, business, or transaction, and words are used "which everybody conversant with that trade, business, or trans-"action, knows and understands to have a particular meaning in "it, then the words are to be construed as having that particular "meaning, though it may differ from the common or ordinary "meaning of the words."

All the trade evidence shows that "crawling boards" are boards with battens on them. [His Lordship referred to the evidence as to the meaning of "crawling boards," summarised above, and continued:] One is inclined to comment that if a crawling board conveys to everybody's mind a board with slats across, that is more likely to be the meaning that the regulations intended than the meaning which it conveyed to the architect personally.

The view of all the witnesses (other than the architect) who gave their views on the matter, is shared and confirmed by the defendants themselves. The factory inspector wrote to them saying: "I understand that at the time of the accident suitable "and sufficient ladders, duck-ladders or crawling boards were not "being used on the roof through which he fell." The defendants replied, inter alia: "The earlier receipt of a number of leaflets "recommending the use of crawling boards is also acknowledged "and the provision of a number of these for the use of our staff "has had serious consideration." It would have been easy to say: "We have plenty of crawling boards since scaffold boards "can be used as such." Finally, it is odd that the regulations say crawling boards if they mean boards.

[4] [1952] 2 All E.R. 747.

[5] [1891] 2 Q.B. 115, 119.

Against this, Mr. Jukes argues that crawling boards need not have battens so long as they are suitable. On flat roofs battens are unnecessary and may be a nuisance. On steep roofs they have to have battens to comply with the test of suitability. It would be absurd to prescribe battens when they are, if anything, undesirable, and his interpretation is, he says, the more reasonable one. Moreover, where there was a conflict the judge was entitled to accept the defendants' architect.

In my view, however, the architect was really agreeing with the other witnesses that crawling boards connoted battens, in the minds of everybody, and his own views of what the regulations meant was irrelevant. I naturally hesitate to differ from a judge who has obviously given such careful consideration to the matter, but I find myself driven to the conclusion that by crawling boards the regulations mean something other than boards; they mean boards with battens on them. In my view, had the judge come to that conclusion, he would probably have assessed the deceased's share of responsibility at two-thirds and that of the defendants at one-third. That is, in my view, the fair proportion. Mr. Beney urges that the whole or the greater blame rests on the defendants. I do not agree. The deceased was a man of great experience and he took a risk which he knew he should not take.

There remains the question whether the judge should have taken into account the pension which the plaintiff has been receiving from the defendants. It was a voluntary payment by them and the aggregate amount paid up to the date of trial was £914. The evidence as to its origin is exiguous and consists of very few and vague answers by the widow.

[His Lordship referred to the evidence summarised above, commenting on the absence of any evidence as to the defendants' practice on the payment of widows' pensions. His Lordship continued:]

The problem starts with the words of the Fatal Accidents Act, 1846, s. 2: "And in every such action the jury may give "such damages as they may think proportioned to the injury "resulting from such death to the parties respectively for whom "and for whose benefit such action shall be brought." Subsequent cases have made it clear that in estimating that injury gains as well as losses must be taken into account to arrive at the net loss. In *Baker* v. *Dalgleish Steam Shipping Co.*[6] this court held that the pension of the widow of a naval petty officer, although it was voluntary and she had no legal right to it, must be taken into account; but that the fact that it was voluntary was important on quantum. Scrutton L.J. there said[7]: "On the "other hand, as the question is what is her pecuniary loss by the "death, any pecuniary advantage she has received from the death "must be set off against her probable loss. This is clear if she "receives such advantage as of legal right." And later: "The

[6] [1922] 1 K.B. 361. [7] Ibid. 372.

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"same principle applies to voluntary benefits conferred in consequence of the death. Just as in assessing the loss by death the probability of voluntary contribution destroyed by the death of the contributor may be included to swell the claim, so the probability of voluntary contribution bestowed in consequence of the death may be used to reduce the claim by showing what loss the claimant has in fact sustained by the death."

Difficulty has arisen on the facts of various cases in deciding what benefits can be properly said to have resulted from the death. In *Peacock* v. *Amusement Equipment Co. Ltd.*[8] this court held that a benefit did not result from the death and, therefore, should not be taken into account in the following circumstances. The plaintiff recovered damages in respect of the death of his wife, who had children by a former marriage to whom she left her shop and her home above it, so that the plaintiff had to go to live elsewhere. The step-children sold the business and premises and, as a voluntary act of generosity, paid one-third of the proceeds of sale to the plaintiff. Somervell L.J. said[9]: "I think that it would be only in very unusual circumstances that a voluntary payment would be taken into account when there was no expectation of it at the time of the death. It seems to me that that indicates for itself that there is a nova causa interveniens which makes the payment not in consequence or as a result of the death within the meaning of the statements which have been made with regard to this problem. To return to the way in which the judge put it, I would have said that this payment was not made as a result of the deceased's death. Of course, it would not have been made unless the wife had died, but I would have said that it was the result of the step-children's consideration, and perhaps affection, for their step-father."

On the other side of the line was a decision in *Mead* v. *Clarke Chapman & Co. Ltd.*[10] This court there took some account of the benefit to a child (whose father had been killed) of having a step-father who had married her widowed mother and supported the child. Singleton L.J. there said[11]: "I do not think that it is right to say that no regard should be paid to the fact that the daughter has a step-father who is kind and good to her. It is the duty of the judge assessing damages to pay regard to all relevant facts and, as far as anyone can tell, the child did not suffer any damage between the time of the second marriage of her mother and the date of trial, but it should not be assumed that of necessity the position will remain the same."

Jenkins L.J. said[12]: "In this state of affairs, Mr. Scarman, for the plaintiff, invites us to hold that all we should have regard to is the loss which Christine has sustained by the death of her

[8] [1954] 2 Q.B. 347; [1954] 3 W.L.R. 288; [1954] 2 All E.R. 689.
[9] Ibid. 354.
[10] [1956] 1 W.L.R. 76; [1956] 1 All E.R. 44.
[11] [1956] 1 W.L.R. 76, 81.
[12] Ibid. 83.

"father, and not the compensating gain she had received in the "shape of an affectionate step-father. Mr. Scarman arrives at "that result in this way: He says that injuries on the one hand "and benefits on the other are only to be regarded if they are the "result of, or the consequence of, the death in question. Here, "he says, the marriage, from the point of view of the child, has "no causal connection at all with the accident; that, from the "child's point of view, the marriage is irrelevant; it does not "give her any rights of maintenance against the step-father. "Therefore, he says, to take into account what the child has "gained in the form of the prospect of being maintained by the "step-father would be doing what was held to be wrong in "*Peacock* v. *Amusement Equipment Co. Ltd.*[13]; that is to say, "lightening the burden of the wrongdoers (namely, the defen-"dants), on the strength of the generosity of the step-father, as "it is in this case, or the step-children, as it was in *Peacock's* "case.[13] In my view, that is not the right way of regarding "Christine's acquisition of a step-father. Clearly, if the father "had not died, the mother could not have remarried and the "child could never have acquired a step-father. She could not "have the advantage of being protected by two fathers at one "and the same time; so that the financial advantage to her of the "protection of the step-father was something that she could not "have enjoyed but for the death of her father. In my view, there "is a sufficient causal connection here to make it proper to take "into account the financial consequences to the child of the re-"marriage of her mother."

Problems of causation often give difficulty. The temptation to secure a more precise principle for application to the facts may obscure rather than clarify the problem. The distinction between causa causans and causa sine qua non does not help here. For clearly the death was not the causa causans of the child acquiring a step-father. And if benefits can be taken into account in cases where the death was merely the causa sine qua non, that would have justified the taking into account of the benefits received from the generosity of the step-children in *Peacock's* case.[13] I do not think that any more precise principle or formula can be obtained than the original words of the Act "resulting "from such death." That, as it seems to me, is the approach of Jenkins L.J. in the passage I have quoted, when he said: "In "my view, there is a sufficient causal connection here to make it "proper to take into account the financial consequences to the "child of the remarriage of her mother." It must be remembered that the Act expressly laid the task of assessment on a jury and defined it in broad and simple terms.

Approaching this case as a jury would approach it, did this pension result from the death of the deceased? Had the pension come from the generosity of some third party who was in no way

[13] [1954] 2 Q.B. 347.

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concerned with the accident, one might well say that it did not result from the death but from that generous impulse. But here the employers paid the pension to the widow of a man whose whole working life had been spent in their service and who had met his death while working on the roof of their premises. It is true that there is no evidence as to their motives or their usual practice or the machinery by which they instituted the pension. And as Parker L.J. pointed out in *Mead* v. *Clarke Chapman & Co. Ltd.*,[14] the onus is on the defendants to show that the pension should be taken into account. But the chain of causation is so direct and so strong on the few facts that are known to us, and any inferences that would break or weaken that chain are so unlikely and remote that, in my view, the pension should be taken into account as resulting from the death.

Since the pension is voluntary and the evidence as to its terms is so nebulous, I think it would be wrong to attribute any great future value to it. The defendants could at once determine it on the day that judgment was given, if they felt it unjust that they should go on paying it. Nevertheless, it is right to put some value on the chances of its continuing. As £914 had been paid up to the date of trial when the assessment fell to be made, I should value the benefit at the figure of £1,100. That sum, therefore, should be deducted from the total sum of damages before the proportion is calculated. An argument was put forward in favour of deducting the whole of it from the plaintiff's proportion of the damages, but I can see no ground of legal principle or justice for so doing. The amount of the judgment when the calculation has been done remains unaltered.

Lord Evershed M.R. I have had the advantage of seeing in advance the judgment which Pearce L.J. has delivered, and I agree entirely with his conclusions and with the reasons he has given for them.

I only venture to add a few observations of my own because, although the final result for the plaintiff is the same, nevertheless we have arrived at that result in some respects by a different route, and in these respects we have differed from the opinion of the judge.

The judge considered with great care and, as he himself said, with anxiety, the problems before him, including the question—and this is one of the questions on which we have ventured to come to a different view from his—of the meaning in regulation 31, paragraph (3) of the formula "crawling boards."

The end of the matter is stated thus by the judge: "I have "been very much exercised here as to what remains, in those "circumstances, of the obligation upon the defendants." Then, omitting one sentence, he continues: "It is said by Mr. Jukes "that having found, as I now have found, that there was no

[14] [1956] 1 W.L.R. 76.

"breach of the obligation here on the part of the defendants to "provide suitable crawling boards, and that the failure to use "them was the act of the deceased man, I should exonerate the "defendants from liability."

I do not need to go again over the evidence which my brother Pearce has analysed in the course of his judgment. I bear in mind, of course, that I have not, as had Gorman J., the advantage of hearing the witnesses; I bear also in mind, as Mr. Jukes observed in the course of his reply, that the witnesses were at times, to say the least, in some degree of confusion between what were ladder boards, duck boards and crawling boards. None the less, as my brother has pointed out, I find it inescapable, after a close reading of all the evidence, to conclude otherwise than that all the evidence, even that of the architect, was to the effect that by "crawling boards," would be understood by those versed in the appropriate trades (and therefore so intended by Parliament), boards that were supplied with transverse struts or bars; and I also draw attention as did my brother, to the circumstances that unless such a view is taken, the word "crawling" in the regulation would appear to me to be entirely otiose.

It follows, therefore, that with all respect to him, I part company from the judge in this matter, in that I would conclude that here the defendants were in breach of their obligation to provide suitable crawling boards. It does not, of course, necessarily follow from that, that the defendants are to any extent, or to any greater extent, responsible for the loss of his life by the deceased; but again I find it impossible to put from my mind the point which was put by my brother, expressed briefly thus: that the provision of proper crawling boards would have been, at least according to the ordinary expectation, an incentive to their use.

Moreover, I cannot read the relevant pages of this judgment and not conclude that if the judge had taken the view which I venture to think he should have taken on this question of the provision of suitable crawling boards, he would have attached some greater share of the blame to the defendants; it seems to me that no other view really is consistent with the sense and general tendency of his language.

On the other side I do not, of course, forget the important point that here was a man of long experience, naturally careful in his ways who, as was proved, knew quite well that he must not in any circumstances allow his weight to go upon the fragile roofs or ceilings.

For those reasons I do not think it would be right to increase to a preponderating share the blame of the defendants. But I repeat that, consistently with the general tenor of Gorman J.'s conclusions, I think there must be some increase, and that proposed by my brother seems to be a fair one, namely, from one-quarter to one-third.

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I turn now to the second question, a difficult question which is of some general interest, namely, that of the extent to which there should be taken into account by the plaintiff what Jenkins L.J. called the "compensating gain" of the voluntary pension which she has so far received from the defendants.

As my brother has observed, the question depends upon the effect of the relevant section, section 2, of the Fatal Accidents Act of 1846; it is, as was said, a jury point, and the court acting in that way has to give such damages as it may think "proportionate to the injury resulting from such death."

An examination of the decided cases may, I think, lead to the conclusion that no clear definitive principle can be enunciated which will cover every kind of case, and it may be said that the matter has been obscured, rather than illuminated, by the use of the Latin language in such phrases as causa causans, causa sine qua non, and so on. But, treating each case as one to be judged by the sort of commonsense standard which a jury would apply according to the particular facts, the question must be, as I think, whether in a true, real and accurate sense what is sought to be taken into account results from the death. Of course, to this extent the death plays a part, and an essential part, in the chain of events which ends with the compensating gain, namely, that unless the man had died clearly nothing would have been paid. But in *Peacock* v. *Amusement Equipment Co. Ltd.*[15] this court, I think, founded itself upon the view that the compensating gain which the widower received from his step-children was, in a real, true and accurate sense, the result, not of his wife's death, but of his step-children's generosity.

On the other side is the case already referred to, *Mead's* case[16]: and if the language of Jenkins L.J. that "there was a "sufficient causal connection" is given the fullest possible scope, it might be said to be wider than I myself think that Lord Justice would have intended.

It is to be observed that in that case, as I follow it, the judge in the court below had taken such account of the step-father's kindness to this child Christine that he had reduced Christine's damages to £36. This court thought that the compensating gain of the step-father's regard and care for the child could not be, as counsel for the plaintiff submitted, excluded altogether from consideration; but, unlike the judge, they thought that they could not give it such effect that financially the child had suffered no loss at all—in other words, as though there had been no death; and, therefore, the child's damage was increased from £36 to £200.

This case to my mind is a stronger one for the argument that the sum paid should be taken into account. This is a case in which, albeit the evidence of the circumstances are deficient, the employers of this man may be taken to have

[15] [1954] 2 Q.B. 347. [16] [1956] 1 W.L.R. 76.

made this payment in recognition of what I ventured to call during the course of the argument an obligation of humanity towards the widow of an old and well-tried servant, who had been killed in their service, in the course of their employment; and to my mind, that being so, there clearly is in Jenkins L.J.'s phrase, a sufficient causal connection with the death to entitle the defendants to have their benefaction taken into account. In other words, no less than the plaintiff's financial loss when her husband was killed does she have a compensating gain "resulting "from the death" in the form of the pension which she has received. I add that to hold otherwise in such a case as the present would appear to me not to be in the interests of public policy, since it would inevitably be likely to discourage voluntary payments of this kind which considerate employers might feel some conscientious obligation or inclination to make.

The question of estimation of the amount is, of course, a matter of some difficulty. It was pointed out that the mere fact that the pension is voluntary should not make the estimation nil. It is conceded that the estimate was to be made at the time of the judgment; at that time approximately £910 had been received, and I cannot accept and nor, if I may be forgiven for saying so, do I understand, Mr. Ogden's ingenious claim for some process of discount. But viewing the matter at the date of the trial, I think the judge would have assumed in the circumstances the likelihood, or the probability, of some continuance, and such an assumption has in fact been borne out by subsequent payments. So that if one adds the full amount of the subsequent payments and arrives at £1,110, it seems to me that one reaches a fair estimate which the judge could have made of the value, financially, of that compensating gain.

It will, of course, be observed that the result in the end is the same exactly as the conclusion of the judge—the sum of damages, namely £4,440, being reduced to £3,330, but, the plaintiff being now entitled to a third of the smaller sum, arithmetically the result is the same. That is coincidental, but in my judgment it happens to be just, and in the circumstances, therefore, I agree that in effect the order made stands as the judge made it. Indeed, subject to counsel's arguments about it, it would appear that the only variation necessary is to excise the recital of the apportionment—I think that would be the most convenient thing to do—and let the judgment stand in other respects as it is drawn up.

Appeal and cross-appeal dismissed.

Solicitors: *Clifford-Turner & Co.; W. H. Thompson.*

E. D.

[COURT OF APPEAL.]

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Feb. 9, 10, 11, 12, 13; *Mar.* 23.

Jenkins, Romer and Ormerod L.JJ.

* GRANADA THEATRES LTD. *v.* FREEHOLD INVESTMENT (LEYTONSTONE) LTD.

[1956 G. 2126.]

Landlord and Tenant—Repairs—Covenant—"Structural repairs of a "substantial nature"—Meaning of "structural repairs"—Meaning of "substantial"—Notice to landlords of disrepair—Disrepair due to failure of tenants' predecessors to repair—Liability of landlords—Long delay by landlords in complying with notice—Refusal of landlords to give specification of proposed repairs—Landlords' workmen prevented from doing repairs—Repairs done by tenants—Whether tenants entitled to damages.

By clause 2 (3) of a lease made in 1941 of a cinema the tenant covenanted to keep the demised premises "in good and substantial "repair and condition and properly decorated . . . but nothing in "this clause contained shall render the [tenants] liable for struc-"tural repairs of a substantial nature to the main walls roofs "foundations or main drains of the demised building." By clause 3 (2) the landlords covenanted, except so far as the tenants were liable under their covenants, to "repair maintain and keep the "main structure walls roofs and drains of the demised premises in "good structural repair and condition." On December 13, 1954, the lease was assigned to the plaintiffs (the tenants).

The roof being in disrepair and the cement rendering and brickwork of the front main elevation being defective, the tenants, on January 31, 1955, served a schedule of dilapidations on the landlords in respect of these. Long negotiations followed. The tenants contended that the roofs required reroofing at a cost of £961, the landlords, on the other hand, alleged that they had obtained a tender of £130 10s. for the work, and that £961 was excessive. The landlords further contended that the repairs were the liability of the tenants, being due to the failure of the tenants' predecessors in title to keep the premises in good repair in accordance with their repairing covenants. The tenants required the landlords to furnish their surveyor with a written specification of the repairs the landlords proposed to do. The landlords failed to do so but, after a long correspondence, on September 19, 1955, on their instructions, a builder with his men entered on the premises and started to repair the roof. They were ordered off the premises by the tenants, who subsequently did the repairs themselves at a cost of £961 and in this action claimed damages for breach of the landlords' covenant to repair the roof, and a declaration that the landlords were liable to repair the front elevation:—

Held, (1) that making good the rendering and brickwork of the front elevation were structural repairs of a substantial nature and fell within the landlords' covenant to repair.

(2) That the repairs to the roof also fell within the landlords' covenant.

(3) That an assignee of a term is not liable for particular breaches of a tenant's repairing covenants committed by his predecessor, though he is liable for the disrepair of the premises as they stand when he takes over so far as their then state of disrepair falls within the scope of the tenant's repairing covenants; but that

particular breaches committed before the assignment to him, as distinct from the state of the premises when he takes over, are matters, generally speaking, with which he is not concerned; and that, in the short time which elapsed between the assignment of the premises to the plaintiffs and the service of the notice of dilapidations, no appreciable part of the disrepair could be attributed to breach of the lessees' covenant by the plaintiffs as tenants; accordingly, the accumulated breaches of the lessees' repairing covenants could not be set off against the claim against the landlords for breach of covenant.

(4) (Jenkins L.J. dissenting), that, assuming that the repairs which the landlords proposed to do to the roof would have constituted a sufficient performance of their covenant under clause 3 (2) of the lease, the landlords had, on the facts, given to the tenants a sufficient warning of their intention to do the repairs, and of the nature of the work they proposed to do, and that the tenants having prevented the landlords from doing the work, the landlords were not in breach of their repairing covenants in regard to the roof and the tenants had no cause of action in respect of the landlords' failure to repair the roof.

(5) That the case must be remitted back to the trial judge to determine whether the landlords' proposed repairs would have, if completed, have complied with the landlords' repairing covenant.

Decision of Vaisey J. [1958] 1 W.L.R. 845; [1958] 2 All E.R. 551 varied.

APPEAL from Vaisey J.[1]

By a lease dated June 12, 1941, the Century Cinema at Leytonstone, Essex, was demised by the predecessors in title of the defendants to the predecessors in title of the plaintiffs. By clause 2 (3) of the lease the tenants covenanted: "To keep the "demised premises and the sanitary and water apparatus and all "additions and improvements thereto in good and substantial "repair and condition and properly decorated and in a state in "every respect fit for cinematograph entertainments but nothing "in this clause contained shall render the lessee liable for struc-"tural repairs of a substantial nature to the main walls roofs "foundations or main drains of the demised building." By clause 3 (2) the landlords covenanted "To (except so far as the "lessee is liable under the lessee's covenants hereinbefore "contained) repair maintain and keep the main structure walls "roofs and drains of the demised premises in good structural "repair and condition at all times during the said term."

By an assignment of December 13, 1954, the lease became vested in the plaintiffs, Granada Theatres Ltd. (hereinafter called "the tenants"). On January 31, 1955, they served a schedule of dilapidations on the defendants, Freehold Investment (Leytonstone) Ltd., the then owners of the reversion (hereinafter called "the landlords"), requiring them to repair the roofs and the front elevation of the cinema, from which the cement rendering was breaking away. A long correspondence followed between the parties. The landlords at first repudiated all liability, but at a

[1] [1958] 1 W.L.R. 845; [1958] 2 All E.R. 551.

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later stage their Lordships held that they agreed to do repairs. It appeared from that correspondence that one Coles, who was the architect acting for the tenants, contended that the whole auditorium roof needed stripping and reroofing, none of the old slates being worth re-using. He also contended that the smaller roof at the rear of the premises required re-covering with asbestos. The tenants' builders' estimate for this work was £807 for the auditorium roof and £154 for the rear roof, making £961 in all. One Rusha, who was the architect for the landlords, did not agree with Coles. Rusha advised the landlords that the auditorium roof did not require stripping. He considered that the matter could be dealt with by the roof being overhauled, broken and cracked slates being replaced and refixed where they had slipped. He obtained an estimate from one Tidey, a builder, for this work. Tidey's estimate "to overhaul and renew cracked and broken slates "(approximately 351) refix all slipped slates and leave water-"tight" was £130 10s. This estimate only referred to the auditorium. The landlords did not obtain an estimate for the rear roof.

In the correspondence which took place between the parties and their respective architects, the tenants' advisers repeatedly drew the landlords' attention to the fact that the auditorium had been redecorated and that the roof leaked when it rained. The tenants threatened to do the repairs themselves. In the course of this correspondence Coles, on behalf of the tenants, several times asked for detailed specifications of the work which the landlords proposed to do, and stated that no work must be done until he had sufficient information to satisfy him that the roof would be satisfactorily repaired, and that the times of working would be acceptable to the management of the cinema. No specifications were supplied by the landlords.

On September 14 Rusha wrote to Coles that his contractors would be commencing work on the roof early the next week. On September 19 Tidey sent his men to the cinema and they began the work of repair on the roof on the landlords' behalf. On the instructions of one Bernstein, the tenants' managing director, they were ordered off the premises and not allowed to continue the repairs. The parties' architects were by this time at loggerheads and failed to reach any agreement. The tenants did the work of repair themselves.

In this action the tenants sought to recover £961 as damages for breach by the landlords of their covenant to repair the roofs, and a declaration that on the true construction of the lease the repairs to the front elevation of the cinema were the responsibility of the landlords.

The landlords contended (1) that some of the roof repairs were not, and that none of the front elevation repairs were, repairs within the landlords' covenant in clause 3 (2) of the lease; (2) that such of the roof repairs as fell within clause 3 (2) were not necessary in order to repair, maintain and keep the

main structure, walls, roofs and drains of the cinema in good structural repair and condition; (3) alternatively, that such of the roof repairs and of the front elevation repairs as were repairs within clause 3 (2) had become such repairs by reason of the neglect or failure of the tenants to carry out from time to time, as and when necessary, such repairs as ought to have been carried out by the tenants under clause 2 (3) of the lease, for an assignee was not relieved of liability merely because the premises had become out of repair before he took his assignment; (4) that they were not liable for the cost of the repairs carried out to the roof by the tenants; and (5) that their refusal to carry out repairs to the front elevation was not a breach of their obligations under clause 3 (2).

The tenants replied, inter alia, that even if individual items of disrepair occurring before the assignment to them had been the liability of the then tenants and not the landlords, at the time of the assignment these items had become "of a substantial "nature." At the first moment when the tenants became liable at all on the covenants of the lease, the repairs in question had accordingly ceased to fall within the tenants' covenant and fell within the landlords' covenant. The landlords might have a claim for indemnity against those in whom the lease was previously vested, but that could not affect the present tenants. Even if an assignee was liable to make good disrepair existing at the time of the assignment to him, this could be so only if the items of disrepair then fell within the tenants' repairing covenant. An assignee was not vicariously liable for breaches of covenant by his predecessors in title.

Vaisey J. gave judgment for the tenants, holding that the repairs both to the roofs and the front elevation of the premises were structural repairs of a substantial nature. He, however, held, as the evidence of the cost of effecting the repairs was unsatisfactory, that there must be an inquiry as to damages.

The landlords appealed.

H. Heathcote-Williams Q.C. and *John Vinelott* for the landlords.

R. E. Megarry Q.C. and *Oliver Lodge* for the tenants.

The following decisions were referred to in argument which are not mentioned in the judgments: *Guarantee Trust Company of New York* v. *Hannay & Co.*[2]; *Chapman* v. *Michaelson*[3]; *Grescot* v. *Green*[4]; *Lurcott* v. *Wakeley*[5]; *Betty's Cafés Ltd.* v. *Phillips Furnishing Stores Ltd.*[6]; *Taylor* v. *Needham.*[7]

Cur. adv. vult.

[2] [1915] 2 K.B. 536.
[3] [1909] 1 Ch. 238.
[4] (1700) 1 Salk. 198.
[5] [1911] 1 K.B. 905.
[6] [1957] 1 Ch. 67; [1956] 3 W.L.R. 1134; [1957] 1 All E.R. 1, C.A.; reversing [1956] 1 W.L.R. 678; [1956] 2 All E.R. 497.
[7] (1810) 2 Taunt. 278.

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GRANADA THEATRES LTD. v. FREEHOLD INVESTMENT (LEYTONSTONE) LTD.

March 23. The following judgments were read:

JENKINS L.J. This is an appeal by the defendants, Freehold Investment (Leytonstone) Ltd., from a judgment of Vaisey J., dated June 13, 1958, in an action brought against them by the plaintiffs, the Granada Theatres Ltd., concerning the liability of the landlords under a landlord's repairing covenant contained in a lease dated June 12, 1941, by the landlords' predecessors in title to the tenants' predecessors in title, of the premises known as the Century (formerly the Academy) Cinema, 350A, High Road, Leytonstone. The lease was for a term of 21 years from June 2, 1941, at a rent of £750 per annum, subject to increase as therein mentioned. The term was assigned to the tenants on December 13, 1954. The landlord's repairing covenant is drawn by reference to a repairing covenant by the lessee, which is in these terms. It is No. 3 in the fasciculus of lessee's covenants contained in clause 2 of the lease: "The lessee for itself and its assigns and "to the intent that the obligations may continue throughout the "term hereby created covenants with the lessors as follows. . . . "(3) To keep the demised premises and the sanitary and water "apparatus and all additions and improvements thereto in good "and substantial repair and condition and properly decorated "and in a state in every respect fit for cinematograph entertain-"ments but nothing in this clause contained shall render the "lessee liable for structural repairs of a substantial nature to the "main walls roofs foundations or main drains of the demised "building." The landlord's repairing covenant is in these terms—it is No. 2 in the fasciculus of landlord's covenants contained in clause 3 of the lease: "(2) To (except so far as the lessee is "liable under the lessee's covenants hereinbefore contained) re-"pair maintain and keep the main structure walls roofs and "drains of the demised premises in good structural repair and "condition at all times during the said term."

The effect of this covenant, read in conjunction with the lessees' repairing covenant, appears to be that the landlords are liable under it for structural repairs of a substantial nature to the main walls, roof, foundations or main drains of the demised building; whereas the tenants are liable under the lessees' repairing covenant for all repairs not falling within that description. This follows, I think, from the exclusion from the landlords' repairing covenant of repairs "for which the lessee is liable under "the lesses' covenants hereinbefore contained," coupled with the obligation cast on the lessee by the lessees' repairing covenant to do all repairs, with the exception of structural repairs of a substantial nature to the main walls, roof, etc.

The questions in the case are in substance: (a) whether certain works of repair done or needing to be done (i) to the main roof (formerly slated) and smaller back roof (at all material times covered with asbestos sheeting) of the auditorium of the cinema; and (ii) to the front elevation (consisting of a 9-inch brick wall

rendered with cement) of the demised premises, or any, and if so which, of these works, are repairs of the description for which the landlords are liable upon the true construction of these ill-drawn covenants; and (b) if so, whether the tenants have lost, or are precluded from asserting, their rights in respect thereof on one or other of the grounds relied on by the defendants, to which I will later refer.

To anticipate matters, it appears that after a protracted dispute, the tenants themselves carried out the work on the auditorium roofs which they considered to be necessary in order to put the roofs in the state of repair demanded of the landlords under their repairing covenant. Having carried out this work, the tenants began the present action, in which they claimed (to put it shortly) (1) £961 as damages for the cost incurred by the tenants in executing the roof repairs, and (2) a declaration that upon the true construction of the lease the repairs to the front elevation of the cinema were the liability of the landlords.

By the order under appeal (again putting it shortly) the judge made declarations in favour of the tenants to the effect that, upon the true construction of the lease, the repairs to the roof of the cinema and the repairs to the front elevation of the cinema required by items 84 and 85 of the schedule of dilapidations, referred to in paragraph 13 of the statement of claim, and set out in the schedule to the order, were the liability of the landlords, and ordered an inquiry what damages had been sustained by the tenants by reason of their having carried out the repairs to the roof referred to in paragraph 11 of the statement of claim. In reaching the conclusions to which the order gave effect, the judge held that all the repairs in question were structural repairs of a substantial nature and, as such, within the scope of the landlord's repairing covenant. He also rejected an argument advanced on the landlords' side to the effect that even, if the repairs in question were in cumulo structural repairs of a substantial nature, they were no more than the accumulated product of individual wants of repair, each of which considered separately ought to have been remedied by the tenants under the lessees' repairing covenants, and that the landlords, accordingly, had a claim against the tenants in respect of these individual breaches sufficient to wipe out the tenants' claim against them under the landlords' repairing covenant. The judge refrained from deciding whether this contention could be supported in principle, rejecting it on the ground that in the present case the tenants only acquired the term on December 13, 1954, and served their schedule of dilapidations on January 31, 1955; the inference being that, in his view, there could not, during that short period, have been any material contribution by the tenants to the accumulated disrepair. A further point taken on the landlords' side, which loomed large in the argument before us, and which, no doubt, was ventilated before the judge, and must inferentially be taken as having been rejected by him, although he did not expressly deal with it, was

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to the effect that the tenants had forfeited any claim they might otherwise have had in respect of the roof repairs because the landlords had at all material times been ready and willing to do the necessary repairs, but the tenants had prevented the landlords from doing such repairs by refusing to allow the landlords access to the premises for that purpose, and ultimately doing the repairs themselves. There is one small question of fact which appears to have been misapprehended by the judge. In his judgment he attributes the £961 wholly to the cost of repairing the main roof of the auditorium, whereas, in fact, it was made up of £807 for the main roof and £154 for the rear roof, both roofs, and not the main one only, having been repaired by the tenants themselves before action brought.

I must now refer to the history of the dispute, and in view of the point taken on the landlords' side, to the effect that the tenants in any case disqualified themselves from relief in respect of the roof repairs by wrongfully preventing the landlords from doing those repairs, and ultimately doing them themselves, it must, I fear, be referred to in some detail. It will be best appreciated through the correspondence, to which I will next turn.

[His Lordship read the correspondence and continued:] As appears from what I have already said, the judge construed the landlords' repairing covenant in the same way as I do, that is to say, as extending to "structural repairs of a substantial nature." As to the meaning of the expression "structural repairs" and the words "substantial" and "structure," the judge made these observations which I am content to adopt. He said [1]: "It "appears, rather surprisingly, that the expression 'structural "'repairs' has never been judicially defined, a fact to which "attention is drawn in Woodfall on Landlord and Tenant, 25th "ed., p. 770, para. 1732, and counsel in the present case have "accepted that statement as correct. The writer of the text-"book submits on the same page that 'structural repairs' are "those which involve interference with, or alteration to, the "framework of the building, and I would myself say that "'structural repairs' means repairs of, or to, a structure. It is "sometimes said that repairs must always be either structural or "decorative, and if that is the simple criterion we are, in this "case, certainly not dealing with decorative repairs.

"Next, what is meant by the words 'of a substantial nature'? "In a South Australian case, *Terry's Motors* v. *Rinder*,[2] the "word 'substantial' is pilloried as a word devoid of any fixed "meaning, and as being an unsatisfactory medium for conveying "the idea of some ascertainable proportion of a whole. In *Palser* "v. *Grinling*,[3] a question arose as to what was a 'substantial "'portion' of a rent, and the decision is summarised (not

[1] [1958] 1 W.L.R. 845, 848; [1958] 2 All E.R. 551.
[2] [1948] S.A.S.R.(Aus.) 167.
[3] [1948] A.C. 291; 64 T.L.R. 2; [1948] 1 All E.R. 1.

"perhaps very helpfully) in the headnote, saying that 'sub-"'stantial' does not mean 'unsubstantial,' but is equivalent "to 'considerable,' and that the judge of fact must decide the "matter according to circumstances in each case. See also "*Thorneloe and Clarkson Ltd.* v. *Board of Trade.*[4] Again, what "is a 'structure'? And what ought to be regarded as part of a "structure? We are dealing here with (1) the roof, and (2) one "of the main walls of a cinema, and surely those are parts of the "structure of the building."

As to the specific items of disrepair upon which the dispute turns, I may deal first with the front elevation of the premises. The competing views are, on the one hand, that you have here a wall, which no doubt is part of the structure, coated with a cement rendering, which can be regarded for this purpose as equivalent to paint. The cement rendering is merely, one might say, decorative, perhaps to some extent protective, but is no more part of the structure than a coat of paint would be. On the other hand, it is said that the front elevation of the cinema consists not of a wall with the incidental application of cement rendering, but it consists of a 9-inch wall rendered in cement. The bricks and the cement should be taken together, and they together constitute the front elevation. In my view, the latter way of regarding this cement rendering and the wall behind it is correct. On the evidence as a whole, the proper conclusion appears to me to be that the cement rendering (which appears to have been from $\frac{3}{8}$ to $\frac{7}{8}$ inches in thickness) set up a chemical reaction in the bricks of the 9-inch wall, and that this chemical reaction, coupled with the effect of water seeping down between the rendering and the wall and the effects of frost, caused the bricks to deteriorate and the rendering to come away from the wall, taking with it a considerable proportion of the outer ends and sides of the bricks. Moreover, the rendering, where it had come loose from the wall, was liable to fall, and was thus a potential source of danger. The operations necessary to make good the frontage to the premises would, therefore, consist of removing the rendering, making good the defective brickwork, and replacing the rendering. These operations appear to me, as they did to the judge, to amount to structural repairs, and, moreover, in view of their extent, to amount to structural repairs of a substantial nature, and, therefore, these were repairs which fell to be included in the landlords' repairing covenant.

I need not take time by going into the evidence, but my conclusions are amply supported, at all events, by the evidence, and I see no reason to differ from the judge on that item.

Next, as to the roofs, it appears to me that even the work recommended by Tidey, which, according to his estimate, involved the use of some 350 new slates but which, in fact, would have called for the provision or refixing of, I think, nearer 500 slates in

[4] (1950) 66 T.L.R. (Pt. 1) 1117; [1950] 2 All E.R. 245.

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all, if one allows for slipped slates and lost ones, would amount to a structural repair of a substantial nature. I do not think that a matter of 350 to 500 slates out of a total of 12,000 slates on a roof could be regarded as a mere trifle. The question, when one is dealing with such things as slates, is necessarily to some extent one of degree. It was put in the course of the argument that if a gale blew off two slates, for example, the work of replacing them could hardly be said to be a structural repair of a substantial nature. But obviously different considerations must apply if there were a hurricane stripping the house of all its slates, and I would add that, if somebody "bought blind" a house represented to be "structurally complete," and he went there and found the rafters with no slates on them, he could, I apprehend, complain with justification that his vendor had been guilty of misrepresentation. There are, of course, two ways of putting this. Mr. Heathcote-Williams, while admitting that a roof is a part of the structure and, accordingly, that repairs to the roof would be in the nature of repairs to the structure, says that in this case there is not enough substance in the structural aspect of the repairs. I think that fairly puts his position, and his reason for so submitting is that, although no doubt slates would have to be replaced and renewed, there would be no interference with the rafters or roof beams of the cinema; it would merely be a matter of replacing the protective skin or layer in the form of slates which formed part of the roof but which could be removed and replaced without interfering with the structure of the roof.

Paying the best attention I can to the arguments and the evidence, I see no sufficient reason here for differing from the view taken by the judge that the roof repairs also fell within the landlords' repairing covenant.

Then there was a point of a different nature taken in the course of the argument that it would be inequitable to make the order sought. That contention was abandoned by Mr. Vinelott, with the concurrence of Mr. Heathcote-Williams, and I need not say anything further about it.

Then there was the interesting point to which I have already referred to the effect that these dilapidations did not occur overnight, but occurred, as it were, slate by slate, as slates got loose or fell off over the years, and inch by inch as the rain gradually seeped down the cement rendering or chemical reaction began to do its work. On this basis it is said that the alleged breaches of the landlords' repairing covenant are no more than an accumulation of individual breaches of the lessees' repairing covenant, and, consequently, that the tenants here cannot recover. It is said that, in view of their liability under their covenant for the individual wants of repair making up the totality of disrepair, they must be liable for the totality of disrepair made up of those individual items, and that can be expressed as a set-off or cross-claim for an amount sufficing to wipe out the claim under the landlords' covenant. It appears to me that this contention

fails for a number of reasons. First, it is clear, in view of the very short time which elapsed between the assignment to the tenants and the service of the schedule of dilapidations, that no appreciable part of the disrepair could have been attributable to breaches of the lessees' covenant to repair committed by the plaintiffs as tenants themselves. It seems to me that this in itself is sufficient to dispose of the argument. An assignee of a term is not liable for particular breaches of tenant's repairing covenants committed by his predecessors. He is, of course, liable for the disrepair of the premises as they stand when he takes over, so far as their then state of disrepair falls within the scope of the tenant's repairing covenants, but particular breaches committed before the assignment to him, as distinct from the state of the premises when he takes over, are matters, generally speaking, with which he is not concerned. Over and above that, it is to be observed that this part of the landlords' case is pleaded so as to apply only to the acts of the tenants themselves and not of their predecessors in title, and it appears that, when it was sought to amend the defence by bringing in this point, the inclusion of a reference to the predecessors in title of the present tenants was expressly disallowed, the proposed amendment being objected to by the tenants.

Finally, it seems to me, if this point were otherwise sound, it could only operate by way of counterclaim; each side would have their claim to damages for breach of covenant, and if one of them wanted to pursue his claim after a claim had been made against him by the opposite party, I should have thought his proper course would have been to do so by an appropriate counterclaim in the action, and, as I understand it, there is no question of any such counterclaim here.

Those, I think, are all the points with which it is necessary to deal, except one. It does remain to consider with respect to the repairs to the main roof of the cinema, the landlords' contention to the effect that the landlords were, and had at all material times been, ready and willing to carry out the requisite repairs in accordance with the landlords' covenant in clause 3 (2) of the lease, but were prevented from doing so by the tenants.

On this aspect of the case we were invited by both parties to assume that the repairs to the main roof, which the landlords engaged their builder, Tidey, to carry out, would, if carried out, have constituted a sufficient performance by the landlords of their obligations under clause 3 (2) of the lease so far as this roof was concerned, and to decide whether, on that assumption, the tenants' conduct was such as to destroy their claim to damages under this head. This questions turns almost entirely on the correspondence, to which I have already referred. Rusha, the landlords' architect, was cross-examined at considerable length on the correspondence, and he made it quite clear that he gave the tenants' architect, Coles, no particulars at all of the work the landlords intended to do on the main roof, apart from the last

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paragraph of his letter of July 7, 1955: "Subject to my client's "approval, I recommend that a reputable firm of builders should "be employed to overhaul both the roofs, replacing broken and "cracked slates and refixing where slipped." That statement clearly did not commit Rusha or the landlords to anything. Thereafter Rusha, acting on instructions, repeatedly either refused, or simply did not answer, Coles' request for information as to the work to be carried out, and the only information Coles ever got from Rusha as to the work proposed seems to have been that the roof was to be made "watertight."

As to the law to be applied to the facts emerging from the correspondence and from Rusha's evidence:

(1) It is well settled that a landlord's covenant to repair is a covenant to repair on notice.

(2) It is further well settled that under such a covenant the landlord has an implied licence to enter on the premises for the purpose of performing it (see *Saner* v. *Bilton* [5]).

(3) Where, as here, the covenant is to "keep" in repair, failure to perform it after notice constitutes a continuing breach in respect of which a fresh cause of action arises from day to day so long as the requisite repairs remain undone.

(4) In the event of the landlord failing to do the requisite repairs within a reasonable time after notice, the tenant is entitled to sue him in damages without first incurring expense by doing the repairs himself (*Hewitt* v. *Rowlands* [6]).

(5) The covenant is clearly not specifically enforceable, but I apprehend that, in the event of the landlord failing to do the repairs in a reasonable time, the tenant can, at his option, do the requisite repairs himself and claim the proper cost of so doing as damages flowing from the breach.

(6) If the landlord attempts within a reasonable time to do the work but is prevented from so doing by the tenant refusing him entry on the premises in accordance with the implied licence, the tenant cannot, I apprehend, maintain his action for damages so long as he persists in such refusal, because, in such circumstances, the landlord is not in breach of his covenant, or, at all events, has only been put in breach of it by the tenant's own conduct.

(7) The parties are under a duty to each other to act reasonably. It behoves the landlord, who is in breach of his covenant, to be diligent in the remedying of such breach. He is not entitled to keep the tenant waiting indefinitely and then complain if the tenant ultimately decides to do the work himself. On the other hand, he must be reasonable in the exercise of his licence to enter and (as I think) give the tenant sufficient notice of his intention to enter, and information as to the nature and extent of the work he proposes to carry out. On his part, the tenant must not unreasonably obstruct the landlord in the exercise of his right of

[5] (1878) 7 Ch.D. 815. [6] (1924) 131 L.T. 757.

entry for the purpose of doing the work, or take the matter out of the landlord's hands by doing the work himself before the landlord has had a reasonable opportunity of doing so.

In the present case the original "schedule of dilapidations and "wants of repair" enclosed in the tenant's letter of January 31, 1955, to the landlords, seems, in the first instance, to have been wrongly addressed, but ultimately to have reached the landlords' solicitors by February 9, 1955. There is no doubt that it constituted a notice of disrepair for the purposes of the landlords' covenant. It was met on March 2, 1955, by a letter from the landlords' solicitors denying liability.

At this point it would, I apprehend, have been open to the tenants forthwith to treat the landlords as having repudiated their obligation under the covenant, and, without allowing any further time, either to bring their action for damages immediately without first doing the work themselves, or, at their option, to proceed at once to do the requisite work and sue the landlords for its proper cost as damages flowing from the breach. Neither of these courses was actually pursued by the tenants, but the fact that they were open to the tenants shows that, at this early stage of the correspondence, the tenants already had a complete cause of action.

[His Lordship reviewed the correspondence and continued:] In the end, the tenants resolved the deadlock by doing themselves the re-roofing in asbestos specified as an alternative to stripping and re-roofing in Coles' letter of June 7, 1955. That, as I have said, must, in view of the assumption we have been invited to adopt as to the sufficiency of Tidey's proposed work, be taken to have exceeded what was necessary to comply with the covenant. The landlords as reversioners have benefited by the tenants' work, and now claim to be entitled to that benefit for nothing, and, notwithstanding their breach of covenant, to be absolved from liability even for the sum it would have cost to carry out Tidey's proposed work. In all the circumstances of the case I am not prepared so to hold. It appears to me, that in view of the landlords' long delay, and their refusal or disregard of Bernstein's and Coles' requests for information as to what they proposed to do, the matter had, before September 19, 1955 (when Tidey's men were ordered off), reached a stage at which the tenants were entitled to do the necessary work themselves, in the absence of a firm assurance from the landlords that they really intended to do without further delay that which was necessary in order to comply with the covenant, with sufficient details of the work proposed to give Coles a reasonable opportunity of judging whether what was proposed would put the roof in the state of repair which the covenant demanded.

As I have said before, the landlords gave no particulars beyond saying that the roof would be made watertight. They remained in breach of their covenant for months after service of the notice of disrepair. It is not clear that they ever admitted that they

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were under any obligation to do any work on the roof. They certainly maintained in their defence to the action that they were under no such obligation. They had had ample opportunity of complying with the covenant before Tidey's men ever came on the scene. I do not say that the tenants were wholly reasonable. They may have demanded more in the way of information as to the work proposed than they were strictly entitled to claim. On the other hand, the landlords were at least equally unreasonable. They were guilty of inordinate delay and undue reticence as to their intentions. The fact that they may have been asked for more information than they were obliged to give could not justify them in giving virtually no information at all. It would need a strong case to satisfy me that the tenants had by their conduct deprived themselves of their accrued and accruing claims for damages in respect of an undoubted and persistent breach of a continuing covenant such as this, and I do not consider that the defendants have made out such a case.

Accordingly, in my view, the tenants are entitled to damages in respect of the disrepair of the roof, even on the assumption we are asked to make that the work which Tidey was engaged to do would, if done, have satisfied the covenant. But clearly, on this assumption, the tenants' damages in respect of their expenditure on repairs to the roof must be limited to the reasonable cost of complying with the covenant by Tidey's method. It would seem—though this point has not been argued and I therefore express no concluded opinion upon it—that on the same assumption the landlords might be entitled to claim credit for any amount they had to pay Tidey in respect of the quarter of the work which he had done before being ordered off.

But my brothers, from whom I differ with diffidence, take a different view on this part of the case. The effect of their view appears to be that if the work proposed by Tidey would have been a sufficient compliance with the landlords' repairing covenant had he been allowed to complete it, then the tenants' claim must fail so far as the main (or slated roof) is concerned. The judge expressed no finding one way or the other on the question whether Tidey's proposals, if carried to completion, would or would not have constituted a sufficient compliance with the covenant. It seems that there must, accordingly, be a reference back to the judge for a finding on this question. This, and any other points arising as to the form of order to be made will, however, best be discussed after my brethren have delivered their judgments.

Romer L.J. With the exception of one point, I am in full agreement with the judgment which my Lord has delivered. The only question on which I have the misfortune to differ from him is that which was referred to in argument as the "ready and "willing" point.

As to this, the tenants contend for various reasons that the

landlords cannot succeed in their submission that they were willing to do the requisite repairs to the slate roof but were prevented by the tenants from doing so, and, accordingly, were not, in this respect, at least, in breach of their repairing covenant when the tenants issued their writ.

On the hypothesis, however, which we were asked to accept for the purpose of considering this question, that the method which Tidey proposed to adopt in order to do the work was adequate and satisfactory, it does appear to me that the landlords' submission is well founded. The tenants' first objection is that the landlords never gave them an unconditional assurance of their intention to do any work. It is true, that in his letter of July 7, 1955, Rusha told Coles that "Subject to my clients' "approval, I recommend that a reputable firm of builders should "be employed to overhaul both the roofs, replacing broken and "cracked slates and refixing where slipped." That, in itself, of course, is no more than a conditional recommendation and would be quite insufficient to support the defendants' case. But on September 13, 1955, Rusha wrote to Coles a letter which appears to me to amount to an unqualified intimation of intention to send the contractors on to the premises during the early part of the following week in order to do repair work; an intention which was, in fact, carried into effect. Therefore, I cannot accept the tenants' contention that the landlords never evinced, or communicated to them, a sufficiently definite intention to do any work to the roof.

The tenants' next objection is that the landlords did not in any case give them details of the work which they proposed to do. At one stage of his argument Mr. Megarry went so far as to say that before a landlord can enter upon the demised premises in order to perform his covenants to repair, he must supply the tenant with a detailed specification of the intended work. Mr. Megarry cited no authority in support of such a proposition and I am unable to accept it. Alternatively, he submitted that, if there is no specification, the landlord must at least furnish the tenant with such information as he possesses relating to the work, and that, in the present case, the defendants did not even show Tidey's estimate to the tenants. I should imagine that it is very likely that if Coles had asked Rusha to show him Tidey's estimate, a short and simple document, Rusha would have let him see it. What, however, Coles was wanting to see, as the correspondence shows, was a detailed specification of the work which the landlords were proposing to carry out, and this, as I have already intimated, was more than the tenants' were entitled to demand—even if such a specification existed, which in fact it did not. In my judgment, Rusha's letters of July 7 and September 13 gave the tenants sufficient notification of what they were proposing to do and when they intended to do it; and it is to be observed that the last paragraph of the letter of July 1, being almost an echo of the relevant part of the schedule of dilapidations which the

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tenants had served on the landlords on January 31, 1955, cannot really have left Coles in any doubt as to the work which Rusha had it in mind to do.

[His Lordship reviewed the correspondence and continued:] In my judgment, accordingly, the landlords gave the tenants sufficiently clear notice of their intention to do the work, and sufficient information as to the nature of that work. What then in those circumstances is the result of their being prevented from doing it, and of the tenants repairing the slate roof themselves? On the assumption already referred to (viz., that the work which the landlords intended to do would have been a sufficient compliance with their covenant), the result, in my judgment, is that on this part of the case the tenants could not succeed. In asking for an order on the landlords to repay them for the work which they themselves did, they are asking in substance for damages for breach by the landlords of their repairing covenant. If, however, the tenants prevented the landlords from performing that covenant and then put it out of the landlords' power to perform it by doing the work themselves, I cannot see how it can be said that the landlords were then or thereafter in breach at all. In the event, therefore, of it being subsequently decided or admitted that the work referred to in the correspondence would have been a sufficient performance of the landlords' covenant if it had been carried out, I would hold that the tenants have established no cause of action so far as the slate roof is concerned.

On every other question I entirely agree with what my Lord has said, and there is nothing that I wish to add for myself.

ORMEROD L.J. I am in full agreement with the matters which have been dealt with by Jenkins L.J., and do not propose to deal with those matters, except on the last point, which has been called the "ready and willing" point.

Assuming that the landlords are right when they say that the work set out in Tidey's estimate was all that was necessary to put the roof in a proper state of repair, the question arises whether the landlords made known to the tenants that they were ready and willing to do this work. The contention of the tenants is that at no time did they have enough information of the proposed work to enable them to form any opinion as to its adequacy. From time to time in the correspondence they ask the landlords for a written specification of the proposed work which the landlords refuse or neglect to give. The case is complicated by the fact that the lease does not give to the landlords any power to enter upon the land to perform their covenant. Mr. Megarry, however, referred us to *Saner* v. *Bilton*,[7] from which it appears that such a right may be implied. But, he argued, that this was a right to be exercised reasonably, and, in these circumstances, it was reasonable that the landlords should inform the tenants of

[7] 7 Ch.D. 815.

the work proposed to be done. For the landlords it was argued that they had discharged their obligation, if they could show that they had engaged a competent surveyor and builder, and were acting on their advice. The tenants, on the other hand, contended that they were entitled to know exactly what it was the landlords proposed to do. In my judgment, each of these submissions goes too far. The tenants are, I think, entitled to know the general nature and purpose of the work to be performed. They have to put up with the inconvenience of having workmen on the premises, and it is reasonable that they should have such information as would enable them to judge whether the proposed repairs would be likely to fulfil their purpose. There is no doubt that the landlords made it known to the tenants that they proposed to do some work. They not only said so in their letters, but they sent a builder to the premises who actually started to do the work, but was sent away by the tenants' manager. It is clear too from the correspondence and from the evidence what work the landlords proposed to do. Whether that work would have been a sufficient compliance with the covenant is a question which will have to be determined by the judge. The question now is whether the tenants were sufficiently informed.

[After referring to certain of the letters passing between the parties, his Lordship continued:] On July 29 Rusha wrote to Coles, the tenants' architect. It is contended by the tenants that the use of the phrase "make the roof watertight" in this and subsequent letters indicated that the landlords intended to do no more than patch up the obvious leaks in the roof, which would not amount to putting the roof in repair. Reading the correspondence between the parties as a whole, I do not think this contention is justified. The question of the roof being watertight was a matter of urgency and was no doubt uppermost in the minds of the landlords' architect, but the reasonable inference appears to be that the landlords intended to carry out the work. That such was, in fact, their intention, is made clear from their correspondence with Tidey, the builder engaged by the landlords, and from the evidence given at the trial both by Tidey and Rusha.

It is unfortunate that, by September, 1955, the parties and the respective architects representing them, appear to have been at loggerheads. The tenants and their architect were demanding a specification of the proposed work, and the landlords were failing, for some reason, to make any attempt to comply with the demand. Rusha had in his possession an estimate from Tidey, a copy of which he could have sent to the tenants' architect. He did not do so, and it appears from the evidence that in this he was acting on the instructions of his clients.

[His Lordship, having considered further parts of the correspondence, continued:] In my judgment, it appears sufficiently from the correspondence between the parties that the landlords were prepared to do such work in the repair of the roof as would have complied with the tenants' original notice of want of repair.

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If the tenants were in any doubt about this, such doubt could, in my view, have been resolved if Coles had complied with Rusha's suggestion for a meeting, a suggestion which, in my view, was a very sensible and reasonable one. Coles and his clients, however, continued to insist on a written specification, which, as I have already said, they were not entitled to demand. I think the real trouble between the parties was that the tenants, on the one hand, were not prepared to be satisfied by anything less than stripping and recovering the roof, and, on the other hand, the landlords took the view that this was unnecessary, and that the replacement of broken, cracked and slipped tiles was all that needed to be done. In my view, the tenants had sufficient notice of work which the landlords proposed to do. If the judge is of opinion that the proposed work would have been a sufficient compliance with the landlords' covenant, it would seem that there is no liability now on the landlords in respect of this item of the tenants' claim. The tenants have themselves stripped the roof and covered it with asbestos, so putting it out of the power of the landlords to comply with the covenant. If, of course, the judge is of a contrary opinion, the landlords will be liable in damages for such sum as it is eventually found would have been necessary to put the roof in proper repair.

Judgment of Vaisey J. set aside in so far as it was adjudged that the landlords were liable to the tenants for damages in respect of their failure to carry out the repairs to the auditorium roof, and declared that the landlords were liable for such repairs only if the repairs proposed to be carried out by them, if completed, would not have constituted compliance with the covenant in clause 3 (2) of the lease. Ordered that it be referred to Vaisey J. for him to determine whether the repairs proposed to be carried out, if completed, would have complied with the covenant. Save as aforesaid, appeal dismissed.

Solicitors: *Harewood & Co.; E. F. Turner & Sons.*

B. A. B.

[HOUSE OF LORDS.]

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Jan. 28, 29, 30; *Feb.* 2, 3, 4, 5; *March* 2, 3, 4, 5; *April* 16.

* SOUTH OF SCOTLAND ELECTRICITY BOARD AND ANOTHER . . . . . APPELLANTS;

AND

BRITISH OXYGEN CO. LTD. . . . . RESPONDENTS.

SAME . . . . . APPELLANTS;

AND

BRITISH OXYGEN GASES LTD. . . . RESPONDENTS.

Electricity—Tariff—"Undue discrimination"—High voltage and low voltage consumers—Differential—Fuel variation charge—High load factor consumers—Annual maximum demand charge not incorporated—Electricity Act, 1947 (10 *&* 11 *Geo.* 6, *c.* 54), *s.* 37 (8).

By section 37 (8) of the Electricity Act, 1947: "An area board in fixing tariffs . . . shall not show undue preference to any person "or class of persons and shall not exercise any undue discrimina- "tion against any person or class of persons . . ."

A company, being an industrial consumer of high voltage electricity (which required less fuel to produce per unit than low voltage electricity) complained that "undue discrimination" had been exercised against it, as against low voltage consumers, in that although, in the case of one tariff, that tariff granted it a fair differential reflecting the respective fuel costs when fuel was x shillings a ton, dividing those costs fairly between the two sets of consumers, a fuel variation clause (providing for an increase or reduction in unit charge if the cost of fuel was more or less than x shillings a ton) vitiated the tariff when fuel costs rose by distributing the additional cost equally per unit between the two sets of consumers.

Another company, which made a similar complaint, relying on section 10A (5) of the Hydro-Electric Development (Scotland) Act, 1943, which was in terms similar to those of section 37 (8) of the Act of 1947, further contended that there was undue discrimination against it, in that the tariff regulating the charges to it failed to incorporate an annual maximum demand charge, giving it the option of paying an annual charge ten times the maximum monthly demand charge, on the ground that, since it had a high load factor and its demand was constant throughout the year, it was responsible for little, if any, of the surplus generating capacity which the board was obliged to maintain. It averred a general recognition of this practice in England and Wales.

Both companies claimed repayment of the sums alleged to have been overcharged.

The immediate question was whether there should be a proof before answer, that is, whether a sufficient case in support of the claim had been made out in the pleadings to warrant calling evidence to make it good:—

Held, (1) (unanimously) that there should be a proof before answer on the averments of undue discrimination against the companies as high voltage consumers, and (2) (Lord Reid and Lord

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* *Present*: VISCOUNT KILMUIR L.C., LORD MERRIMAN, LORD REID, LORD TUCKER and LORD KEITH OF AVONHOLM.

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Keith of Avonholm dissenting) that there should also be a proof before answer on the averments of undue discrimination against the second company as consumers with a high load factor.

Per Viscount Kilmuir, Lord Merriman and Lord Tucker. A case of undue discrimination can be made out by a person compaining although he does not establish that another person or class of persons was preferred to him in price, and the cost of providing the supply is a relevant factor in considering whether or not there has been such discrimination.

Per Lord Reid and Lord Keith of Avonholm. Although the question whether or not there had been undue discrimination was not to be judged by reference to cost of supply, yet, even when this had been eliminated, there were other factors relevant to the comparison between the tariffs for a high voltage or a low voltage supply, and the questions of undue preference or discrimination here could not be decided without evidence.

By the majority. On the question of the annual maximum demand charge there had been presented a case which demanded that the facts should be ascertained.

Held, further, unanimously, that there was nothing in law to prevent recovery of sums which could be proved to have been overcharged.

Decision of the Second Division of the Court of Session, 1958 S.C. 53 affirmed.

Appeals from the Second Division of the Court of Session.

The first appeal was against an interlocutor of the Second Division of the Court of Session in an action for declarator and payment in which both appellants were defenders and the respondents were pursuers. The appellants were (1) the South of Scotland Electricity Board (successors to the South West Scotland Electricity Board in terms of the Electricity Reorganisation (Scotland) Act, 1954) and (2) the Electricity Council (successors to the Central Electricity Authority in terms of the Electricity Act, 1957). The respondents were the British Oxygen Co. Ltd. Both appellants tabled pleas to the relevancy of the respondents' averments. On January 7, 1955, the Lord Ordinary (Lord Hill Watson) sustained these pleas and dismissed the action. On motion to review, the Second Division on June 10, 1955, recalled the interlocutor of the Lord Ordinary and allowed a proof before answer (excluding certain averments). On July 19, 1956, the House of Lords dismissed an appeal by the appellants against the last-named interlocutor.[1] After amendment the Lord Ordinary (Lord Hill Watson) by interlocutor dated May 31, 1957, allowed a proof before answer of the averments in support of certain of the declaratory conclusions and quoad ultra dismissed the action. On motion for review, the Second Division on November 7, 1957, recalled the Lord Ordinary's interlocutor and allowed a proof before answer of the averments in support of certain of the declaratory conclusions and the conclusion for payment.

The second appeal was against an interlocutor of the Second Division of the Court of Session in an action for declarator,

[1] [1956] 1 W.L.R. 1069; [1956] 3 All E.R. 199.

interdict and payment in which the appellants, the South of Scotland Electricity Board, were defenders and the respondents, British Oxygen Gases Ltd., were pursuers. The appellants tabled pleas to the competency of the action and the relevancy of the respondents' averments. On February 7, 1958, the Lord Ordinary (Lord Guest) sustained the appellants' plea to relevancy so far as directed against one of the matters in issue and quoad ultra allowed a proof before answer. On motion for review, the Second Division on March 28, 1958, recalled the interlocutor of the Lord Ordinary, repelled the appellants' plea to competency and allowed a proof before answer.

The facts are set out in their Lordships' opinions.

J. O. M. Hunter Q.C. (of the Scottish Bar), *E. S. Fay Q.C.* (of the English Bar) and *R. Reid* (of the Scottish Bar) for the appellants.

Sir Andrew Clark Q.C. (of the English Bar), *I. H. Shearer Q.C.* (of the Scottish Bar) and *A. J. Mackenzie Stuart* (of the Scottish Bar) for the respondents.

The following authorities, besides those referred to in their Lordships' opinions, were cited in argument: *Reg.* v. *Railway Commissioners* [2]; *Liverpool Corn Traders' Association* v. *Great Western Railway Co.* [3]; *Lever Brothers Ltd.* v. *Midland Railway Co.* [4]; *Macnaughton* v. *Macnaughton's Trustees* [5]; *Ransome* v. *Eastern Counties Railway Co. (No. 2)* [6]; *South Western Gas Board* v. *Blackburn* [7]; *Johnston* v. *Consumers' Gas Co. of Toronto* [8]; *Metropolitan Supply Co. Ltd.* v. *Ginder* [9]; *Attorney-General for Victoria* v. *Melbourne Corporation* [10]; *Wylie* v. *Fisher* [11] and *Hogg* v. *Auchtermuchty Parochial Board.* [12]

Their Lordships took time for consideration.

April 16. VISCOUNT KILMUIR L.C. My Lords, the first of these appeals is a further appeal by the statutory successors of the defenders (appellants) in the action which was previously before this House in June, 1956, and in which the opinions of your Lordships were given in July, 1956. The first named appellants are the South of Scotland Electricity Board, a public authority established under the Electricity Reorganisation (Scotland) Act, 1954. On April 1, 1955, they took over the functions of the South West Scotland Electricity Board, an area board established under the Electricity Act, 1947. The second appellants are the

[2] (1889) 22 Q.B.D. 642.
[3] (1892) 8 Ry. & Can.Traff.Cas. 114.
[4] (1909) 101 L.T. 438; 25 T.L.R. 768.
[5] 1953 S.C. 387.
[6] (1858) 4 C.B.N.S. 135.
[7] (1952) 102 L.J.Newsp. 542.
[8] [1898] A.C. 447.
[9] [1901] 2 Ch. 799; 17 T.L.R. 435.
[10] [1907] A.C. 469; 23 T.L.R. 753.
[11] 1907 S.C. 686.
[12] (1880) 7 R. (Ct. of Sess.) 986.

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Electricity Council established under the Electricity Act, 1957. They are a public authority and are successors to the British Electricity Authority established under the Act of 1947 and renamed the Central Electricity Authority by the Act of 1954. The respondents were at all material times industrial consumers of electricity within the area supplied by the first appellants. The action was originally raised on August 3, 1953, against the South West Scotland Electricity Board and the British Electricity Authority. It was and is an attack on three consecutive tariffs embodying charges for electricity, the first of which came into operation on January 1, 1952, and the third of which ceased to operate on December 31, 1955. The attack made on each tariff is now limited in effect to a simple declarator that the defenders exercised undue discrimination against high voltage users like the pursuers, coupled with a conclusion for payment of £10,000. In the result the conclusions now insisted on are 1 (*a*), 3 (*a*), 5 (*a*) and 8.

The earlier history of this case is that both defenders (appellants) tabled pleas to the relevancy of the pursuers' (respondents') averments: on January 7, 1955, the Lord Ordinary (Lord Hill Watson) sustained those pleas and dismissed the action; on motion for review, the Second Division, on June 10, 1955, recalled the interlocutor of the Lord Ordinary and allowed a proof before answer (excluding certain averments); on July 19, 1956, this House dismissed an appeal by the appellants against the last-named interlocutor; after amendment, by interlocutor dated May 31, 1957, the Lord Ordinary (Lord Hill Watson) allowed a proof before answer of the averments in support of certain of the declaratory conclusions and quoad ultra dismissed the action; on motion for review the Second Division (Lord Mackintosh dissenting on the first point) on November 7, 1957, recalled the Lord Ordinary's interlocutor and allowed a proof before answer of the averments in support of the declaratory conclusions which I have mentioned and the conclusions for payment. When this action was previously considered by this House the question was whether on a true interpretation of section 37 (8) of the Electricity Act, 1947, the respondents had relevantly averred a case of undue preference or undue discrimination. The House then decided that the word "undue" was not restricted to signifying that the preference or discrimination was illegitimate, and was capable of signifying an excessive preference or discrimination. This House refused to consider an argument that, since high voltage consumers (including the respondents) were charged less than low voltage consumers, there were no relevant averments of any preference or discrimination, on the ground that this argument had not been advanced in the lower courts. The appellants then amended their record to raise the question whether the respondents had relevantly averred that any preference or discrimination existed, and also the question of the relevancy of the averments

relating to the alleged overcharge, and in a certain event the competency of the present action.

Section 37 (8) of the Electricity Act, 1947, is in the following terms: "An area board, in fixing tariffs and making agreements "under this section, shall not show undue preference to any "person or class of persons and shall not exercise any undue "discrimination against any person or class of persons, and the "central authority shall, in exercising their powers under the "section in relation to the fixing of tariffs and making agreements "by area boards, secure compliance by area boards with this "subsection."

It is also provided by subsection (3) of the same section that the prices to be charged by area boards for the supply of electricity by them shall, subject to any directions of the central authority, be in accordance with such tariffs as may be fixed from time to time by them, and those tariffs shall be so framed as to show the methods by which and the principles on which the charges are to be made, as well as the prices which are to be charged.

The first tariff here in question, after setting out the lower prices for a supply metered at or above a voltage of 6,000 and higher prices in respect of a voltage less than 6,000, contains the following proviso: "(*b*) The unit charge shall be increased or "reduced at the rate of ·0008d. per unit for each penny by which "the fuel cost per ton used for the purpose of, and shown on, "the invoice for the supply of electricity in bulk by the British "Electricity Authority to the board in the previous month is more "or less than 38s. 0d."

Now, it is common ground that it is less costly for the defenders to supply electricity at high voltage than at low voltage. The amount of fuel required to produce and supply to the user a given amount of electricity on a high voltage supply is substantially less than that required to produce and supply the same amount of electricity for a low voltage supply by reason of the losses in transformation and distribution. This accounts for the difference in price charged to high voltage and low voltage consumers in the first tariff, ·45d. and ·475d. respectively. There is, therefore, a differentiation of ·025d. per unit which represents a differential of 5·55 per cent. That was with the cost of coal at 38s. 0d. a ton. A change in the cost of coal is dealt with by the proviso which I have already quoted. The respondents aver that no differentiation is made in this fuel variation charge between high voltage and low voltage supplies and, in consequence, it operates unfairly against high voltage consumers. In the 12 months ended March 31, 1953, the average cost of fuel per ton was 67s. 3d. and approximately 38 per cent. of the unit component (basic rate plus fuel addition) is attributable to the fuel variation charge. In the case of the second tariff the differential in the new basic unit charge is only 3·78 per cent. In the case of the third tariff it is 3·74 per cent. The respondents aver that the least differential in unit charge that can be given without

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unduly discriminating against high voltage users is a differential of 5·55 per cent. (when the cost of fuel is 38s. 0d. a ton) increasing (as the cost of fuel increases) in accordance with the increasing ratio of fuel component to oncost component in the unit charge. To the appellants the vital point is that the high voltage consumers, including the respondents, pay less than the low voltage consumers.

On these facts the appellants submitted first that the respondents have not relevantly averred that any discrimination (whether due or undue) was exercised against them. They supported this by the arguments that no person can establish a case of undue preference or discrimination without relevant averments that another person or class of persons is preferred to him, that whether there is preference must be judged, when the alleged preference is monetary, by the criterion of price and that, judged by price, the respondents are not, upon their averments, discriminated against but preferred to the low voltage consumers. They go on to say that the respondents' criterion of cost is wrong in law and has not hitherto been applied in electricity cases and, further, that the respondents' case involves giving a positive meaning to a negative provision in the statute which will make the courts a tariff-fixing body.

It is convenient to begin by considering what is the ordinary meaning of subsection (8). The fact that it contains the two phrases "undue preference" and "undue discrimination" seems to me to make clear that it places two prohibitions on the area board. The first prohibits making an undue difference between one customer and another in favour of one; the second prohibits making an undue difference between them against the other. It may well be that the many and important functions assigned to the board will necessitate them approaching a problem with the desire to charge a consumer or group of consumers less than other customers. They may do so, but it must not be too much less. On the other hand, they may feel, for example, that the cost of electricity is so minor a constituent of the end-products of some other consumers that they should be charged more. Again, it must not be too much more. I cannot find that this construction is undermined by the negative form of the section.

The sternest injunctions from the Ten Commandments onwards have tended to be in this form. Equally, the duty of the courts is clear and comprehensible; it is to step in when the making of a difference between customers goes beyond measure and reason. I therefore do not find difficulty either in the negative form of the subsection or in the argument that the courts may be placed in the position of fixing tariffs. I am reluctant to construe any enactment as barring recourse to the courts in the absence of clear words. Here we are invited so to do on what appears to me flimsy implications.

I now come to the argument that the complainant must show that someone else is preferred in price, and that it is illegal to

look at the cost of giving the supply. Counsel for the appellants accepted the position that, however unfairly a consumer has been treated, he must not come into court unless he can find someone who pays less. They adopt Lord Mackintosh's interpretation of discrimination[1] by amending the statute to read: "shall not "exercise any undue discrimination against any person or class of "persons by giving to his or their competitors an undue prefer-"ence in the matter of the charge to be made to him or them "whether under a tariff or an agreement." In fact, the argument amounts, in the words of Lord Patrick,[2] to asking us to read into section 37 (8) some such words as: "provided that, if amount "of charge is in question, a person shall be deemed not to be "preferred unless he is charged less than the person with whom "he is compared, and no person shall be deemed to be dis-"criminated against unless he has been charged more than the "person with whom he is compared."

Looking at the words of the subsection, I can find no justification for such an addition and I should be loath to read into the statute so manifest an intention to do unfairness. In many cases there will be a practical difficulty for a would-be complainer to base an attack on anything except price. In this case, however, the appellants, who are under a statutory obligation to set out the methods and principles of the tariffs, commence by creating a differential of 5·55 per cent. between high voltage and low voltage consumers with the cost of coal at 38s. 0d. per ton. Thereafter, by their own fuel variation clause, they themselves say that they are causing the differential to diminish, although they do not dispute that it will be more expensive and will require more coal to supply low voltage electricity. The respondents aver that 5·55 per cent., suitably adjusted as the price of coal rises, is the lowest proper differential. I am unable to see why, in these circumstances, they should not be allowed the opportunity of proving it unless there is some authority to the contrary. The appellants have introduced the question of cost to themselves and must abide the result.

The appellants, however, maintain that Parliament must be taken to have used the phrase "undue preference" as it was interpreted by the courts under earlier electricity and railway statutes, and submit that there is no case where a person paying less has complained of undue preference. On this point it must at once be noted that the decisions are under statutes whose wording is different. None of these cases turned on the meaning or effect of the words "discriminate against." Moreover, in no case did the question in issue in this case directly arise, although Sir Andrew Clark submitted that in *Attorney-General* v. *Wimbledon Corporation*,[3] to which I shall refer later, the view was expressed that there could be a discrimination although the consumers compared were paying the same. He further submitted

[1] 1958 S.C. 53, 90.
[2] Ibid. 77.
[3] [1940] Ch. 180; 56 T.L.R. 242; [1940] 1 All E.R. 76.

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that this is not a case where the compared consumers are receiving the same service, as one was receiving high voltage and the other low voltage electricity. This is a submission on which I do not feel it necessary to pronounce finally as it could be elaborated when the facts are investigated.

With these general points in mind, I examine the electricity cases on which reliance was placed. The first is *Attorney-General* v. *Long Eaton Urban District Council.*[4] That decision purports to apply the distinction made by the railway cases between the legitimate and illegitimate reasons for making a "lower or "preferential charge." It is illegitimate to charge less in order to get customers, but it is legitimate to charge less if it costs less. It was held, applying these principles to the facts of the case, that there was a breach of both section 19 (the "equality" section) and section 20 (the "undue preference" section) of the Electricity Act, 1882. The importance of the case is that, in his dissenting opinion in the instant case, Lord Mackintosh[5] quotes the words of Sargant J.,[6] "lower or preferential charge." With all respect, I am unable to build on a quotation which was natural on the facts of that case but not addressed to the problem before us. On the other hand, the principle applied might well be thought to point to its converse that where it is less costly to supply A than B there ought to be a differentiation, and if it is not granted there will be a discrimination.

The second case was the *Attorney-General* v. *Hackney Corporation,*[7] from which I have been unable to obtain any assistance on this part of the case. The third was *Attorney-General* v. *Wimbledon Corporation.*[8] In that case the material facts are stated in the headnote as follows: "In 1936 [S.] discovered that "other houses in the same area with the same floor space were "subjected to an annual charge of about £7 only, and he applied "for a reduction. The defendants replied that, being a large "consumer, they could only reduce his fixed charge to £7 on "condition that he submitted to a maximum limit of 2½ kilowatts "at times of peak load. S. accepted this limit for a time, but "made repeated efforts to find out from the defendants, on what "basis his original fixed charge of £15 was estimated. The "defendants refused to supply him with any information on this "matter, and after much correspondence, reimposed the fixed "charge of £15." It was held that the tariff was not per se ultra vires and illegal, and the action by the Attorney-General was dismissed. On the action brought by the relator in his own name, Simonds, J. (as he then was) says[9]: "The plaintiff had, in my "judgment, no other course open to him than to bring his action, "and he is entitled to relief. I have already indicated that I am

[4] [1914] 2 Ch. 251; 30 T.L.R. 537; [1915] 1 Ch. 124; 31 T.L.R. 45 (C.A.).
[5] 1958 S.C. 53, 91.
[6] [1914] 2 Ch. 251, 263.
[7] [1918] 1 Ch. 372; 34 T.L.R. 166.
[8] [1940] Ch. 180.
[9] Ibid. 200.

"not disposed to grant an injunction which would debar the "defendants from operating by agreement this or any other kind "of two-part tariff. It will, I think, meet the case if I grant an "injunction following the language of sections 19 and 20 of the "Act. It will be sufficiently clear from what I have already said "that the attempts to impose upon the relator alone among con-"sumers a limit of maximum demand cannot be justified." The last sentence is important because it refers to a position which obtained for some time, although it had been altered before the action was commenced, when the relator paid the same charge as the compared consumers but had imposed upon him a maximum demand. This the learned judge thought unjustifiable.

Bearing in mind that opinion and the problems raised in these electricity cases, I cannot find anything which forces upon me an interpretation of section 37 (8) which could admittedly procure unfairness.

I now turn to the railway cases. In considering them it is necessary to state in broad terms the statutory background. Section 90 of the Railway Clauses Act, 1848, was in effect an equality section but only permitted comparison when goods of the same description were hauled by the same type of engine over the same piece of line. By reason of its very limited effect Parliament soon passed the Railway and Canal Traffic Act, 1854. Section 2 of that Act prohibited undue preference and undue or unreasonable prejudice or disadvantage. Section 3 provided a special remedy. The effect of these sections, together with section 6, was to make that remedy exclusive save that it preserved the position under the Act of 1845 where that was applicable.

The next relevant legislation was the Railway and Canal Traffic Act, 1888. I note, without elaborating, the provisions in sections 12 and 13 with regard to damages and pass to section 27, which placed the onus on the railway company to disprove "undueness" where the complainant established that another was paying less than he. This did not alter the substantive law as to what was undue preference or undue prejudice or disadvantage, but enacted that if you want to shift the onus you must show that you are charged more.

It is important to have that outline of the statutory provisions in mind because only two of the cases submitted to assist us were before the Act of 1888. These were *In re Harris and Cockermouth and Workington Railway Co.*[10] and *Murray* v. *Glasgow and South-Western Railway Co.*[11] The first was a case of giving lower rates to keep customers, although Cockburn C.J.[12] and Crowder J.[13] deal with the materiality of cost to the railway company and, indeed, the appellants in this case concede that cost is material and can be relied on by a board in rebutting "undueness." The

[10] (1858) 3 C.B.N.S. 639.
[11] (1883) 11 R. (Ct. of Sess.) 205.
[12] 3 C.B.N.S. 639, 711–712.
[13] Ibid. 715–716.

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second, so far as the first point in this case is concerned, does not seem to me to be of assistance to either side.

The cases after the Act of 1888 are all cases where the complainant was seeking to take advantage of the alteration of onus, and any dicta which may be abstracted were made on the hypothesis that the complainant was charged more and must be viewed in that light.

In my opinion, therefore, the appellants do not establish that the interpretation of section 37 (8) is limited by attaching to undue preference or undue discrimination a special meaning drawn from previous authority. In my view, the appellants' first contention fails.

The second point of the appellants is that, on the assumption that the first appellants have exercised undue discrimination against the respondents, the latter have no remedy by way of recovery of any sums paid under a tariff which has been brought into force. The appellants seek to draw a distinction between the effect of an equality section and an undue preference section. I do not think that they succeed. In my opinion, the first governing principle is that a tariff which imposes a charge upon the respondents involving their being unduly discriminated against is contrary to section 37 (8) of the Electricity Act, 1947. The respondents were charged more than is warranted by the statute. Then it is clear that, until a court so declares, the respondents have no alternative but to continue to pay the charges demanded of them. In principle the appellants should not be permitted to retain payments for which they have no warrant to charge. The respondents may therefore recover whatever sum they may be able to prove was in excess of such a charge as would have avoided undue discrimination against them. I did not understand it to be disputed that the charges to the low voltage consumers are correct. It is fully within the competence of a court on the evidence before it to estimate the amount by which the respondents have been overcharged, and the respondents have, in my view, averred with sufficient specification the standard by which that amount should be estimated.

I cannot find anything in the cases decided under the railway and electricity statutes which would necessitate or lead to a contrary view. I respectfully agree with Lord Patrick that *Great Western Railway Co.* v. *Sutton* [14] and *Lancashire and Yorkshire Railway Co.* v. *Gidlow* [15] support this view. The appellants admit that if a breach of an equality clause were established, any unwarranted excess charge could be recovered, but submitted that certain cases under the railway statutes justified the distinction that excess charges proved to have been imposed in breach of a prohibition against undue discrimination were irrecoverable. I

[14] (1869) L.R. 4 H.L. 226. [15] (1875) L.R. 7 H.L. 517.

find no ground for the distinction alleged. In *London and North-Western Railway Co.* v. *Evershed* [16] two members of your Lordships' House affirmed the decision of both the Divisional Court and the Court of Appeal that overcharges could be recovered as a breach both of an equality section and an undue preference section, while two relied only on the equality section. In *Budd* v. *London and North-Western Railway Co.*[17] the court held that overcharges under an undue preference clause could be recovered. It is quite true that they omitted to consider the effect of sections 2, 3 and 6 of the Railway and Canal Traffic Act, 1854, and therefore their decision cannot stand, but on the present point the bent of the minds of the judges is clear. In *Murray* v. *Glasgow and South-Western Railway Co.*[18] Lord President Inglis was of opinion that the pursuer had stated a relevant breach of section 2 of the Act of 1854, but decided that the remedies provided by that Act were exclusive and, therefore, that the claim for repayment could not succeed. That does not touch the principle here in question. Moreover, with the greatest possible respect to Lord Herschell, I cannot accept without qualification his statement in the Court of Appeal in the case of *Phipps* v. *London and North-Western Railway Co.*[19]: "*Budd* v. *London and North-Western* "*Railway Co.*[20] is . . . unquestionably no longer law. It is an "action brought to recover differences which are said to constitute "an overcharge by reason of difference of treatment under section "2 of the Act of 1854. The House of Lords has decided in "*Denaby Main Colliery Co. Ltd.* v. *Manchester, Sheffield and* "*Lincolnshire Railway Co.*[21] that no such action will lie."

In the *Denaby Main* case [21] this House decided, in the first part of the case, which included consideration of undue preference, that the plaintiff had failed to prove that there had been a breach of section 2 of the Act of 1854. They discussed the question whether an action would lie for breach of the section or whether the remedy under section 3 was exclusive. The House had *Murray's* case [22] before them. Lord Halsbury reserved his opinion, Lord Selborne and Lord Fitzgerald did not mention the matter, while Lord Blackburn took the same view as the Lord President in *Murray's* case [22] that the remedy under the Act of 1854 was exclusive. I have already mentioned the position in which the matter was left in *Budd's* case.[23] There is no decision that in principle and apart from the special provisions of the Act of 1854 an action cannot lie to recover overcharges made in breach of a section prohibiting undue preference or undue discrimination. I have read with the care which they deserve the doubts expressed by Lord President Inglis in *Murray's* case [24] when he says that

[16] (1877) 2 Q.B.D. 254; 3 Q.B.D. 134 (C.A.); (1878) 3 App.Cas. 1029 (H.L.).
[17] (1877) 36 L.T. 802.
[18] 11 R. (Ct. of Sess.) 205.
[19] [1892] 2 Q.B. 229, 248; 8 T.L.R. 49.
[20] 36 L.T. 802.
[21] (1885) 11 App.Cas. 97; 2 T.L.R. 199.
[22] 11 R. (Ct. of Sess.) 205.
[23] 36 L.T. 802.
[24] 11 R. (Ct. of Sess.) 205, 212–213.

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the tolls were within the statutory limit, and then asks: "What, "then, made them unlawful? They were not so because Wilkie "was overcharged, but because the Eglinton Iron Co. was "charged less and thereby unduly favoured." Again, I think that the answer could not be put better than in the words of Lord Patrick [25]: "It is beside the point that the complainer has been "charged a less rate than the statute would have permitted. "The same might be said in the case of an action for breach of "an equality clause, but is no answer if in fact A has been charged "more than B for the same service. It is equally no answer if in "fact B has been unduly preferred to A in the matter of charges "in breach of an undue preference clause."

Again, I find nothing in the authorities under the railway and electricity statutes which prevents one applying the principle which I have previously stated and the appellants fail on the second point. That is sufficient to dispose of the first appeal which, in my view, should be dismissed.

In the second appeal the South of Scotland Electricity Board are the appellants and British Oxygen Gases Ltd., a company to which the British Oxygen Co. Ltd. has sold its undertaking in industrial and medical gases, are respondents. The appellants issued their first tariff with effect from January 1, 1956, and the respondents have taken large supplies of electricity at high voltage from the appellants under that tariff. On July 12, 1957, the respondents raised the present action against the appellants. They complain that by the new tariff the board exercised undue discrimination against them as consumers of high voltage electricity. This is the same type of complaint as the British Oxygen Co. Ltd. make against the three tariffs in the first appeal. They also complain that by the new tariff the board exercised undue discrimination against them as consumers having a high load factor of over 70 per cent. This appeal comes before us as an appeal against an interlocutor of the Second Division of the Court of Session in an action brought by the respondents for declarator, interdict and payment. The appellants tabled pleas to the competency of the action and the relevancy of the respondents' averments; on February 7, 1958, the Lord Ordinary (Lord Guest) sustained the appellants' plea to relevancy so far as directed against one of the matters in issue and quoad ultra allowed a proof before answer: on motions for review (after amendment of the pleadings) the Second Division recalled the interlocutor of the Lord Ordinary, repelled the appellants' plea to competency and allowed a proof before answer.

The appellants argued before us—(1) that the respondents have not relevantly averred that the appellants have exercised any discrimination against them—(A) as high voltage consumers, or (B) as consumers with a load factor of over 70 per cent.;

[25] 1958 S.C. 53, 82.

(2) that, on the assumption that the appellants have exercised undue discrimination against the respondents, the respondents have no remedy (*a*) by way of recovery of any sums paid under a tariff which has been brought into force, (*b*) by way of interdict against the appellants charging prices fixed under such a tariff.

As far as the relevancy of the averments of discrimination against the respondents as high voltage consumers is concerned, this raises first the question which I have already considered and answered in the sense that there can be undue discrimination, even where the party alleged to be discriminated against is not paying more. It was also suggested by the appellants in this case that the respondents by their failure to aver any fact or explanation of their averment that 5·55 per cent. is a minimum fair differential when the cost of fuel is 38s. 0d. per ton have not given sufficient notice of the case that they intend to prove. This plea was fully considered by the Lord Ordinary and by all four judges in the Second Division. I accept their reasons for rejecting it and I do not think it necessary to add anything to them.

Similarly, I need not repeat the reasons why, in my opinion, the respondents can, if they establish discrimination, recover whatever sum is in excess of such a charge as would have avoided discrimination. Furthermore, the appellants have failed to convince me that the Second Division are in error on the question of interdict.

This leaves the relevance of the averments of discrimination against the respondents as consumers with a load factor of over 70 per cent. The respondents maintain that the tariff here in question further discriminates against them in that it fails to incorporate an annual maximum demand charge which is defined as one in which the consumer is given the option of paying as an annual charge ten times the maximum monthly demand charge. They say that the cost of production and distribution of electricity is and must be related to the highest demand of the year. In other words, for part of the year there must be maintained surplus generating capacity which has to be paid for. On this they base their allegation that from the point of view of the supplier, the consumer with a constant or relatively constant demand is more satisfactory than one whose demand is subject to major fluctuations. Load factor is the ratio which the quantity of electricity used in a year bears to the quantity that would have been used had the maximum rate of user of electricity been maintained throughout the year. The respondents are consumers whose load factor is exceptionally high, being of the order of 80 per cent., and it follows that their demand is responsible for little, if any, of the appellants' unproductive generating capacity. The respondents say that the charges under the said tariff are directly related to meeting the highest demand in a year, whereas the adoption of an annual demand charge would

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recognise that consumers having a high load factor should not be charged on the same basis as those having a low load factor whose seasonal demands inflate the fixed costs of electricity supply. The respondents further say that the provision of an annual demand charge is in accordance with proper, recognised and usual practice in such tariffs, and that 10 of the 12 area boards in England and Wales make such an annual demand charge available to industrial consumers at the consumers' option. I respectfully agree with their Lordships of the Second Division that the respondents have in the foregoing deployed a case which requires that the fact should be ascertained before a final answer is given as to its relevancy.

I would also dismiss the second appeal.

Lord Merriman. My Lords, the background of both these appeals is so fully set out in the opinion of my noble and learned friend the Lord Chancellor, which I have had the advantage of seeing, that no recapitulation on my part is called for. Moreover, the Lord Ordinary (Lord Guest), in the second appeal, gives the history in detail of all the four tariffs for the supply of electricity involved in this dispute. The nature of the dispute is the same throughout: namely, whether the defenders have exercised undue discrimination against industrial users of supplies of electricity metered at or above a voltage of 6,000, including the pursuers.

As between the first three tariffs with which the first appeal is concerned and the fourth tariff with which the second appeal is concerned, the parties, both suppliers and users, have changed; but nothing really turns upon this and I shall refer to the pursuers and defenders throughout this opinion.

It is also to be observed that as between the first and second appeal the method of supply changed. In the case of the first three tariffs the defenders bought electricity in bulk from the British Electricity Authority and merely distributed it to the users, whereas in the case of the fourth tariff the defenders themselves generated the electricity they supplied.

I need only say by way of preface that a duty was placed upon the area board in framing a tariff to show the method by which and the principles on which the charges for electricity are to be made. Some criticism (see Lord Patrick at page 35 B of the Record in the second appeal) has been made that the defenders have failed in this respect.

This much, at least, is clear about the construction of the first tariff: a distinction is made between supply metered at or above a voltage of 6,000 and that metered at a voltage of less than 6,000, "generally of the order of 415 volts" (see Answer 3 in the Record of the first appeal).

These two supplies have been called throughout "high" and "low" voltage respectively although the terms are not actually used in the first tariff and in subsequent tariffs different measures

of "high" and "low" are specified and a "medium" range is introduced. It is unnecessary to refer further to these modifications, since it is upon the method and principles on which the first tariff has been constructed and upon the perpetuation thereof in subsequent tariffs that the pursuers found their case of undue discrimination. It is admitted that in general it is less costly to the defenders to supply electricity at high voltage than at low voltage, and that in respect of the low voltage supply there falls on the defenders the loss entailed in transformation to the lower voltages and, in the case of certain customers, the loss entailed in distribution; that the low voltage supply tariff is based, inter alia, upon average transformation and distribution losses; and that for that reason there is a differential tariff between low and high voltage. The basic unit prices are fixed in the first tariff as ·45d. for high voltage, and ·475d. for low voltage, giving a differential of ·025d., which, expressed as a percentage of ·45d. is 5·5 per cent. Of this differential the pursuers make no complaint; on the contrary they aver that this is the minimum percentage which avoids discrimination against them. This averment is repeated in relation to all the other tariffs; and it is the averred failure throughout to maintain at least this percentage of differential which the pursuers plead as discrimination against them.

From the fact that the defenders were buying electricity in bulk for distribution under the first three tariffs it follows that the purchase of the extra units required, as is averred, for the supply to users of low voltage electricity necessarily increased the defenders' costs in this respect. Accordingly a clause described as "the fuel clause" was inserted in the first tariff in the following terms: "(*b*) The unit charge shall be increased "or reduced at the rate of ·0008d. per unit for each penny by "which the fuel cost per ton used for the purpose of, and "shown on, the invoice for the supply of electricity in bulk by "the British Electricity Authority to the Board in the previous "month is more or less than 38s. 0d." As the fuel cost per ton was invariably more than 38s., the question of reduction can be ignored. This fuel clause is the crux of the first tariff, and its operation is reflected in the other tariffs.

The area of dispute clearly appears by contrasting two passages in the pleadings. In Answer 6, at pages 12 G and 13 A of the Record in the first appeal, the defenders explain and aver that although the basic cost of coal in the fuel clause of the old (that is, the first) tariff was 38s. per ton, the actual price of coal when the old tariff was introduced was not less than 60s. per ton, and the basic unit prices for high voltage and low voltage were fixed at levels which, when adjusted by the operation of the fuel clause, resulted in charges for high voltage and low voltage supplies appropriate to these defenders'

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costs at that time. Thus, as has been said (Lord Hill Watson)[26] "the defenders have chosen to gear the price per unit to the "cost of fuel by the fuel variation clause." I appreciate that this particular pleading is merely intended to repel the argument based on cost, if, as the defenders do not admit, the question of cost is relevant at all.

On the other hand, in condescendence 12 (at page 16 of the Record in the second appeal) the pursuers accept and aver that the low voltage unit price and the fuel variations applicable thereto in all four tariffs are fair and reasonable in the circumstances, and it is upon that basis that they found their averment of overcharge.

Translating these averments into actual terms, it is asserted, on the one hand, that the basic unit prices of ·45d. for high voltage and ·475d. for low voltage supplies were fixed at levels which, *when adjusted by the addition to each basic price of ·0008d. per unit for each penny by which the fuel cost per ton was increased above the arbitrary figure of 38s. per ton* (the italics are mine) resulted in charges for high voltage and low voltage supplies appropriate to these defenders' costs at that time. To this the pursuers reply that they expressly admit that the basic price of ·475d. for low voltage is fair and reasonable, and so is the adjustment of that basic price by the operation of the fuel clause; and, as I have already said, it has never been disputed that the basic price of ·45d. and the differential of ·025d. is also fair and reasonable. But the pursuers say that it is self-evident that the fuel clause cannot operate to produce a charge for the high voltage supply which is appropriate to the defenders' costs, since for every penny by which the cost of fuel rises above 38s. the identical figure of ·0008d. is added to the basic price for high voltage, in spite of the admitted fact that the cost of high voltage supply is less than that of low voltage supply. This, they assert, is undue discrimination against them.

In other words, the pursuers' case is that the indiscriminate addition to two different basic prices of an identical figure on the 264 occasions on which the cost of fuel rises by one penny from 38s. to 60s. itself operates as a discrimination against them, inasmuch as, to use the words of the Lord Justice-Clerk in the first appeal,[27] the pursuers are "being called upon to bear a "disproportionate amount of the costs of distribution."

It is true that in the second tariff a differential is introduced into the additional charge per unit; namely, ·0008d. for the low voltage and the lower figure of ·00075d. for the high voltage. Of this differential as such no complaint is made. But the pursuers aver that the discrimination against them in the first tariff is carried forward into the second tariff in the following manner, as appears from the analysis in Lord Keith's opinion

[26] 1958 S.C. 53, 59. [27] Ibid. 68.

in the former appeal to your Lordships' House [28]: In the second tariff the basic price is raised to 60s. a ton; the resultant of the increase of 22s. in the basic price at ·0008d. for each 1d. is ·211d. This figure is added to each of the original price units of ·45d. and ·475d., producing new price units of ·661d. for high voltage and ·686d. for low voltage. This preserves a differential of ·025d., but perpetuates the vice of having applied the same increased unit charge indiscriminately between the fuel costs of 38s. and 60s. per ton.

I do not think it is necessary to go into detail about the third tariff. Suffice it to say that on the introduction of the second tariff the percentage of differential is said to be reduced from 5·55 per cent. to 3·78 per cent., and under the third tariff it is reduced further to 3·74 per cent.

As to tariff IV: First, I think that in condescendence 10 (page 12 C to F), and in condescendence 12 (page 15 F), it is sufficiently averred that this tariff is tainted by the vice in the first tariff. Secondly, however that may be, there is a definite averment that the minimum percentage of differential is 5·55 per cent., which plainly relates to the original differential of ·025d. in tariff I before adjustment by the fuel clause in that tariff. It is averred that the differential in tariff IV is only 4·28 per cent. in favour of high voltage users.

Condescendence 12 also contains the important admission, already mentioned, that the pursuers accept and aver that the low voltage unit price and the fuel variations applicable thereto in all four tariffs is fair and reasonable in the circumstances.

Secondly, as to the annual maximum demand charge, I am of opinion that there is a sufficient averment of a general recognition of the practice of offering such a tariff to industrial users with the high load factor, as now defined in the amended pleading, and I agree with Lord Patrick (at page 37 D of the second appeal), that the pursuers have in this regard presented a case which demands that the facts should be ascertained before a final answer is given as to its relevancy. I also agree with the Lord Justice-Clerk (page 32 E) that "to cut and carve on the extent of the "proof in the present case will serve no useful purpose, and may "even complicate matters if, as seems likely, the two cases will "be investigated together."

The fundamental approach adopted in the argument for the defenders is that in section 37 (8) of the Electricity Act, 1947, the exercise of any undue discrimination against one user or class of users of electricity is merely a facet of showing undue preference to another user or class of users. The next step is that the cases decided about the undue preference of one customer over another under the Acts of Parliament governing railways show that the question must be dealt with in two stages—viz.: First, whether there has been a preference—a question which, it is argued, can

[28] [1956] 1 W.L.R. 1069, 1075–1076; [1956] 3 All E.R. 199.

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only consist in comparing a rate actually paid by one customer or class of customers with that paid by another: and it is only if preference in this sense is established that the second question arises whether the preference thus given is undue. By analogy it is argued that the question of preference and discrimination in connection with the supply of electricity can only be decided in terms of the price actually charged to the rival users and, therefore, as it is admitted that the pursuers and other high voltage users pay less per unit than do the low voltage users, there can be no question of preference to the low or discrimination against the high voltage users respectively; and, therefore, that the question of undueness cannot arise at all.

On the other hand, it is conceded that in considering whether a proved preference or discrimination is undue the question of cost to the defenders, amongst other things, may be considered. The Lord Justice-Clerk pointed out that the defenders are forced to this splitting up of the problem into two stages in order to reach a situation where they can get away from cost, which is fatal to them: but that it seems to ignore that what constitutes undue discrimination is fundamentally a question of degree.[29] He also pointed out[30] that the defenders' argument went practically the distance of saying that "preference" has become a term of art, and that it had significance only in relation to rate, adding: "Indeed, this contention may well be essential to the success "of the defenders' argument." I agree with these comments.

It is easy to see how it is that in the railway cases "prefer-"ence" and "a lower rate" came to be treated as more or less synonymous, more especially after section 27 (1) of the Act of 1888 placed on the railway companies the onus of justifying the lower rate.

In *Phipps* v. *London and North Western Railway Co.*,[31] a case much relied on by the defenders, Lindley L.J. said: "That clause "appears to me to be perfectly intelligible. The moment one of "two traders on the same line finds that the other is being charged "at a less rate than he is, he is entitled to say to the railway "company, 'How do you justify that?' As I understand this "section, the burden of proof is on the railway company to show "that such lower charge or difference does not amount to an "undue preference." He continues in the next paragraph: "That gives rise to the question, What is an undue preference? "Now, if you look at the sections which relate to this matter, "beginning with the equality clause, s. 90 of the Act of 1845, "s. 2 of the Act of 1854, and this s. 27 of the Act of 1888, "you find these expressions used, all of which appear to me to "point to the same sort of mischief. You have 'undue,' or "'unreasonable,' or 'unfair' 'preference,' or 'prejudice' or "'disadvantage,' or 'favour.' What is undue, etc., is a question

[29] 1958 S.C. 53, 68.
[30] Ibid. 69.
[31] [1892] 2 Q.B. 229, 251–252.

"of degree, and being a question of degree, it is obviously a "question of fact. . . ."

In the same case Lord Herschell, in considering whether the advantage of two competitive routes is a legitimate matter to be taken into account as between two traders, one of whom has, but the other has not, that advantage, says[32]: "All that I have to "say is that I cannot find anything in the Act which indicates "that when you are left at large, for you are left at large, as to "whether as between two traders the company is showing an "undue and unreasonable preference to the one as compared "with the other, you are to leave that circumstance out of con-"sideration any more than any other circumstance which would "affect men's minds."

Moreover, it is not universally true that even in the railway cases "preference" only consists in a difference of rates. In *Murray* v. *Glasgow and South Western Railway Co.*,[33] another case much relied upon in the argument for the defenders, Lord President Inglis, discussing the remedy open to a complainant, said: "It is to be observed that there may be other modes in "which undue preferences may be granted by a railway company "to one trader over another by which one loses and another gains "time, a very important consideration in the eye of the trader. "That is not an overcharge of rates, but that is one of the matters "that are embraced in this statute."

Further, as regards electricity in *Attorney-General* v. *Wimbledon Corporation*,[34] Simonds J., as he then was, held that there could be undue preference or discrimination in spite of equality of the charge if, as against the complainant, an objectionable condition is attached to an equal charge.

In my opinion, Lord Mackintosh, in the first appeal,[35] underrates the significance of this latter case, and is mistaken in thinking that *Attorney-General* v. *Hackney Corporation*[36] is against the contention of the pursuers. Warrington L.J.[37] clearly thought that the fact that the relative cost of the supply of energy for power was less than that for light, and that supply of energy for both was less than the supply for light alone were relevant factors, and that it was a commercial problem to be looked at broadly, and not with a meticulous examination as a question of mathematics of slight advantages or disadvantages in the manner of dealing with particular customers or classes of customers.

In my opinion, there is no justification whatever for the contention that discrimination can only be considered in relation to price and that it is only if the pursuers pay more that the undueness of discrimination in this limited sense can be considered.

In my opinion, considerations that are relevant to the question whether a discrimination is undue are relevant to the question whether there is undue discrimination. I think that the phrase

[32] [1892] 2 Q.B. 229, 242.
[33] 11 R. (Ct. of Sess.) 205, 212.
[34] [1940] Ch. 180.
[35] 1958 S.C. 53, 90–91.
[36] [1918] 1 Ch. 372.
[37] Ibid. 392, 393.

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"*shall not exercise any undue discrimination*" has to be considered as a whole, and that a fair distribution of the cost of supplying electricity as between one class of users and another is not to be left out of consideration "any more," to revert to Lord Herschell's phrase already quoted, "than any other "circumstance which would affect men's minds."

It is a matter for the pursuers to establish at the proof that 5·55 per cent. is the lowest percentage of differential which avoids discrimination against them, but, taking this averment and the averment of the reduced percentages under the second, third and fourth tariff pro veritate, it is my opinion that these averments are relevant as showing the exercise of varying degrees of undue discrimination against high voltage users.

It was suggested that as the basic unit prices themselves show a preference in favour of the high voltage users, it is absurd to say that at the same time there is a discrimination against them. No doubt this would be so if that were the case, but the so-called preference, which nobody has suggested in this case is an undue preference, in the fixing of the basic unit prices is exercised once for all when that differential is fixed, whereas the discrimination which lies in the adjustment of those prices by the operation of the fuel clause occurs progressively on each of the 264 occasions on which the price of coal rises by 1d. per ton between 38s. and 60s.

In substance I agree with the reasoning on this point of the Lord Justice-Clerk and Lord Patrick in the first appeal.

As regards the remedies, assuming that the averments are proved, the pursuers, in my opinion, are entitled to conclude both for repayment of the amounts overpaid and for declarator. I do not agree with the submission that the fact that the first three tariffs are now superseded would produce a bare declarator, if only because of the effect which declarator would have upon the costs of the proceedings both in your Lordships' House and below.

Mr. Mackenzie Stuart also satisfied me by reference to McLaren's Practice (1916), at pages 649, 650, and the cases there cited, that the court will allow an action of declarator to be brought by a party whose liability for a money payment under an Act of Parliament is in question with the object of construing the statute. This covers the present cases.

As regards the claim for the repayment of moneys overpaid, it is unnecessary to refer at length to *Parker* v. *Great Western Railway Co.*[38] or to *Great Western Railway Co.* v. *Sutton*[39] or *Lancashire and Yorkshire Railway Co.* v. *Gidlow*,[40] *per* Lord Chelmsford.

It is sufficient to say that in *Maskell* v. *Horner*[41] Lord Reading C.J., referring to these authorities, and in particular

[38] (1844) 7 Man. & G. 253.
[39] L.R. 4 H.L. 226.
[40] L.R. 7 H.L. 517, 527.
[41] [1915] 3 K.B. 106, 119; 31 T.L.R. 332.

to the advice given by Willes J. in *Great Western Railway Co.* v. *Sutton*[42]—where that learned judge said that he had "always "understood that when a man pays more than he is bound to "do by law for the performance of a duty which the law says "is owed to him for nothing, or for less than he has paid, there "is a compulsion or concussion in respect of which he is entitled "to recover the excess by condictio indebiti, or action for money "had and received"—said that "such claims made in this "form of action are treated as matters of ordinary practice and "beyond discussion."

It should be noted, too, that Lord Patrick is correct in pointing out in the first appeal[43] that Lord Herschell's opinion in *Phipps* v. *London and North Western Railway Co.*[44] that no such action would lie is based on a faulty interpretation of the decision in *Denaby Main Colliery Co. Ltd.* v. *Manchester, Sheffield and Lincolnshire Railway Co.*[45]

I agree with counsel for the defenders that, unlike the railway cases based on an equality clause, this is not a simple question of the recovery of the difference between two rates. But I do not agree with his submission that the court is singularly ill-fitted to deal with the question. On the contrary, I see no reason, when all the relevant factors have been established in the course of the proof, why a judge should not be able to arrive at a fair figure to reimburse the pursuers in respect of the loss, if any, they have sustained. Here, again, I agree with the Lord Justice-Clerk and with Lord Patrick.

For these reasons I would dismiss both these appeals.

Lord Reid. My Lords, this is the second occasion on which the first of these two cases has been before your Lordships. On the first occasion the present appellants failed on the contentions which they had maintained in the Court of Session, but they also put forward contentions which they had not maintained below. This House refused to deal with these contentions and the case was sent back. The record was then extensively amended and as the case now stands the main contention of the pursuers and present respondents is that three tariffs made by the original defenders, the South West Scotland Electricity Board, which were in operation successively between 1951 and 1955, and under which they paid for electricity supplied to them, contained provisions which unduly discriminated against them. They further claim that if they are successful in proving undue discrimination they are entitled to recover overpayments due to such discrimination.

These tariffs were in two parts. Against that part which imposes a charge per kilowatt of maximum demand no complaint is made, though there is a complaint against such a charge in the second case now before the House. The complaint in this case

[42] L.R. 4 H.L. 226, 249.
[43] 1958 S.C. 53, 82.
[44] [1892] 2 Q.B. 229, 248.
[45] 11 App.Cas. 97.

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is against the other part of the tariffs which made charges per unit of power supplied. The pursuers were, and are, users of electricity supplied at high voltage, which admittedly costs less to supply than the same amount of power at low voltage. The defenders recognised this by charging a higher price per unit to low voltage consumers, but the pursuers' case is that the difference of price under the tariffs does not adequately reflect the difference in cost and that, in fact, the price charged for high voltage supply was not as low as it ought to have been in comparison with the price charged to low voltage consumers. That, they say, constituted undue discrimination against them and other high voltage consumers.

The main contention of the defenders, the present appellants, is that there can be no discrimination, let alone undue discrimination, against any consumer in respect of the price which he has to pay per unit if the price per unit charged to him is less than the price per unit charged to the other consumers with whom he makes a comparison. Determining whether there has been discrimination or preference in respect of charges must involve a comparison between the charge made to the pursuer and the charge made to some other consumer. Shortly stated, the defenders' contention is, that what must alone be compared are the prices charged, while the pursuers' contention is that, in making a comparison, one must have regard to the costs of supply to the two classes of customer. So the defenders maintain that the pursuers' averments are irrelevant, and that the action should be dismissed because, admittedly, the price charged to them per unit was less than the price charged to low voltage consumers. The pursuers maintain that they are entitled to proof of their averments, and they support the interlocutor of the Second Division under which proof before answer is ordered.

The last of these three tariffs ceased to be in force on December 31, 1955, while the former appeal to this House was pending. The original defenders, the South West Scotland Electricity Board, have now ceased to exist, their functions and liabilities having been taken over by the appellants, the South of Scotland Electricity Board, who have wider functions than the old board. In addition to seeking declarators that in fixing their tariffs the old board unduly discriminated against them, the pursuers sue for the amount of the overcharges caused by such discrimination. In their defences the defenders now plead that the action is incompetent. They say that even if there was undue discrimination, and even if the amount of overcharges which resulted from such discrimination could be proved, the pursuers are not entitled in law to recover any such overcharges from them. Then they say that if the pursuers have no right to recover anything the declarators sought ought not to be granted because they would have no practical value or effect.

The plea that the action is incompetent ought, in my opinion, to be disposed of now before proof is allowed, even though the

proof to be allowed is only proof before answer. I would repel this plea because I think there is nothing in law to prevent recovery of any sums which can be proved to have been overcharged. The only reason advanced for the contrary view was that overcharges made by railway companies were said to be irrecoverable if they were due to the company having given an undue preference to another consumer. It is therefore unnecessary to look at the railway legislation and the authorities under it.

The Railways Clauses Acts of 1845, and certain other private Acts, contained an equality clause which made it illegal for a company to charge one customer more than they charged another under similar circumstances, and it is quite clear that a person who proved breach of an equality clause could recover from the company any overcharge which he had paid, i.e., the difference between what he had paid and what he would have paid if the company had charged him as the equality clause required (*Great Western Railway Co.* v. *Sutton*[46]), and recovery was not prevented by the fact that when he paid the charge demanded he knew that he was being overcharged.

Equality clauses were soon found to be an inadequate protection. They only applied where the journeys compared were precisely the same, so that a trader whose goods were carried a shorter distance than the goods of his competitor, but who was charged more than his competitor, got no relief under these clauses. So there was enacted the Railway and Canal Traffic Act, 1853. I need not quote section 2. The effect of it was to prohibit any undue or unreasonable preference or advantage or prejudice or disadvantage, and this applied where the journeys were not identical. We were not referred to any earlier use of the expressions "preference" or "prejudice" in any Act in such a connection, and, when prohibitions of undue preference were later introduced into Acts dealing with electricity and other matters, it is not unreasonable to suppose that Parliament had in mind the Act of 1853, and the way in which it had been interpreted by the courts. If there were clear and binding authority under the railway legislation that overcharges resulting from undue preference or prejudice could not be recovered, I might be inclined to hold that the same rule should apply here, but there is not. The 1853 Act contained in sections 3 and 6 provisions for an alternative form of remedy, and a prohibition against proceeding by way of action, so cases under it which decided that it was not competent to sue for the amount of overcharges were really decided on the special terms of sections 3 and 6, and they can only assist in cases under other legislation, where there is nothing corresponding to section 6 of the 1853 Act, in so far as they contain expressions of opinion as to the effect of undue preference clauses standing alone. We were referred in particular to the opinion of Lord President Inglis in *Murray* v. *Glasgow and*

[46] L.R. 4 H.L. 226.

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South Western Railway Co.,[47] and the judgment of Lord Herschell in *Phipps* v. *London and North Western Railway Co.*[48] I agree with what has been said by my noble and learned friend, the Lord Chancellor, about these opinions, and with his approval of the criticism of them by Lord Patrick, and I find no difficulty in holding that the plea to competency fails.

The main controversy turns on the meaning of section 37 (8) of the Electricity Act, 1947. It required that the defenders in fixing their tariffs should not "show undue preference to any "person or class of persons" and should not "exercise any undue "discrimination against any person or class of persons." Before coming to the pursuers' averments, I think it necessary to consider what is meant by the expressions "undue preference" and "undue discrimination." It was argued that these phrases are composite phrases, so that it is wrong to ask first was there a preference and then was it undue: in other words, an undue preference does not mean a preference which is undue. I cannot accept that argument. It appears to me to be a complete answer to a complaint of undue preference to prove that, in fact, there was no preference at all; and similarly with regard to discrimination. I cannot imagine a case in which it could be said: true there is no preference but there is an undue preference.

It is undisputed that, whatever be the meaning of these terms, they imply a comparison of the treatment of the pursuer with the treatment of some other consumer. The section provides that "in fixing tariffs" there shall be no undue preference, etc. So the comparison must be between the effects of the tariff on the pursuer and on the other consumers. And any comparison must surely be made by reference to some criterion or "yard-"stick." The case for the pursuers seems to me to amount to this: a board is prohibited by the section from fixing any tariff which results in unduly unfair treatment of any one consumer in comparison with any other, and in judging what is unfair a very wide inquiry is necessary. If that had been the intention of Parliament I think that very different words would have been used to express it.

A tariff necessarily involves the grouping together of a large number of consumers. The cost of supplying one will be different on a minute analysis from the cost of supplying another, and, even on the wider basis of taking into account the whole circumstances, meticulous justice would require different charges for different consumers, and would prevent any large-scale grouping. The 1947 Act for the first time required tariffs to be fixed, and it must have been recognised that this would necessarily produce some measure of injustice by imposing the same charges in cases where costs of supply and other circumstances might justify a difference. It was left to the boards, under the general control of the central authority, to make such tariffs as they should think

[47] 11 R. (Ct. of Sess.) 205. [48] [1892] 2 Q.B. 229.

proper. The right of a customer to challenge a tariff by legal action is limited. He must be able to show that in fixing the tariff the board has shown undue preference or exercised undue discrimination. I read that as meaning that legal action is excluded unless there is preference or discrimination, and that once preference or discrimination is established the question then arises whether, in the whole circumstances, it was undue. And if I am entitled to look at the railway legislation, where the expression undue preference originated, I am reinforced in this view. At first the customer had to prove that there was a preference and that it was undue but, by the Railway and Canal Traffic Act, 1888, section 27, once the customer had proved that there was a preference the company had to discharge the burden of proving that the preference was justified—that it was not undue. There is high authority that this did not alter the substance of the law, and it is, to my mind, clear that there were always two steps—is there a preference and is it undue?

Once a preference has been shown to exist there can be a very wide inquiry whether or not it was undue. So, ask the pursuers, why should there not be that inquiry without the need first to show that there was a preference? I would answer that in this way: the whole idea of tariffs is to produce equality of charging over wide areas, and the 1947 Act appears to me to be saying to the boards—if you depart from equality of charging you must be prepared to defend any inequality in a court of law by showing that there is good reason for it. That is a real safeguard, but it is a very different thing to say it is open to every consumer to allege that a board has carried the policy of equality of charging too far, and to attack the board's grouping by saying that justice requires that he should get better treatment than the rest of the group. That would open the door so widely that a court could, in effect, be required to review the whole policy of the board and of the central authority in relation to charging and the making of tariffs. If that had been the intention I would have expected the Act to have been very differently drafted.

The pursuers complain, not of undue preference to others, but of undue discrimination against themselves, and, if I am right so far, the first question to ask is whether there has been any discrimination against them. They argue that discrimination is not merely the converse of preference but that it must be judged in a different way and by a different standard. Admittedly, they pay less per unit of electricity than the consumers with whom they make a comparison: but they say that, even if this is regarded as a preference to themselves, they are nevertheless being discriminated against because the preference given to them is unduly small. I find that very difficult. In the first place, it does not seem to me to accord with the ordinary use of language. If I already pay less than my competitor but justice requires that I should pay still less, I might well say that I am being unfairly treated, but it would not occur to me to say that the seller

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is exercising discrimination against me in comparison with the way he treats my competitor. Under this Act preference or discrimination must be established on a basis of comparison. It is not enough to say that you are paying more than is just, and the pursuers' whole case is based on a comparison with the low voltage consumers who already pay more than they do per unit. The only argument that appears to me to have any weight is that "discrimination" appeared for the first time in the 1947 Act: in the earlier electricity legislation there was only a prohibition of undue preference. So it is possible to say that Parliament must have intended the new word to add something. It is certainly more appropriate where one person is being required to pay more than a large group of other people: one would, I think, say that discrimination is being exercised against him rather than that the others are getting a preference. This may be what Parliament had in view. But I cannot think that merely adding this new word was intended to have, or has, the effect of introducing an entirely new and different standard, so that at one and the same time the same person can be held to have a preference and yet to be discriminated against.

What then is the standard by which preference or discrimination is to be judged? The defenders say price charged to the consumer and the pursuers say cost of supply. The Act uses these words in connection with the fixing of tariffs which deal with prices and not with cost of supply, and one would expect these words in this context to refer to price. Moreover, prices are easily ascertained by inspection of the tariff but costs of supply are not: their ascertainment probably involves highly contentious questions of costing and the like. So, if preference is a matter of cost, it would be impossible to tell whether there is any preference or discrimination until an elaborate investigation had been made. Then, again, prices remain stable until a tariff is altered, but costs of supply vary, and the costs of supply to a particular consumer may vary, not only with the general costs of production, but with the way in which he spreads his demand. And, finally, I find no trace of cost of carrying the goods being held relevant under the railway legislation. It therefore appears to me that preference and discrimination here do not refer to cost of supply. But it is possible to have discrimination in some matter other than price which directly affects the consumer, for example, requiring him to observe some condition which is not imposed on other consumers.

Many authorities were cited in the course of argument. In the course of judgments dealing with quite different matters, expressions are found which, taken by themselves, appear to assist one side or the other. I shall not detain your Lordships by dealing with them, because none of them appears to me to indicate that the learned judge had come to any conclusion about any of the questions now before the House; he may not even have had such questions in mind.

For the reasons which I have stated, I reject the pursuers'

contentions that undue discrimination means something other than a discrimination which is undue, that discrimination is something other than the converse of preference, and that it is to be judged by reference to costs of supply and not by prices charged. So I turn to the pursuers' averments to see whether they disclose some specialties which cannot be decided without proof.

In the first action the pursuers lay great stress on the method by which the charges per unit to high voltage and low voltage consumers was determined. There were first basic prices per unit of ·45d. and ·475d. respectively, which were to apply with the cost of coal at 38s. per ton, and then there was an additional amount of ·0008d. per unit for every penny by which the cost of coal exceeded 38s. The difference between the basic charges for the two classes of consumer is 5·5 per cent. The addition made in respect of the rising cost of coal was the same for both classes so that, although the charges per unit rose substantially as the cost of coal rose, the gap between the two charges remained ·025d. and did not increase proportionally with the charges. The result was, that in the end the gap represented only a proportion of 3·74 per cent. of the total charge.

Admittedly it is cheaper to supply at high voltage, and the main reason appears to be that electricity is generated at high voltage and must then be transformed before it can be supplied at low voltage. This process involves losses, so that to supply say 100 units at low voltage more than 100 units must be generated. For this and other reasons, the pursuers say that the differential of 5·5 per cent. originally allowed by the defenders if coal cost 38s. is the minimum that ought to be allowed in every case if undue discrimination against them is to be avoided. They say that the differential ought to increase and not diminish as the cost of coal rises, but they accept this differential of 5·5 per cent. as adequate for the range of coal prices involved in this case.

If the pursuers are right that there can be discrimination against them although, in fact, they paid lower prices, then I think that their averments are clearly relevant. But if they are wrong on the meaning of discrimination then, apart from one matter to which I shall come, I do not see how their averments can be relevant. It is true that the defenders tied their charges to the cost of coal, and it is said that on their own showing it was manifestly unfair to add the same additional sums to both unit charges. Let me assume that that is so: I do not see how it helps them. If the pursuers are right about the meaning of discrimination they do not need this additional argument, though these facts might help them at the proof. But if they are wrong about discrimination, that means that, however mainfestly unfair the tariff might be, there would be no remedy under section 37 (8) unless and until such unfairness resulted in their being charged more than the low voltage consumers.

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But there is one argument for the pursuers which causes doubt in my mind. I have said that it is necessary to generate more than 100 units—say 105—in order to supply 100 units at low voltage. The defenders argue that a unit is a unit no matter at what voltage it is supplied and that the only relevant comparison is between prices per unit. The pursuers say that, even ruling out cost of production as irrelevant, price per unit is not the proper comparison; electricity at low voltage is, so to speak, a different article and the defenders have to perform a costly service in converting high voltage electricity into low voltage. This, they say, cannot be left out of account in comparing prices: to compare like with like one must take the 105 units which are converted into 100 units at low voltage. I am not at all sure that this argument is open to the pursuers on their present record. But if it is, it raises technical matters, and I would not like to express any opinion about it without having evidence on it. If, therefore, your Lordships are of opinion that there should be proof before answer in the first case, I would not dissent.

The second action deals with two quite different matters. The first is, to my mind, indistinguishable from the matters raised in the first action. But the other requires separate consideration. The tariff in this case included (as did the tariffs in the other case) a charge per kilowatt of maximum demand supplied in each month, and that is defined as meaning twice the number of units consumed during that half-hour in the month in which the recorded consumption is highest.

The pursuers' case as stated in condescendence 11 is: "The "said tariff further discriminates unduly against the pursuers in "respect that it fails to incorporate an annual maximum demand "charge, i.e., one in which the consumer is given the option of "paying as an annual charge 10 times the maximum monthly "demand charge." Then they say that their annual load factor is 80 per cent., which is exceptionally high, and that it is cheaper to supply them than customers with a low load factor because their consumption does not rise in the winter months. Then they aver: "In the circumstances condescended upon the most "accurate measure of their utilisation of generation and distribu-"tion capacity is an annual and not a monthly demand charge. "The adoption of said annual demand charge recognises, as "should be done in fixing a tariff without undue discrimination "or undue preference, that consumers having a high load factor "should not be charged on the same basis as those having a low "load factor whose seasonal demands inflate the fixed costs of "electricity supply. By charging the pursuers on the basis of a "monthly demand charge instead of an annual demand charge, "the defenders, by their failure to incorporate such a charge in "their tariff, discriminate unduly against the pursuers and against "other customers having a load factor above 70 per cent. of "maximum supply throughout the year. The pursuers believe "and aver that the said percentage load factor is the highest

"that can be charged on a basis of monthly demand without "undue discrimination being exercised against high load factor "users." And then they say that it is the usual practice of other boards to provide an annual demand charge. They admit that consumers with a high load factor already get an advantage, but say that that does not affect their claim.

There is no question here of the units of electricity supplied being different in any way. The only difference is that it is more economical to supply a consumer if his demand is regular and does not fluctuate. The pursuers are content to pay the same price per unit as is paid by those with lower load factors and they do not even say that the monthly maximum demand charge is excessive or seek repayment of part of it. They seek to dictate to the board what kind of tariff they should have; they do not object to anything in the present tariff; what they ask for is an optional alternative to part of it. And their money claim is for the amount they would have saved if they had been offered such an option and had taken it. The fact that this may have been the practice of other boards could only show that the defenders might have adopted this course; there is no compulsion on all boards to act in the same way.

I would hold these averments to be irrelevant even if, contrary to my view, a person who already pays less can be said to be discriminated against. It is one thing to say that a consumer can recover part of what he has paid under an existing tariff. But it appears to me to be going very much farther to say that the board was bound to make a different form of tariff, and that, if it had, the pursuer would have escaped more lightly, and then to sue for the difference between what the pursuer paid under the actual tariff and what he would have paid if a different tariff had been in operation.

When proof before answer is allowed on part of a case in the ordinary way I would not refuse proof before answer on the rest. But the two parts of this case are quite different and to allow proof on the second part would add considerably to the expense and to the time occupied. I would therefore allow this appeal to the extent of holding irrelevant the averments in condescendences 11 and 12 which are directed to support conclusion 1 B in the second action.

Lord Tucker. My Lords, I agree that both these appeals should be dismissed for the reasons which have been stated in the opinion of my noble and learned friend the Lord Chancellor.

Lord Keith of Avonholm. My Lords, when this case came formerly before your Lordships, in a somewhat different guise, on appeal by the present appellants, the appeal was dismissed, with the result that the case should normally have proceeded to a proof before answer, in accordance with the interlocutor of the Second Division dated June 10, 1955, affirmed by this House.

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At the previous hearing in this House various questions were raised for the first time which the House declined to consider on the ground that they had not been taken and considered in the courts below and that your Lordships had not the benefit of judgments of the Court of Session on the points raised. It is not surprising that after ventilation of these new points in this House the defenders on their return to the Court of Session amended their record and stated four new pleas with the result that amendments were also made by the pursuers. In the result there was presented to the Lord Ordinary what in material respects was a new record, which he had to consider afresh, being so moved by the defenders, before proceeding to proof.

On the fresh arguments submitted to him the Lord Ordinary held that the pursuers were entitled to a proof before answer on the question whether the defenders had shown an undue preference to users of low voltage supply and exercised undue discrimination against the pursuers as users of high voltage supply. He held that the pursuers had made no relevant averments in support of declarators that the defenders' tariffs were ultra vires and ought to be reduced. He further held that the pursuers had made no relevant averments for payment of overcharges. In the result, by interlocutor of May 31, 1957, he allowed the pursuers a limited proof before answer of their averments in support of their conclusions that the first-named defenders had exercised undue discrimination against industrial users of electricity metered at or above a voltage of 6,000, including the pursuers, contrary to section 37 (8) of the Electricity Act, 1947, in respect of three separate and consecutive industrial demand tariffs.

On a reclaiming motion to the Inner House, the Second Division, while formally recalling the Lord Ordinary's interlocutor, in effect repeated it, with the addition of allowing the pursuers a proof before answer on their conclusion for payment of overcharges. It is in this state that this case comes for a second time to your Lordships' House without any proof having yet been taken into the facts of the case. Though on the previous appeal this House sent the case back to the Court of Session for a proof before answer, no exception, in my opinion, can be taken, in light of what has subsequently happened, to the case returning here for further consideration of its relevancy on the amended pleadings. This possibility may not have been foreseen in some of the speeches on the former appeal to this House, but, in view of the procedure which has since been followed out before the Lord Ordinary and in the Inner House, no question as to the propriety of the present appeal arises.

Two main questions have been argued. The argument, which this House refused to consider on the previous occasion, that the pursuers have made no relevant averments of discrimination exercised against them, has been repeated. This argument has now received full consideration both by the Lord Ordinary and

by their Lordships of the Second Division. It is also reinforced by an admission of the pursuers, relied on by the defenders and added to the record since the case was last in this House, as follows: "Admitted that the pursuers have in fact been charged "throughout a lower price than have low voltage consumers "taking a supply under the same conditions as to load and load "factor."

Counsel on both sides have presented very closely reasoned arguments on this question. Shortly stated, for the appellants (whom I shall call the defenders) it was submitted that in the matter of charges made for supply there is no warrant for preference or discrimination being considered except by reference to relative prices charged to two competitors for the service supplied. Reliance was placed on precedents under the Railway Acts and earlier Electricity Acts. The pursuers, on the other hand, submit that under the Electricity Act, 1947, discrimination can be exercised against a consumer by charging him more than is proportionate to the relative cost of supply to him and others like him as compared with the cost of supply to other consumers. In the present case it is common ground that the cost of supplying the pursuers, who are high voltage consumers, is less than the cost of supplying low voltage consumers, and the complaint of the pursuers is that the tariffs imposed on them do not fairly represent the relative difference in cost. The complaint is particularly directed to the operation of the cost of fuel variation clause. I dealt in detail with this clause on the previous appeal and do not propose to explain its operation again. The respective contentions of the parties do not really turn on this clause. They have a much wider range. Nor does the argument touch the question whether there is undue discrimination. It is conceded that if the pursuers have relevantly averred discrimination, the question whether it is undue must be a matter of proof. The discrimination with which the Act is concerned is discrimination which is undue. It is conceded, as I understand, by the pursuers that there may be discrimination which is not undue and of which they could not complain. But the defenders' contention here is that there is no relevant averment of discrimination at all, whether due or undue.

In the Court of Session the Lord Ordinary, proceeding largely on the cost of fuel variation clause, considered that the pursuers' averments were relevant to show a preference to users of low voltage supply and a discrimination against users of a high voltage supply. "As counsel for the pursuers put it," the Lord Ordinary said,[49] "'the defenders have chosen to gear the price per unit "'to the cost of fuel by the fuel variation clause.'" It may be observed that the Lord Ordinary seemed to regard preference and discrimination as correlative terms. What is a preference to A is a discrimination against B. Their Lordships of the Inner

[49] 1958 S.C. 53, 59.

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House, with the exception of Lord Mackintosh, have taken a less restricted view. "Discrimination" they regard, if I read their opinions correctly, as a somewhat elastic word not necessarily related to preference and covering any kind of treatment that could not be regarded as fair on a basis of comparative costs. As Lord Patrick puts it, the only clue the statute provides to the considerations which must determine the different rates to be levied on different classes of consumers is the fact that the system is one providing for the recovery of costs alone. "Prima facie," he says,[50] "such a system, contemplating as it does different "rates for different classes of consumers, would link the differ- "ent rates in some way to the different costs of giving the different "supplies." I am not satisfied that very much the same might not have been said in the days of railway companies and electricity companies, with the profit element added, subject in the case of railway companies to the statutory maxima fixed by their special Acts. Lord Mackintosh dissented from the rest of their Lordships of the Second Division in this matter. He would make the matter of preference or discrimination depend on the relative position of the complaining consumer and his competitor in the matter of the price charged to each for his supply and not on the costs to the undertaker of giving the supply.

Like the Lord Ordinary, Lord Mackintosh necessarily treats preference and discrimination as correlative terms. But, unlike the Lord Ordinary, he considers that the pursuers' averments show that in fact they were getting a preference in price over the low voltage consumers and so there is no relevant averment of discrimination. I confess that this reading of the word "dis- "crimination" in the Act of 1947 is the one that naturally occurs to me. The earlier Electricity Supply Acts prohibited undue preference but did not use the word "discrimination" or any corresponding expression. The Railway Clauses (Consolidation) Acts of 1845 used the terms "prejudicing" or "favouring," and the Railway and Canal Traffic Act, 1854, in section 2, used the terms "preference and advantage" and "prejudice and disad- "vantage," and in no case, so far as I have observed, have these expressions been regarded as other than expressions of the same thing from a different point of view. I think Mr. Hunter, in his argument for the defenders, was well warranted in saying that "preference" was an apt word to use with reference to a person who was receiving preferential treatment in comparison with most other persons, and "discrimination" the apt word to use with reference to a person to whom most other persons were being preferred. I find it difficult to think that Parliament intended the difference between "preference" and "discrimina- "tion" in section 37 (8) to be anything different from the conception of the difference between "favouring" and "prejudicing" in the Acts of 1845 or between "preference and advantage" and

[50] 1958 S.C. 53, 76.

"prejudice and disadvantage" in the Act of 1854. The idea also that consumers of electricity are to have their tariffs regulated on the basis of the cost of supplying them seems to me to carry with it the most far-reaching consequences. In the matter of the supply of electricity the conditions and the costs of supply vary infinitely from consumer to consumer. Carried to its logical conclusion it would follow that the consumer or class of consumers whom it was most costly to supply would have to be charged proportionately high tariffs if the board wished to escape complaint from other consumers of undue discrimination. I find great difficulty in seeing how this conception can be carried out consistently with such statutory directions as are contained, in the interests of "rural areas," in section 1 (6) (*b*) of the Act of 1947, or with the provision for simplification and standardisation of methods of charge in section 1 (6) (*d*) of the same Act. Complaint of discrimination, of course, would not be enough. It would have to be said that the discrimination was undue, and undueness, on the pursuers' submissions, would have to be related to the cost of supply. In the present case it may be that their task would be limited and made easier by the terms of the cost of fuel variation clauses in the respective tariffs, though it will be noted that the terms of these clauses vary with each tariff. But that is, in a sense, accidental to the present case and, if the pursuers are right, I see no stopping-place between examination of a cost of fuel variation clause and examination of the cost of any other component entering into the costs of supply, or indeed the costs at large of giving the supply. If costs are brought in as the criterion of discrimination, they must equally be brought in as the criterion of preference. Preference and discrimination become then not really a matter of comparison of prices or charges as between consumer and consumer but a comparison of prices with the costs of the producer. This amounts, as I see it, very much to saying that consumers are entitled to claim preferences. The statute only prohibits undue preferences. Equality of charge is not prohibited. Reference was made to a passage in the judgment of Warrington L.J. (as he then was) in *Attorney-General* v. *Hackney Corporation*,[51] where he says: "It is conceded that users of energy for power as a class are entitled to be charged at a lower rate than those who use it for light alone." Later he refers to consumers of energy for both power and light as "entitled to better terms" than consumers of energy for light alone. I do not read this reference as meaning that any consumer is entitled to demand a preference from the supplier in appropriate circumstances. I take the Lord Justice as meaning that in a question with another consumer complaining of a preference, the preferred consumer may be heard to say: "I am entitled to a preference over you." The passage, I think, has reference to the argument for the plaintiff thus stated[52]: "The mere fact

[51] [1918] 1 Ch. 372, 393.

[52] Ibid. 375.

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"that he takes 80 per cent. for power and 20 per cent. for light "does not *entitle* the defendants to differentiate the charge for "light as against non-power consumers."

When this case was last before this House I made some general observations on some problems arising on the case as then presented, intended to be of an entirely tentative character. I would refer only to one of these. I said [53]: "The question may "be put thus: whether discrimination may not be exercised "against one consumer and a preference given to another where "both are charged the same rate in circumstances which justify "a differential rate between them. If the answer is 'yes' it "would equally follow that where the differential was too small, "a like complaint could be made." In using the word "rate" I had in mind price, or tariff, though I may not have made that clear. I also had in mind the case of *Phipps* v. *London and North Western Railway Co.*,[54] where the tariff charged to the complainer for carriage of his pig-iron was 5s. 2d. per ton, whereas the charge to two of his competitors was 5s. 8d. per ton. But when these charges were related to carriage per mile it was found that the complainer was being charged 1·05d. per ton mile and his competitors ·95d. and ·85d. respectively per ton mile. There was very good reason for calculating the charges upon the basis of the ton mile, for section 90 of the Railway Clauses (Consolidation) Act, 1845 (corresponding to section 83 of the Scottish Act), provided for equality of rates "per ton per mile or otherwise." There is no equality clause in the Act of 1947, nor was there any common factor indicated in the equality section of the Electric Lighting Act, 1882, to which prices could be related, but it does not follow that some factor could not be found to provide a fair and proper basis for ascertaining whether there exists undue preference or undue discrimination. Even if cost be eliminated as a basis per se, other factors may come in in comparing the tariffs for a high voltage supply with those for a low voltage supply. I take one illustration. The price per unit consumed may show a preference to the high voltage customer over that charged to the low voltage customer. It may be, however, that on the units generated to supply these respective consumers, the result comes out the other way, owing to variation in transmission and distribution or other losses between the two classes. I find myself unable, in these circumstances, to decide the question of undue preference or discrimination without evidence. Accordingly, though perhaps for different reasons from those moving the majority of their Lordships of the Second Division, I agree that a proof before answer must be allowed on this branch of the case.

If there is to be an inquiry on the issue of undue discrimination, there seems no strong ground for refusing an inquiry on the other main question in the case, the recovery of overcharges. This matter was also canvassed at the previous hearing in this

[53] [1956] 1 W.L.R. 1069, 1078. [54] [1892] 2 Q.B. 229.

House, though not with the same exhaustiveness as on this appeal, and some doubts were expressed as to the competency or appropriateness of this remedy. There seem to have been no instances of overcharges having ever been recovered in a case of undue preference under the Railway Acts or earlier Electricity Acts, except in the somewhat doubtful decision of *Budd* v. *London and North Western Railway Co.*,[55] where the competency of such a remedy seems to have been assumed. *Great Western Railway Co.* v. *Sutton*[56] was a claim under an equality clause and the point in the case was whether overcharges wrongfully imposed and paid under compulsion could be recovered as money had and received. *Lancashire and Yorkshire Railway Co.* v. *Gidlow*[57] was a case where damages were awarded in respect of illegal charges levied from the complainer and restrictions imposed in carrying his goods which were not warranted by the terms of the company's statute. So was it also in *London and North Western Railway Co.* v. *Evershed*.[58] But under the Railway Acts the remedies in respect of undue preferences to competitors were defined by statute and common law remedies held to be excluded. Under the Electricity Acts the point seems never to have arisen. The attempt to reduce the tariffs complained of has now been abandoned, and until evidence has been led and it can be seen how the court approaches the problem of assessing overcharges I find it unnecessary and undesirable to express any further views under this head.

On the view I have taken, I find it unnecessary to consider other submissions raised by counsel for the appellants. For the reasons given, I would dismiss the appeal.

The general considerations to which I have already referred apply to conclusion 1 A of the action of British Oxygen Gases Ltd. against the South of Scotland Electricity Board, which is the subject-matter of the second appeal to this House. I find difficulty in connecting this action in any way with the earlier action, for although the pursuers set forth the earlier tariffs imposed on their predecessors, the British Oxygen Co. Ltd., these appear to me to be entirely unconnected with the tariff complained of in this action. This tariff was fixed by a different board operating in a much wider area of supply and with wider powers, including both generating and distributing powers. While the defenders took over the functions of the South West Scotland Electricity Board, who previously supplied the pursuers' premises, that does not, in my opinion, associate them with the tariffs fixed by their predecessors. In the matter of the new tariff it would seem that the defenders must be considered as an entirely independent authority. The pursuers, however, still base their case on an inadequate differential as between high and low voltage users, and on this aspect of the case I can make no distinction between the two actions.

[55] 36 L.T. 802.
[56] L.R. 4 H.L. 226.
[57] L.R. 7 H.L. 517.
[58] 3 App.Cas. 1029.

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This second action, however, raises a new point under conclusion 1 B. The pursuers claim special treatment in respect of what they say is their exceptionally high load factor of 80 per cent., and they invoke the example of tariffs in the area of other electricity authorities where they say such special treatment is accorded. They claim that special maximum demand charges should be allowed to consumers with a load factor above 70 per cent. of maximum supply throughout the year. Failure by the defenders to have incorporated such an allowance in their tariff is averred as the exercise of undue discrimination against the pursuers. This raises in undiluted form the question of the relevance of equating charge to cost. It further seems to me to take an entirely arbitrary datum line of 70 per cent. In my opinion the pursuers have stated no relevant ground on which such a claim should be allowed to go to proof.

In the result I would in this case allow a proof before answer, excluding from probation any averments in support of conclusion 1 B of the summons.

Appeal dismissed.

Solicitors: *Blakeney & Co. for Campbell, Smith Mathison & Oliphant, W.S., Edinburgh, and Wright, Johnston & Mackenzie, Glasgow; Simpson, North, Harley & Co. for Pringle & Clay, W.S., Edinburgh.*

F. C.

[QUEEN'S BENCH DIVISION.]

1959
April 9.
Lord Parker C.J., Donovan and Salmon JJ.

* *In re* VERNAZZA.

Practice and Procedure—Vexatious litigant—Matters to be taken into consideration—Pleadings disclosing cause of action—Whether court entitled to look at whole history of matter—Supreme Court of Judicature (Consolidation) Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 49), *s.* 51 (1).

On an application under section 51 (1) of the Supreme Court of Judicature (Consolidation) Act, 1925,[1] the question whether proceedings instituted by the respondent are vexatious is not determined solely by inspecting the document initiating the proceedings to see whether it discloses a cause of action; the court must have regard to the whole history of the matter, as it does when an application is made to strike out a pleading under the inherent jurisdiction.

[1] Supreme Court of Judicature (Consolidation) Act, 1925, s. 51 (1): "If, on an application made by the "Attorney-General under this section, "the High Court is satisfied that any "person has habitually and persistently and without any reasonable "ground instituted vexatious legal "proceedings, . . . the court may, "after hearing that person or giving "him an opportunity of being heard, "order that no legal proceedings shall "without the leave of the High Court "or a judge thereof be instituted by "him in any court, . . ."

MOTION.

The Attorney-General moved the court for an order under section 51 (1) of the Supreme Court of Judicature (Consolidation) Act, 1925, that no legal proceedings should without the leave of the High Court or a judge thereof be instituted by the respondent, Anthony Vernazza, on the grounds that he had habitually and persistently, and without any reasonable ground, instituted vexatious legal proceedings.

The facts are stated in the judgment of Lord Parker C.J.

Sir Reginald Manningham-Buller Q.C., *A.-G.*, and *J. R. Cumming-Bruce* in support of the motion.

Arthur Bagnall for the respondent.

No cases were referred to in argument.

LORD PARKER C.J. In these proceedings the Attorney-General moves for an order under section 51 (1) of the Supreme Court of Judicature (Consolidation) Act, 1925, that no legal proceedings shall without the leave of the High Court or a judge thereof be instituted by the respondent. The grounds for the application are that the respondent has habitually and persistently and without any reasonable ground instituted vexatious legal proceedings. The case, in some ways, is rather tragic. As long ago as 1935 the respondent was obsessed with the idea that he was owed £158,982 0s. 6d. for services rendered to a company. He brought proceedings claiming that sum in the King's Bench Division, and those proceedings came before Swift J. At that time the present respondent's leading counsel had advised him that he had no case, but thanks to the generosity of the defendant company, judgment was entered by Swift J. for the defendants without costs, on the understanding that they would allow the plaintiff (the present respondent) to take out and retain the £400 that was in court. Notwithstanding that, he persisted in this delusion. He has since brought actions in the Chancery Division and the Queen's Bench Division, claiming in one form or another that that consent judgment ought to be set aside, and that he is still owed this £158,000. During the course of the history of the matter the company concerned went into voluntary liquidation, and there followed in the Companies Court some five summonses; these, it is true, were to a large extent directed to retaining the status quo and preventing the company from distributing the assets, but all were taken out under this delusion that the respondent was owed some £158,000.

I am quite satisfied that this is just the sort of case to which the section applies, and that an order should be made. Mr. Bagnall, to whom the court is very indebted, has appeared instructed by the Official Solicitor on the respondent's behalf. He has submitted that this case does not come within the section on the ground that no action or other proceedings can be said to be

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vexatious if the statement of claim or other process that starts the proceedings discloses a cause of action. Accordingly, he says that none of the proceedings in this case can be said to be vexatious, except for one Chancery action where the statement of claim was struck out as being frivolous and vexatious.

I am quite satisfied that that contention is wrong. In considering whether any proceedings are vexatious one is entitled to, and must look at, the whole history of the matter, and it is not determined by whether the pleading discloses a cause of action. Indeed, that is the principle applied under the rules of court when application is made to strike out a pleading. Though the pleading may be in order, the court, in its inherent jurisdiction, is entitled to look at affidavits as to the history of the matter, and if, in the light of that history the action is vexatious, the pleading can be struck out and the action dismissed. This is a clear case and there must be the order prayed.

DONOVAN J. I agree.

SALMON J. I agree.

Order accordingly.

Solicitors: *Treasury Solicitor; Official Solicitor.*

J. D. P.

[COURT OF APPEAL.]

C. A.

1959 *Jan.* 22, 23; *April* 27.

Hodson, Ormerod and Willmer L.JJ.

* DIWELL *v.* FARNES.

[Plaint No. N. 1672.]

Husband and Wife—Property—Quasi-husband and wife—Quasi-matrimonial home—Parties unmarried—Division of proceeds of sale—Whether equitable principles relating to married couples applicable. Equity—Equality.

The plaintiff, widow and administratrix of a man who died in 1957, claimed possession from his mistress of a house, No. 15 H. Road. In 1941 the deceased and the mistress began to live together, and a child was born in 1942. In 1945 they went to live at No. 13 H. Road, a rent-restricted house; the deceased was the tenant, but the mistress contributed about two-thirds of the total joint expenses. In 1954 the deceased, as sitting tenant, was able to purchase No. 13 at the low price of £900; the purchase was financed by a building society mortgage taken out by the deceased, but the instalments of repayment were paid by the mistress until

the house was sold. In 1956 the deceased sold No. 13 for £2,300, and with the proceeds he purchased No. 15 next door for £1,250 and discharged the balance of the mortgage.

The county court judge held that the plaintiff widow held No. 15 on trust for sale for herself and the defendant mistress in equal shares. On appeal:—

Held, (1) that the defendant had an equitable interest in the proceeds of sale of No. 15, and not a mere charge by subrogation;

(2) (Willmer L.J. dissenting) that the cases relating to similar transactions between husband and wife were inapplicable, and that the defendant's beneficial interest in No. 15 was the proportion which her repayments of the mortgage on No. 13 bore to the purchase price of that house.

Per Willmer L.J.: In all the circumstances the judge was right in holding that the deceased and the defendant entered into a joint enterprise, and the maxim that equality is equity ought to be applied. The contributions of the defendant towards the rent of No. 13 ought to be taken into account as well as her discharge of the mortgage instalments, and her beneficial interest ought to be one-half share.

APPEAL from Deputy-Judge Coningsby, sitting at Ilford county court.

In the action the plaintiff, the widow and administratrix of one Diwell, who died in 1957, claimed possession of a house, of which the deceased was the owner in fee simple, from the defendant, who was in occupation; by a counterclaim the defendant asserted a claim to an equitable interest in the house.

In 1940 the defendant was employed at the Rex Cinema, Romford, where she met the deceased, he then being the manager of the cinema. In about 1941 they decided to live together, and a child, Christine, was born to the defendant in June, 1942, as a result of their so living. In May 1945 they went to live at 13 Havering Road, the house next door to the one in question. The deceased was the tenant and obtained, either as a gift or loan, the sum of £100, which was required as "key money." This money was obtained from the defendant's mother, a Mrs. Bevis, but was paid to the deceased, who became the tenant of the house.

The deceased and the defendant were both working and saving and shared the expenses of the house. The former earned about £10 a week and the latter £6 a week, rising later to £7 and later still to £7 10s. a week. The deceased only contributed about £2 10s. or a little more per week towards the expenses of the establishment, never averaging more than £3 a week. In 1946 the defendant learned for the first time that the deceased was a married man, but she continued to live with him until 1948, when he obtained work in Birmingham, where he set up a similar establishment with another woman while leading the defendant to believe he was living with his mother. Thenceforward he visited the defendant every two or three weeks and at holiday time.

In 1954 the deceased obtained the opportunity of buying 13

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Havering Road, and as sitting tenant was able to purchase the property for the low price of £900, all of which was obtained by him on a building society mortgage. The mortgage provided for monthly instalment repayments of £5 1s. 3d. Sixteen of these repayments were made, all of them by the defendant.

In June 1956 the neighbouring house, 15 Havering Road, the property now in dispute, was bought by the deceased for £1,250. No. 13 was sold for £2,300 and the mortgage was discharged out of the proceeds of sale, leaving, after payment of legal expenses, little if any balance when No. 15 had been paid for. The deceased raised a mortgage of £600 on the security of this house from the Guardian Building Society for the purpose of improving the property, but spent only £200 of this on this object and appeared to have retained the balance. In December 1956 the deceased took out a policy of life insurance with the Sun Life Assurance Society to ensure that on his death the mortgage would be discharged out of the sum assured. This was done on the death of the deceased.

At the time of the purchase of No. 15 Havering Road and afterwards the deceased wrote to the defendant letters in which he referred to the property and the sale of No. 13 Havering Road, using the words "our sale," "our expenses," and like expressions, showing that he regarded the defendant as interested in the house with him.

The deceased paid one of the instalments of the mortgage on No. 15 Havering Road, otherwise the defendant made all outgoings necessary, apart from mortgage instalments, either out of her own money or out of the contributions which the deceased was continuing to make after his departure to Birmingham. The defendant herself bought a water heater for the house at a total price of £47 19s. 3d., and has paid a deposit and various quarterly instalments thereon.

The county court judge held that the deceased and the defendant had set up house as a joint venture, and declared a trust for sale, the plaintiff and defendant taking equal beneficial interests. The plaintiff appealed.

R. W. Goff Q.C. and *Horatio Vester* for the plaintiff.
John Arnold Q.C. and *Andrew Edwards* for the defendant.

The following cases, which were cited in argument, are not directly referred to in the judgments: *In re Rogers' Question* [1]; *Jones* v. *Maynard* [2]; *Cobb* v. *Cobb* [3]; *Fribance* v. *Fribance (No. 2)* [4]; *Wray* v. *Steele.* [5]

Cur. adv. vult.

[1] [1945] 1 All E.R. 328.
[2] [1951] Ch. 572; [1951] 1 T.L.R. 700; [1951] 1 All E.R. 802.
[3] [1955] 1 W.L.R. 731; [1955] 2 All E.R. 696.
[4] [1957] 1 W.L.R. 384; [1957] 1 All E.R. 357.
[5] (1814) 2 Ves. & Beames 388.

April 27. The following judgments were read.

HODSON L.J. This is an appeal from a judgment of deputy county court judge Coningsby given on February 27, 1958, by which he held that a house, 15 Havering Road, Romford, is held by the plaintiff as administratrix of the estate of her husband, A. E. Diwell, deceased, on trust for sale and is to be held as to a half-share of the proceeds of such sale for the defendant.

The house stood in the sole name of the deceased, and the plaintiff says that it forms part of his estate and that the defendant was no more than a licensee of her late husband, such licence having been determined either by her husband's death or notice subsequently given.

The judge having held that the plaintiff and defendant are equally entitled, the plaintiff contends that even if she cannot maintain that the defendant has no interest in the house, her interest is limited to the extent of a charge on the house equivalent to the amount advanced by her for its purchase, or, if she is entitled to an equitable interest in the proceeds, such interest is fractional and must be calculated by reference to the proportion which her contribution bears to the whole purchase.

The plaintiff complains that the judge wrongly applied the equitable maxim "Equity did delight in equality" on the analogy of those cases decided between husband and wife often under section 17 of the Married Women's Property Act, 1882, although he had correctly directed himself that the husband and wife cases were not authorities directly in point.

[His Lordship stated the facts and continued:] The legal position between the defendant and the deceased is that there was an enforceable legal liability upon the latter to contribute towards the keep of the child, but no contract or joint enterprise between them can be spelled out of their relationship as man and mistress, and their financial arrangements cannot be looked at as if, while they were living together, their relationship was that of man and wife.

Husband and wife cases are in a class by themselves, for the reasons given by Atkin L.J. in *Balfour* v. *Balfour*,[1] where he pointed out that the ordinary incidents of commerce have no application to the ordinary relations between husband and wife. The courts have in the cases of disputes between husband and wife frequently found it impracticable, if not impossible, to distinguish between the respective rights of the parties or assess the amount of their respective contributions to some piece of property which they have acquired and enjoyed together.

Such a case was *Rimmer* v. *Rimmer*,[2] in which the jurisdiction of the courts was invoked under section 17 of the Married Women's Property Act, 1882. Lord Evershed M.R. read[3] the

[1] [1919] 2 K.B. 571, 578.
[2] [1953] 1 Q.B. 63; [1952] 2 All E.R. 863.
[3] [1953] 1 Q.B. 63, 68.

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relevant part of section 17, which is as follows: "In any question "between husband and wife as to the title to or possession of "property, either party . . . may apply by summons or otherwise "in a summary way to any judge of the High Court of Justice "in England or in Ireland . . . who may make such order with "respect to the property in dispute, and as to the costs of and "consequent upon the application as he thinks fit." He proceeded to take as his guide or test the observations of Bucknill L.J. in the unreported case of *Newgrosh* v. *Newgrosh*[4]: "That" (meaning the citation from the statute) "gives the judge a wide "power to do what he thinks under the circumstances is fair "and just. I do not think it entitles him to make an order "which is contrary to any well-established principle of law, but, "subject to that, I should have thought that disputes between "husband and wife as to who owns property which at one time, "at any rate, they have been using in common are disputes "which may very well be dealt with by the principle which has "been described as 'Palm Tree Justice.' I understand that to "be justice which makes orders which appear to be fair and just "in the special circumstances of the case."

Applying that guide or test to the facts of the case the court held that the husband and wife should share equally in the proceeds of sale of a property. Lord Evershed M.R. said in the course of his judgment[5]: "Where the court is satisfied that both "the parties have a beneficial interest, and a substantial bene-"ficial interest, and where it is not possible or right to assume "some more precise calculation of their shares, equality, I think, "almost necessarily follows."

This is not, of course, to say that the maxim "Equity did "delight in equality" is to be used only in husband and wife cases. Lord Evershed M.R. referred in this connection to *In re Dickens*,[6] where, in the absence of materials for apportioning a sum of money between the owners of the copyright and the owners of the manuscript of a work of Charles Dickens, the court apportioned that sum in equal shares.

It, however, remains true to say that the court in husband and wife cases resorts the more readily to the equitable maxim because of the very nature of the relationship of spouses and the absence in most cases of any attempt by either of them to regulate their business relations, if any, with one another in any formal manner. This aspect of the case was explained by Romer L.J. in the following passage[7]: "I think the judgment of the "county court judge is open to criticism only in this, that he "approached the problem before him in rather too strict a way, "in that he applied legal principles which, although perfectly "right and accurate in a dispute as between strangers, require "modification as between a husband and wife when the subject

[4] Unreported.
[5] [1953] 1 Q.B. 63, 72.
[6] [1935] 1 Ch. 267; 51 T.L.R. 181.
[7] [1953] 1 Q.B. 63, 75.

"of dispute is the ownership of what was the matrimonial home." He later said [8]: "It seems to me that the only general principles "which emerge from our decision are, first, that cases between "husband and wife ought not to be governed by the same strict "considerations, both at law and in equity, as are commonly "applied to the ascertainment of the respective rights of strangers "when each of them contributes to the purchase price of property, "and, secondly, that the old-established doctrine that equity "leans towards equality is peculiarly applicable to disputes "between husband and wife, where the facts, as a whole, permit "of its application."

This dispute is not concerned with a matrimonial home and is to be treated accordingly, in my opinion, as a dispute between strangers, the plaintiff's position being that she stands in the shoes of the deceased, who was a stranger in law to the defendant. This does not mean that the defendant can have no claim to share in the proceeds of sale, which are in the nature of a windfall from which someone is entitled to benefit.

The question resolves itself into this: Can she establish her claim to a reasonably precise amount? If she can do this, I think she is not limited to a charge and is entitled to a share of the proceeds of sale of the house No. 15 Havering Road, for if she were entitled to a share in the proceeds of No. 13, it is conceded that the same applies to No. 15 Havering Road.

Romer L.J., on the facts of the *Rimmer* case,[9] took the view that as between strangers in like circumstances contributions to a building society mortgage result in subrogation pro tanto to the society's rights. Without in any way dissenting from the proposition as stated by Romer L.J., each case must, I think, be considered in the light of its own special facts.

In *Silver* v. *Silver* [10] Lord Evershed M.R. regarded such contributions, on the facts of that case, as contributions towards the purchase of property rather than moneys advanced on loan so as to found a charge. In my opinion, the right view to take of the contributions made by the defendant in this case is that they were contributions towards the purchase of the house which was in effect being bought by a series of payments partly of capital and partly of interest so that the defendant obtained an equitable interest in the proceeds limited to the proportion which her contributions bear to the purchase price of the house. (*Cf. The Venture*,[11] and *Gravesend Corporation* v. *Kent County Council*.[12])

This equitable interest can be calculated with reasonable certainty and should be enlarged by an appropriate figure representing the value of the water heater which the defendant installed in the house but cannot, I think, be enlarged further.

[8] [1953] 1 Q.B. 63, 76.
[9] Ibid.
[10] [1958] 1 W.L.R. 259, 262, 263; [1958] 1 All E.R. 523.
[11] [1908] P. 218.
[12] [1935] 1 K.B. 339; 51 T.L.R. 109.

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It has been contended that a relevant consideration tending to enlarge the proportion in favour of the defendant so as to make an even sharing a just result is the fact that the windfall here in question arose from the operation of the Rent Restriction Acts which enabled the deceased, as sitting tenant with a protected tenancy, to make a substantial amount of money out of his landlord's property by selling it with vacant possession for two and a half times as much as he paid the landlord for it.

Since the rent of the house 13 Havering Road was paid very largely by the defendant, it is argued that this was the origin of the profit which enured to the deceased and now is claimed to form part of his estate. I cannot accept this submission and feel myself unable to say that because the defendant contributed towards the rent of the first house in which she lived with the deceased she can be taken to have contributed towards the purchase price, for the rent was not paid to acquire the property. The only payment made to acquire the leasehold was the £100 which the deceased had borrowed from the defendant's mother. On the other hand, when the freehold was acquired it was the deceased and the defendant, so far as her contributions went, who found the purchase price by the mortgage which was the equivalent of payment for the property. I think that material is here available which can enable the court to calculate with sufficient precision the contribution made by the defendant to the purchase price of 13 Havering Road, and the judge was in error in taking the steps which might have been open to him in a husband and wife case of drawing inferences which can only appropriately be drawn when such a relationship exists so as to produce a situation where the only just solution is to treat the parties upon an equal footing.

I would allow the appeal and vary the order of the judge so as to give effect to my judgment, on the basis that the defendant's share of the beneficial estate is in proportion to her contribution to the purchase of the house 13 Havering Road, together with such sums as she has paid or rendered herself liable to pay in respect of the water heater.

Ormerod L.J. The deputy county court judge has decided in this case that there is a trust in favour of the defendant in respect of one-half share of the beneficial interest in the house No. 15 Havering Road, Romford. The basis of his judgment is expressed in the following words: "I am satisfied that at all "material times the parties contemplated and intended a joint "transaction or, as Mr. Edwards put it, a joint venture." He considered that the history of the parties should be taken into account from the time when they first entered into possession of No. 13 Havering Road and the case was a proper one for the application of the equitable maxim "Equality in equity."

May I say at the outset that even if there was sufficient evidence from which a joint transaction or a joint venture might

be inferred, and in my view there was not, such joint venture must depend on a contract express or implied between the parties which, being founded on an immoral consideration, would not be enforceable.

The plaintiff says that the judge was in error in the first place in taking into account the sum of £100 provided by the defendant's mother to enable the deceased and the defendant to go into possession of 13 Havering Road. She then contends that there is no sufficient evidence that the defendant made any payments on account of the mortgage. If it is held that she did make such payments, then, says the plaintiff, they should be treated as payments on account of the mortgage and not as payments of the purchase price. If, contrary to the plaintiff's contention, the payments should be treated as payments of the purchase price so as to give the defendant a share of the beneficial interest in the house, then she says that such share should be in the proportion which the payments bear to the purchase price of No. 13 and not an equal share with the plaintiff.

I propose to deal first of all with the question whether the loan of £100 should be taken into account. If the true position be that the defendant is entitled to a share in the beneficial interest, this question is clearly of the first importance. The uncontradicted evidence of the defendant was that the "money "was loaned to Mr. Diwell" by her mother, Mrs. Bevis. And Mrs. Bevis herself said: "About 1945 they came to me about "renting 13 Havering Road. It was a question of £100 for "fittings. He (the deceased) said 'How about it?' I said "'I'll lend it to you' to get them a place to live in." Later she said: "He said he would give it back to me when he could "afford it." In fact, he never did give it back, and at no time did Mrs. Bevis appear to press for payment. There seems to be no doubt on this evidence that the loan was to the deceased but it was made in order that he and the defendant should be able to obtain possession of the house. The tenancy was in the name of the deceased. The defendant was working at that time and earning £6 to £7 per week. The deceased gave her £2 to £2 10s. per week, sometimes a little more, and she paid the rent and other outgoings. The defendant's contention is that the tenancy of No. 13 was obtained with her mother's assistance through her, that she kept the tenancy in being by paying the rent and that it was possible to buy the house for the low price of £900 only because of the existence of the tenancy, which was a protected tenancy within the meaning of the Rent Restriction Acts. It was this that made possible the subsequent sale at a substantial profit, and the defendant contends that she is consequently entitled to a share in that profit. For my part I cannot accept this view. There is no evidence that at the time the parties went into possession either of them had any intention of buying the house. The defendant and the deceased were anxious to have a house where they could live together and bring up the child of their

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association. But I cannot see what rights the defendant acquired by paying the rent out of such moneys as came into her possession and so, as she contends, keeping the tenancy alive. It would appear that had he been so minded the deceased could at any time have terminated the tenancy, and the defendant would no longer have been entitled to remain in the house. If, in similar circumstances, a husband and wife lived together in a house, the wife working and paying the rent out of a common fund, and the house was subsequently bought by the husband out of his own money, the wife would, I think, have considerable difficulty in establishing a claim if the house was then sold at a profit. The parties here must be treated as strangers and the defendant cannot be in a better position than a wife. In my judgment, although the possession of the parties was the factor which made the purchase of No. 13 possible at so low a price, the fact that the defendant paid the rent out of a common fund, contributed to by herself and the deceased, could give her no other right than to remain in the house so long as the deceased allowed her to stay and refrained from terminating the tenancy.

The question with which I have just dealt is of no importance if Mr. Goff is right in his contention that the defendant is entitled to nothing because the amount of the mortgage payments made by her cannot be ascertained with reasonable certainty, or, in his alternative contention, that if the payments can be ascertained they should be treated only as payments of the mortgage which would entitle the defendant to be subrogated. If, however, the true position be that the payments should be treated as an account of the purchase price of the house then the question becomes important. In these circumstances there would clearly be a resulting trust of a portion of the beneficial interest of the house and whether the tenancy should be taken into account would obviously affect the calculation of that portion.

In the first place, in my judgment, the payments can be ascertained with reasonable certainty. Mr. Goff relied on a passage in the judgment of the deputy county court judge where he said: "I do not think it necessary or even possible to deter-"mine whose money it actually was" (that is, by which the payments were made). If I understood Mr. Goff, his contention was that this was a finding of fact on the part of the deputy county court judge, and should not be disturbed. I do not think it was a finding of fact. It was an expression of opinion in passing on something to which he had not really applied his mind because he did not regard it as relevant. But accepting the uncontradicted evidence there is, in my view, sufficient material before the court on which the necessary calculation can be founded.

The next question is, I think, more difficult, but I have come to the conclusion that the payments should be treated as having been made on account of the purchase price and not as instalments of the mortgage. It is true that Romer L.J. said, in

Rimmer v. *Rimmer* [13]: "He" (the county court judge) "applied "legal principles which, although perfectly right and accurate in "a dispute as between strangers, require modification as between "a husband and wife when the subject of dispute is the owner-"ship of what was the matrimonial home"; and he then went on to say: "In effect he held, as would certainly follow had this "been a case as between strangers, that the wife's contribution "to the building society's mortgage resulted in her being subro-"gated pro tanto to the society's rights; in other words, that by "reducing the debt she took over to the extent of her contribu-"tions the security which the building society had." On the other hand, in *Silver* v. *Silver* [14] the Master of the Rolls clearly regarded such payments as being on account of the purchase price. It appears that each case falls to be decided on its own facts. The mortgage here was for the whole of the purchase price of No. 13, and the payments were equal monthly payments which took account of capital and interest according to the usual practice of building societies, and should in my view be regarded as instalments of the purchase price.

It follows that the defendant is entitled to a share by way of resulting trust in the beneficial interest in No. 15. The only question is whether that share should be in the proportion which her contributions bore to the purchase price of No. 13, or should be of some other amount. I have set out the plaintiff's contention that the most to which she is entitled is the proportion based on her contributions. The defendant contends that she should be entitled to a one-half share. Mr. Arnold's contention was that the principle "Equality in equity" is not confined to cases between husband and wife (see *Dickens* v. *Dickens* [15]) but is a rule or device to which resort should be had in every case in which precise quantification is impossible or difficult or irrelevant. It is certainly true that the rule is not confined to matrimonial cases, and the case of *Dickens* v. *Dickens*, where each party was clearly entitled to a share of royalties, substantial but impossible to quantify, affords an example of the circumstances in which the rule may be applied as between strangers. If the tenancy of No. 13 should have been taken into account it would, I think, have been impossible to have arrived at any other apportionment than that the parties should share equally. But as I have said in my judgment, the tenancy of No. 13 is not a factor to be considered, and the plaintiff's contention on this part of the case is, in my view, the right one.

I would allow the appeal and vary the order of the deputy county court judge on the basis that the defendant is entitled to a share of the beneficial interest proportionate to her contributions to the purchase price of the house No. 13 Havering Road. In addition, she is in my view entitled to be repaid the sums she

[13] [1953] 1 Q.B. 63, 75.
[14] [1958] 1 W.L.R. 259.
[15] [1935] Ch. 267.

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has paid or rendered herself liable to pay in respect of the water heater.

Willmer L.J. The plaintiff claims as against the defendant an order for possession of a house known as 15 Havering Road, Romford, and it is not disputed that the freehold estate is vested in her. It is important to observe, however, that she claims only as administratrix of the estate of her late husband. In law, therefore, she stands in the shoes of the deceased, and is entitled to assert only such rights as could have been asserted by the deceased, had he lived.

The defendant had lived with the deceased as his mistress from 1941 until the date of his death in March, 1957. In 1942 she bore him a child, a daughter who is now nearly grown up. The defendant and the deceased lived together continuously till 1948, when the deceased obtained work in the neighbourhood of Birmingham. After that they lived together only intermittently, during week-ends and holiday times, when the deceased was able to come to London.

From 1945 onwards the defendant and the deceased lived at 13 Havering Road, as weekly tenants in the first instance. In 1954 the opportunity arose of purchasing the freehold, which the deceased did with the aid of a mortgage from a building society. In 1956 he sold No. 13, and the proceeds of sale were sufficient not only to discharge the mortgage but also to purchase the freehold of No. 15, which is the subject of the present claim.

Had the defendant and the deceased been married, this house would properly have been described as the matrimonial home. The defendant's case is that she is in a position analogous to that of a wife, and having, as she asserts, made substantial contributions to the purchase and upkeep of the successive homes, she claims to have acquired an equitable interest in No. 15 which, if established, would not only afford her a good defence to the plaintiff's claim for possession, but would also support a counterclaim by her against the plaintiff. In the first instance the defendant counterclaimed for a declaration that the plaintiff holds the property upon a resulting trust for her absolutely. But this claim was not fully pressed, and the judge in fact found that she was entitled to a half share.

The defendant contends that, No. 15 having been purchased with the proceeds of sale of No. 13, her contributions in respect of No. 13 must be taken into account as giving her an equitable interest in No. 15. It is not in dispute that, by reason of the fact of his being the sitting tenant of a rent-controlled house, the deceased was enabled to purchase the freehold of No. 13 on exceptionally favourable terms. He, in fact, obtained for £900 a house which he was able to sell shortly afterwards for £2,300, thereby obtaining a windfall of some £1,400. It is, therefore, said for the defendant that it is proper to take into account not only such contributions as she claims to have made towards the

purchase of the freehold of No. 13, but also the amounts she contributed towards obtaining and maintaining the tenancy of that property. She relies on the fact that she obtained from her mother a loan of £100 in 1945, which sum the deceased was required to furnish, ostensibly for the purchase of fittings but in reality as key money. The judge, who had the advantage of hearing evidence both from the defendant and from her mother, drew the inference, which in my judgment was abundantly justified, that this loan was intended as a loan to the defendant and the deceased jointly. The defendant claims that throughout the whole period of the tenancy, that is from 1945 to 1954, she paid the whole of the rent out of her own pocket, amounting to £1 5s. 9d. per week at first, but subsequently increased to £1 9s. 1d. By doing this she claims to have been largely instrumental in putting the deceased in a position to purchase the freehold on such favourable terms, thereby obtaining the windfall already referred to. This is enough, it is contended, to justify a claim on her part to have made, albeit indirectly, a very notable contribution towards the purchase of No. 13, and through it of No. 15. Furthermore, the defendant alleges that after the purchase of No. 13, until it was sold in June, 1956, she paid all the mortgage instalments, sixteen in all, at the rate of £5 1s. 3d. per month. After the purchase of No. 15 the defendant claims to have incurred a further liability, under a credit sale agreement, for a sum of £47 for the purchase of a water heater, which was installed in the house. It should be said, however, that the mortgage of £900 on No. 13 was entered into by the deceased in his own name, so that he alone incurred the legal liability for discharge thereof. Moreover, it appears that after the purchase of No. 15 the deceased borrowed a further sum of £600 on mortgage in his own name, and repayment of this was secured by a single premium policy on his own life, the cost of which he bore himself. Of the sum so raised about £200 was spent upon improvements to No. 15, the balance of £400 being apparently spent by the deceased for his own purposes. In substance, therefore, the defendant's case is that, so far as actual money payments were concerned, she made practically all the payments required for the purchase of No. 13, and through it of No. 15, the contribution of the deceased being virtually confined to the incurring of the legal liability for discharge of the respective mortgages.

It is conceded that, as the defendant and the deceased were not married to each other, the many decisions of the court in cases arising out of disputes between husband and wife with regard to matrimonial property are of no direct authority. Many of these cases were, however, cited to the judge, and were again referred to in argument before us, and it has been contended that the principles applicable as between husband and wife cannot be wholly ignored, but may on the contrary be properly applied by way of analogy in deciding the rights of the defendant and the

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deceased inter se. Thus, it is argued that by reason of her contributions towards the purchase of the respective houses the defendant acquired an equitable interest, first in No. 13, and then in No. 15, at least to the extent of the proportion which her contributions bore to the whole outlay. But because of the extreme difficulty in this case, as in many husband and wife cases, of calculating the exact amount of the respective contributions, the husband and wife cases are invoked, by way of analogy, as illustrative of the principle that "Equity delighteth in "equality," where precise calculation is difficult or impossible.

The argument for the defendant found favour with the judge, who based his conclusion upon the view which he took that the defendant and the deceased, by setting up house together, were engaged on a "joint venture" or a "joint enterprise," in the same way as might be said of any other two persons (as, for instance, two unrelated bachelors) who, though strangers in law, choose to set up house together and run a joint establishment. This conclusion was vigorously attacked by counsel for the plaintiff, who objected that such a finding of "joint enterprise" as between strangers could only be justified by proof of an express agreement, or at least by evidence of facts from which an agreement could properly be implied. Here, it is pointed out, no such agreement has been pleaded on behalf of the defendant—nor could it have been pleaded, for the reason that any such agreement could only be based, in the circumstances of this case, upon an immoral consideration.

In these circumstances, so far from being entitled to rely on the husband and wife cases, the defendant must be treated, according to the plaintiff's argument, as a complete stranger, and before she can be entitled to any relief at all she must discharge the onus of proving strictly the precise extent of her contributions, if any, towards the purchase of the property in dispute. The plaintiff contended, in the first instance, that the defendant had failed to prove that she made any contributions at all. In support of this submission reliance was placed upon the absence of any finding by the judge as to what the defendant's contributions, if any, were. Having regard to his view that the defendant and the deceased were engaged upon a joint enterprise, the absence of such a finding was perhaps hardly surprising. What the judge in fact said was: "I do not feel it necessary to decide "whose actual money paid the rent or for that matter the other "outgoings. . . . This problem cannot be resolved by considering "what money came out of or went into what purse."

Secondly, and in the alternative, it was argued that, if the defendant be proved to have made any actual contributions towards the purchase of the property in dispute, the effect of such contributions would be to do no more than create a charge in her favour. By paying off a part of the mortgage debt the defendant would at the most be subrogated to the right of the mortgagee pro tanto, so as to become a creditor of the deceased's

estate to the extent of the amount of her contributions. In support of this submission reliance was placed upon a dictum of Romer L.J. in *Rimmer* v. *Rimmer*,[16] where he said: "In effect "he" (the county court judge) "held, as would certainly follow "had this been a case as between strangers, that the wife's "contribution to the building society's mortgage resulted in her "being subrogated pro tanto to the society's rights; in other "words, that by reducing the debt she took over to the extent "of her contributions the security which the building society "had."

In the further alternative, it was contended that if the fact of her contributions did confer upon the defendant any equitable interest in the disputed property, such interest could not in any circumstances exceed the proportion which her contributions bore to the total outlay. We were invited to say that on the facts such proportion could only be a very small one, having regard to the fact that it was the deceased, and only the deceased, who incurred the legal liability for repayment of the respective mortgages. Moreover, it was pressed upon us that any payments made by way of rent, during the time before either of the houses was purchased, were entirely irrelevant and should be totally disregarded. Thus, even assuming the defendant to have proved some equitable interest in the property in dispute, such interest could not exceed an aliquot share, based upon the proportion which the mortgage payments made by her bore to the total amount due. In no circumstances could she, as a stranger, claim to be put in the privileged position which the law accords to a married woman who has made contributions towards the purchase of the matrimonial home.

Let me deal in turn with each of these three alternative submissions put forward on behalf of the plaintiff. As to the first, it appears to me that, even in the absence of any specific finding by the judge, the defendant abundantly proved that she did in fact make substantial contributions towards the purchase of the home. The judge found, on the uncontradicted evidence of the defendant, that the deceased's contribution to the menage never averaged more than £3 per week. The defendant herself, at the commencement of their association, was earning £6 per week, which increased towards the end to £7 10s. per week, all of which, as found by the judge, she put into the establishment, in the sense that she paid all the usual outgoings on the property (including small repairs), all the food for all three persons, and the clothing for her daughter and herself. It would not, I think, be unfair to allocate at any rate a large proportion of the deceased's contribution to the discharge of his legal obligation to maintain the child. But even on the view most favourable to him—that is, on the assumption that the contributions of both were pooled and applied pro rata to the whole range of

[16] [1953] 1 Q.B. 63, 75.

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the household expenditure—the defendant's contribution throughout was at least double that of the deceased. This would mean that at least two-thirds of the rent, during the time before the purchase of No. 13, and thereafter at least two-thirds of the mortgage instalments must be regarded as being paid out of funds provided by the defendant herself. Let me pause here to remark that in my judgment it is not possible, as contended on behalf of the plaintiff, to disregard the weekly payments of rent during the period from 1945 to 1954 before the actual purchase of No. 13. It was only by virtue of the defendant regularly paying the rent, and thereby maintaining the tenancy, that the deceased was put in the favourable position of being able, as sitting tenant, to purchase No. 13 for a sum representing only a fraction of what the property was worth. What may be called the "windfall" element in the value of No. 13—that is, the amount by which its value exceeded the purchase price—was in effect purchased by the regular payments of rent during the nine years preceding the purchase of the freehold. In my judgment, therefore, the defendant, by contributing a preponderating share of the rent paid from 1945 to 1954 and of the mortgage instalments paid thereafter, must be held to have made a substantial contribution to the purchase of No. 13, and consequently of No. 15 also, seeing that the latter was purchased out of the proceeds of sale of the former.

As to the plaintiff's second submission, I am satisfied that, if it be right to treat the defendant as having contributed substantially to the purchase of the property, she acquired something more than a mere right to be subrogated to the extent of her contributions to the rights of the mortgagee. In my judgment, on the well-known principle of *Dyer* v. *Dyer*,[17] the defendant, by making these contributions, acquired an equitable interest of her own in the property. In that case the rule was stated by Eyre C.B. as follows: "The clear result of all the cases, without "a single exception, is, that the trust of a legal estate, whether "freehold, copyhold or leasehold; whether taken in the names "of the purchaser and others, jointly, or in the names of others "without that of the purchaser; whether in one name or several, "whether jointly or successive, results to the man who advances "the purchase-money; and it goes on a strict analogy to the "rule of the common law, that, where a feoffment is made "without consideration, the use results to the feoffor." This principle was applied by the Court of Appeal in *The Venture* (1908)[18] where it was held that a party who provided part of the purchase money for the purchase of a yacht registered in the name of another was entitled to share in the proceeds of sale in the proportion which his contribution bore to the total of the purchase money. The same principle was again applied in *Gravesend Corporation* v. *Kent County Council*[19] in favour of

[17] (1788) 2 Cox 92, 93.
[18] [1908] P. 218.
[19] [1935] 1 K.B. 339.

one local authority which had discharged mortgage instalments due in respect of a loan raised by another local authority. Another illustration of the application of this principle is to be found in *Bull* v. *Bull*[20] where a mother and her son both contributed to the purchase of a house as a home for themselves, but the conveyance was in the name of the son. When later the parties quarrelled, and the son sued his mother for possession of the house, it was held that he was not entitled to do so. As was said by Denning L.J., in delivering the judgment of the Court of Appeal[21]: "Each is entitled in equity to an undivided "share in the house, the share of each being in proportion to "his or her respective contribution." In the light of these authorities I do not think that the dictum of Romer L.J. in *Rimmer* v. *Rimmer*,[22] to which I have already referred, can be supported. It is to be observed that neither *Dyer* v. *Dyer*,[23] nor any of the other authorities where the principle of that case was applied, was cited to the Court of Appeal in *Rimmer* v. *Rimmer*. Moreover, it appears to me that the dictum of Romer L.J. in that case is difficult to reconcile with the reasoning underlying the judgment of the Master of the Rolls in the same case. In these circumstances I find myself unable to accept the submission that the defendant's right in the present case is restricted to a right of subrogation to the extent of her actual contributions.

This brings me to the third submission put forward on behalf of the plaintiff, and to what I regard as the most difficult aspect of the case. Assuming that the defendant has an equitable interest in the disputed property, as I think is established, how is it possible to quantify the extent of that interest in the light of the rather confused facts of the present case? The cash expenditure of the defendant in paying rent and mortgage instalments in respect of No. 13—expenditure which she made out of funds contributed in the main by herself, but also in some lesser degree by the deceased—must be balanced, as I see it, against the fact that the deceased, by taking the mortgage in his own name, rendered himself liable in law for the discharge of that mortgage up to the full amount of £900. He was never in fact called upon to discharge one penny of that obligation, and I think it fair to say that, so long as the defendant lived with him and was herself earning, there was no great likelihood of his ever having to do so. Nevertheless, the liability in law was his, and in so far as he thus rendered himself liable I think he must be regarded as having contributed in a substantial degree to the purchase of the property. It was in these circumstances that the judge fell back upon the conception of a joint enterprise—analogous to the joint enterprise upon which a husband and wife embark when they set up a matrimonial home—

[20] [1955] 1 Q.B. 234; [1955] 2 W.L.R. 78; [1955] 1 All E.R. 253.
[21] [1955] 1 Q.B. 234, 237.
[22] [1953] 1 Q.B. 63, 75.
[23] 2 Cox 92.

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but appropriate also to the case of any two persons who, though strangers in law, set up house together on the basis of financing the ordinary domestic expenditure out of a common purse. Clearly if there is an agreement between two such persons as to the proportions in which they are to contribute to the expenditure, or if it is possibly to imply an agreement from the amount of the contributions actually made by each of them, the court must give effect to such agreement and apportion the equitable interests of the respective parties in accordance with the principle of *Dyer* v. *Dyer*.[24] Here the defendant has not alleged any such agreement, and for reasons already stated was not in a position to do so. But, as it seems to me, it is at this point that it is appropriate to remember that the burden is upon the plaintiff, who has instituted the action for the purpose of obtaining possession against the defendant, to prove her case. Furthermore, as already pointed out, the plaintiff stands in the shoes of the deceased, and is only entitled to assert such rights as the deceased himself could have asserted had he himself instituted the action in his lifetime. Assuming the facts proved by the defendant—and there has been no evidence to the contrary—could he have been heard to deny that in setting up house together at No. 13 Havering Road he and the defendant were engaging in a joint enterprise similar to that of a legally married husband and wife? He had taken the defendant to live with him in 1941 and for 16 years prior to his death had held her out as his wife. He had apparently allowed her to assume his name, and was content that she should make the payments, whether of rent or of mortgage instalments, in the guise of a wife. In such circumstances he can well be held to have represented by his conduct that he was agreeable to her setting up house with him as a joint enterprise. Moreover, the same inference is, I think, to be drawn from certain letters written by the deceased to the defendant, which have survived and are included in the bundle of correspondence. These letters can be dated, from internal evidence, as belonging to the time when No. 13 was being sold and No. 15 purchased. In one letter he writes: "If *our* sale goes through I will make it up to you "and in 15 *our* expenses won't be so high." He later writes: "He" (the solicitor) "has the contract for me to sign for the "buying of next door but I am signing it when *we get the* "*contract for our own place.* When the man comes from the "council get Mrs. Sibthorp to explain *we intend* to spend some "of the borrowed money on improving the place." Later he writes: "I realise you have a lot to do but the sooner you can "get 13 sold the better. If I were you I would make a list "of what you are going to do in 15 get the materials yourself "and get someone you know local to do the work." Lastly he writes: "As you know I paid this month's mortgage and fire

[24] 2 Cox 92.

"insurance and now I have just signed the papers for my in-"surance policy on the mortgage so if anything happens to me "from now on the mortgage is completely covered." Such words could hardly have been written to the defendant unless the deceased contemplated and intended that the house being purchased was to be the joint concern of himself and the defendant.

In the light of these letters, and in the light of his conduct over the whole period from 1941 onwards, it seems to me that, had the deceased himself sued the defendant in his life time, he would have been estopped from denying that the houses in which he installed the defendant—first No. 13 and then No. 15—were intended to be purchased, and were intended to be run by the defendant, as a joint enterprise for the benefit of both of them. In these circumstances I am not persuaded that the judge was wrong in taking the view that the relationship between the deceased and the defendant was one of joint enterprise.

This conclusion is not of course to be taken as meaning that the relationship between the deceased and the defendant is to be treated as equivalent for all purposes to that of husband and wife. In the case of husband and wife section 17 of the Married Women's Property Act, 1882, specifically empowers the judge who has to adjudicate in property disputes between them to make such order "as he thinks fit." In the exercise of that power the court, in dealing with disputes between husband and wife, where there has been a common purse, and where it has been difficult or impossible to say with certainty out of whose pocket this or that payment was made, has frequently, as the reported cases show, had recourse to the principle that equity delighteth in equality, and has apportioned the property in dispute equally between the spouses. But it would be a mistake to suppose that the application of this principle is to be confined to cases of husband and wife. It is in fact of much wider application, and may be invoked in any case where it is shown that both parties have an equitable interest in the disputed property, but where it would be difficult or impossible to quantify with exactitude the proportions in which they have respectively contributed to the acquisition of the property. It is, of course, true that where the parties' actual contributions are capable of precise ascertainment, the ordinary rule will apply that each has an equitable interest in the property in proportion to his or her contribution. But where such ascertainment is not possible, yet it is clear that both parties have substantially contributed towards the acquisition of the property, then the principle of equality may be invoked, not only in cases of dispute between husband and wife, but in any other case where it is equitable to do so. In *Rimmer* v. *Rimmer* Evershed M.R. is reported as saying[25]: "Where the court is satisfied that both the parties

[25] [1953] 1 Q.B. 63, 72.

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"have a beneficial interest, and a substantial beneficial interest, "and where it is not possible or right to assume some more "precise calculation of their shares, equality, I think, almost "necessarily follows. Vaisey J., for example, in *Jones* v. *May-"nard*,[26] rightly in my judgment applied that reasoning, and "I think that an analogous application of the same reasoning "was adopted by this court when the question of beneficial "ownership of a copyright was considered in *In re Dickens*.[27] "Maugham L.J. said: 'In these circumstances, my opinion is "'that part of the sum realised properly belongs to the estate "'of Sir Henry Dickens and part to the estate of Charles "'Dickens. There are no materials for apportioning the sum "'otherwise than in equal shares between the two estates; "'and that is, in my opinion, the proper conclusion, not only "'because, according to the language of Lord Somers . . . "'"equity did delight in equality," but also because, in the "'exceptional circumstances of the present case, the two con-"'tending parties have equal rights to share in the proceeds of "'sale.' I venture to apply that reasoning to this case, for I "think it applicable." *Rimmer* v. *Rimmer* was, of course, a case of dispute between husband and wife. But I do not understand the Master of the Rolls to be confining his remarks only to such a case. As I understand him, he was intending his statement of principle to be of general application, as is shown by his reference to the case of *In re Dickens*.[28] So read, I think his words are apt to cover the facts of the present very unusual case, and in all the circumstances I think that the judge came to a correct conclusion when he held that the defendant was entitled to a half share of the beneficial interest in the disputed house.

I would for my part, therefore, dismiss this appeal.

Appeal allowed.

Solicitors: *Ernest W. Long & Co.; C. W. Smith & Co.*

F. R. D.

[26] [1951] Ch. 572; [1951] 1 T.L.R. 700; [1951] 1 All E.R. 802.

[27] [1935] Ch. 267, 309.

[28] Ibid.

[CHANCERY DIVISION.]

* BEECHAM FOODS LTD. *v.* NORTH SUPPLIES (EDMONTON) LTD.

1959
April 22;
May 1.

Vaisey J.

[1957 B. 3699.]

Restrictive Practice—Conditions as to resale prices—Individual enforcement—Deposit on container of goods—Sale of liquid in bottle—Retail price of 2s. 6d. plus 3d. deposit returnable on bottle—Whether equivalent to fixed retail price of 2s. 9d.—Whether deposit hiring charge—Whether enforceable condition as to price—Restrictive Trade Practices Act, 1956 (4 *&* 5 *Eliz.* 2, *c.* 68), *s.* 25 (1).

Sale of Goods—Deposit on container—Nature of transaction—Deposit on bottle—Whether sale or hire.

Bailment—Hire.

The plaintiffs manufactured "Lucozade," a glucose drink, and supplied it subject to a condition that it be sold only at the fixed retail prices in the distributors' current price list, of which condition the defendants had full notice. The price list showed the retail price as 2s. 6d. plus 3d. on the bottle; on the back of the price list it was stated that the bottles were charged at 3s. a dozen refundable and that actual ownership of the bottles did not pass to the customers although a charge for them was made. Moulded into the bottles was the word "Lucozade" and on the label was "2s. 6d." followed by a statement "plus 3d. "deposit returnable on bottle with stopper." On each of two occasions the defendants charged a customer 2s. 7d. for a bottle of "Lucozade." On a claim by the plaintiffs for an injunction to restrain the defendants from reselling "Lucozade"—or any other of the plaintiffs' products supplied by the plaintiffs subject to the above-mentioned condition—at prices less than the fixed retail prices, contrary to section 25 (1) of the Restrictive Trade Practices Act, 1956,[1] in which the plaintiffs contended that the "2s. 6d. plus "3d. on the bottle" as shown therein was equivalent to a fixed retail price of 2s. 9d.:—

Held, that, on the true interpretation of the transactions, the goods which were sold were the contents of the bottles, for which each of the customers had paid the full and correct retail price of 2s. 6d., while the bottles themselves were not sold but were merely lent or hired at a charge of a penny instead of threepence; that since section 25 (1) did not apply to hirings, but only to sales, the dealings in the bottles were not within the section; and that, therefore, the claim was misconceived and the plaintiffs were not entitled to the injunction sought.

ACTION.

The plaintiffs, Beecham Foods Ltd., who, under the registered name of the Lucozade Company, manufactured and supplied "Lucozade," a glucose drink, sought an injunction to restrain

[1] Restrictive Trade Practices Act, 1956, s. 25: "(1) Where goods are "sold by a supplier subject to a con- "dition as to the price at which those "goods may be resold . . . that con- "dition may . . . be enforced by the "supplier against any person not "party to the sale who subsequently "acquires the goods with notice of the "condition as if he had been party "thereto."

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the defendants, North Supplies (Edmonton) Ltd., grocers, from reselling "Lucozade"—or any other product of the plaintiffs supplied by the plaintiffs subject to a condition that the same might be sold only in observance of the fixed retail prices published in the distributors' current price list—at prices less than the fixed retail prices, contrary to section 25 (1) of the Restrictive Trade Practices Act, 1956.

The facts are fully stated in the judgment of Vaisey J.

P. J. Stuart Bevan for the plaintiffs.
W. R. Rees-Davies for the defendants.

The cases cited in argument are referred to in the judgment.

Cur. adv. vult.

May 1. Vaisey J. read the following judgment: The plaintiffs, under the registered business name of the Lucozade Company, manufacture and supply a glucose drink which is sold under the trade mark and name "Lucozade." The defendants carry on business as grocers at Edmonton and may be described as cut-price grocers, without any offence in a free country. The question in this action arises under section 25 (1) of the Restrictive Trade Practices Act, 1956. [His Lordship read the material parts of the subsection and continued:]

The plaintiffs say that every bottle of Lucozade supplied by them at all material times was supplied subject to a condition as to the price at which it might be resold, that is to say, subject to the observance of the fixed retail price as published in the current price list issued by Harold F. Ritchie Ltd., the plaintiffs' distributors to the grocery trade. They also say that the fixed retail price published in that current price list was 2s. 9d. per 26-oz. bottle. No such question arises here as arose in *County Laboratories Ltd.* v. *J. Mindel Ltd.*[1] and *Goodyear Tyre and Rubber Co. (Gt. Britain) Ltd.* v. *Lancashire Batteries Ltd.*,[2] for I do not doubt and find as a fact that the defendants had the fullest notice of the condition, and not merely of its existence but of its terms, and, in particular, that the relevant current price list, dated February, 1957, was in fact sent to the defendants under cover of a letter from the distributors dated September 10, 1957. But whether there was a current fixed price of 2s. 9d. per 26-oz. bottle seems to me much less certain, and the condition has in my judgment been so framed as to confuse rather than clarify the rights and obligations of the parties, as I will presently explain.

The current price list contains a column which shows that the retail price of a 26-oz. bottle of "Lucozade" per unit is

[1] L.R. 1 R.P. 1; [1957] Ch. 295; [1957] 2 W.L.R. 541 and 746n.; [1957] 1 All E.R. 806.

[2] L.R. 1 R.P. 22; [1958] 1 W.L.R. 857; [1958] 3 All E.R. 7.

2s. 6d. plus 3d., which the plaintiffs say (wrongly as I think) is equivalent to a fixed retail price of 2s. 9d. per unit. I am by no means clear that that is so. If a customer goes into a grocer's or chemist's shop and asks for and is given a 26-oz. bottle of "Lucozade," he is presumably asked to pay 2s. 9d., which seems no doubt to suggest that he has bought the bottle and its contents for 2s. 9d. But when the transaction is analysed and considered it seems to me to be far from being as simple as that. I look first at the label on the bottle, which is marked in bold figures "2s. 6d." followed by a statement in less bold characters "plus "3d. deposit returnable on bottle with stopper."

I pause to observe that the label now in use does not say by whom the 3d. will be returned, though a label previously used states "plus a deposit of 3d. which will be returned when the "bottle with stopper is returned to the retailer," from which I should infer that only by taking the bottle back to the same shop which supplied it will the customer get his 3d. back. It further seems that the property in the bottle was never intended to pass to the customer. This is the view taken by the distributors, as I will presently indicate. Moulded in the glass of the bottle in large letters is the word "Lucozade," which would preclude the use of the bottle for any other "soft-drink," because such user might easily give rise to a passing-off claim. I suppose the bottle would be of use to contain other kinds of liquid, but I should have thought that to an ordinary customer it would at 3d. be dear at the price.

In the present case each of the two women who effected a trap or test purchase from the defendants paid on each occasion 2s. 7d. and in my judgment may fairly be said to have paid the full and correct price of 2s. 6d. for the liquid but only 1d. for or towards the hire of the bottle. In my judgment, however, the bottle in this transaction was never sold at all, but was merely lent or hired as a convenient receptacle for carrying the liquid home. The same result follows if 2s. 9d. is paid by a customer. In either case I interpret the transaction as a payment of 2s. 6d. in full as the price of the liquid and 3d. or 1d. for the hire of the bottle.

The matter may be looked at in a variety of ways. For example, a customer may go into a shop, ask for a bottle of "Lucozade," fill up his own flask from the contents and hand back the bottle with its stopper across the counter to the shopman. What has he to pay? Surely 2s. 6d. The suggestion that he must pay 2s. 9d. and a minute or two later ask for 3d. back is reducing a very ordinary transaction to an absurdity. The moral is that if people want to fix prices for retail sales they must, in my view, do so in plain, simple and sensible and, above all, accurate language. Here the price of "Lucozade" is 2s. 6d., whether the bottle to carry it home is hired or not.

The short answer to this action is that the bottles in which "Lucozade" is sold are never themselves sold at all. Section 25 (1) of the Act has nothing to do with hiring agreements. It only

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BEECHAM FOODS LTD. v. NORTH SUPPLIES (EDMONTON) LTD.

Vaisey J.

applies to sales and these bottles in respect of which the 3d. is claimed are, so far as I can see, never sold at all to a purchasing customer. It is interesting to observe that in the distributors' retail price list dated May, 1958, there is a statement on the back page that "Lucozade" (26-oz.) bottles are "charged at 3s. per "dozen refundable," followed by a statement that "actual "ownership of the bottles does not pass to the customers "although a charge for them is made." It is further stated that any charge in this respect is only in the nature of a deposit and will be refundable when the bottles are returned. I think that the distributors' view is perfectly right, and that the goods which are sold in the present case are the contents of the bottles and not the bottles themselves. Indeed it is this fact, and this fact only, which justifies the prominence given to the figures 2s. 6d. on the labels.

It is, of course, impossible to regard a bottle as convertible currency, which it plainly is not, for it cannot be used to pay a bus fare or buy a postage stamp. The contract with the customer with regard to the bottles is entirely different from that which affects their contents; they are merely hired while the contents are sold out and out. This sort of dealing may raise some difficult questions, whether, for example, the customer could be compelled to return the bottles to the retailer or the distributor or the plaintiffs or anybody else, or whether he could be sued for conversion of the bottles in any, and what, circumstances. All such questions are beside the point of the present case if the truth be, as I think it is, that the bottles are never sold to a customer and so do not come within the subsection at all.

The plaintiffs' claim is, in my judgment, misconceived, and I think that the action fails and must be dismissed with costs.

Judgment for the defendants.

Solicitors: *McKenna & Co.; S. Eversley & Co.*

K. R. A. H.

[LIVERPOOL CROWN COURT.]

1959
Mar. 10, 17.

Judge Laski.

* REGINA *v.* CAMPBELL AND OTHERS.

Criminal Law—Practice—Postponement of trial—No trial in first or second term after commitment—Right of prisoner to be discharged —Whether still effective—Habeas Corpus Act, 1679 (31 *Car.* 2, *c.* 2), *s.* 6—*Assizes Relief Act,* 1889 (52 *&* 53 *Vict. c.* 12), *s.* 3.

[Reported by E. SOMERSET JONES, Esq., Barrister-at-Law.]

Habeas Corpus—Criminal cause or matter—Discharge before trial—Conditions precedent to application—Habeas Corpus Act, 1679, *s.* 6. *Crown Court—Status—Whether a court of assize—"Janus-like hybrid"—Interpretation Act,* 1889 (52 *&* 53 *Vict. c.* 63), *s.* 13 (4)—*Criminal Justice Administration Act,* 1956 (4 *&* 5 *Eliz.* 2, *c.* 34), *ss.* 1, 3.

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REGINA *v.* CAMPBELL.

On December 11, 1958, C. was committed for trial to the Liverpool Crown Court on a charge of robbery with aggravation. On his arraignment at the January, 1959, session of the court he pleaded Not Guilty, but by reason of the absence abroad of a prosecution witness it was ordered that C. be tried at the next session. At the February session of the court the trial was again postponed. At the March session application was again made by the prosecution to postpone the trial on the ground that the witness was still out of the country:—

Held, that a Crown Court was a court of assize within the meaning of section 13 (4) of the Interpretation Act, 1889,[1] and had jurisdiction, in a proper case, to grant relief under section 6 of the Habeas Corpus Act, 1679,[2] but that since no application had been made on behalf of C. he had failed to comply with a procedural condition precedent and was not therefore entitled to be discharged under section 6 of the Act of 1679.

Anon. (1680) 1 Vent. 346 applied.

Reg. v. *Bowen* (1840) 9 C. & P. 509 considered.

APPLICATION by Crown to postpone trial on indictment.

On December 11, 1958, James Black Campbell, a plumber, aged 28 years, was, with two other persons, committed for trial from Liverpool City Magistrates' Court to the Crown Court at Liverpool charged with robbery with aggravation at Liverpool of John Ball, a seaman, on December 7, 1958, contrary to section 23

[1] Interpretation Act, 1889, s. 13: "(4) The expression 'court of assize' shall, as respects England, Wales, and Ireland, mean a court of assize, a court of oyer and terminer, and a court of gaol delivery, or any of them, and shall, as respects England and Wales, include the Central Criminal Court."

[2] Habeas Corpus Act, 1679, s. 6: "If persons committed for high treason or felony plainly expressed in warrant shall not on petition be indicted as herein mentioned, judges, etc., may discharge upon bail; proviso; and if not indicted and tried as herein mentioned then to be discharged—Provided alwayes . . . that if any person or persons shall be committed for high treason or fellony plainely and specially expressed in the warrant of committment upon his prayer or petition in open court the first weeke of the terme or first day of the sessions of oyer and terminer or generall goale delivery to be brought to his tryall shall not be indicted sometime in the next terme sessions of oyer and terminer or generall goale delivery after such committment it shall and may be lawfull to and for the judges of the Court of Kings Bench and justices of oyer and terminer or generall goale delivery and they are hereby required upon motion to them made in open court the last day of the terme sessions or goale-delivery either by the prisoner or any one in his behalf to sett at liberty the prisoner upon baile unless it appeare to the judges and justices upon oath made that the witnesses for the King could not be produced the same terme sessions or generall goale-delivery. And if any person or persons committed as aforesaid upon his prayer or petition in open court the first weeke of the terme or first day of the sessions of oyer and terminer or generall goale delivery to be brought to his tryall shall not be indicted and tryed the second terme sessions of oyer and terminer or generall goale delivery after his committment or upon his tryall shall be acquitted he shall be discharged from his imprisonment."

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(1) (*a*) of the Larceny Act, 1916. At the January, 1959, session of the court, Campbell pleaded Not Guilty, and his co-prisoners, man and wife, pleaded Guilty and were both sentenced to terms of imprisonment. At the time Ball was out of the country and, accordingly, on the application of the prosecution, it was ordered that Campbell be tried at the next session of the court. At the February session of the court a similar application was made on the same ground and the trial was again postponed. At the March session an application was again made by the prosecution further to postpone the trial because the witness was still out of the country, and it was stated that he would not return until July, 1959. No application was made on behalf of the prisoner.

George Bean for the Crown.
J. M. Dovener for Campbell.

The authorities cited in argument by the prosecution are referred to in the judgment.

Cur. adv. vult.

March 17. Judge Laski read the following judgment: On December 11, 1958, Campbell and two others, man and wife, were committed to this court by the Liverpool magistrates on a charge of robbery with aggravation at Liverpool of one John Ball on December 7, 1958, contrary to section 23 (1) (*a*) of the Larceny Act, 1916. The married pair pleaded Guilty and have been sentenced by me. It is the position of Campbell with which I have to deal.

Campbell came before me at the January, 1959, session of this court. Application was made to respite the case to the February session as the complainant, a seaman, was out of the country. I granted this application and gave bail to Campbell. At the February sitting of this court a similar application was made for the same reason, and I respited the case to this session, Campbell remaining on bail. An application has been made to me further to respite this case, and I have been informed that the complainant will not be in this country until July.

The Habeas Corpus Act, 1679, was cited to me as having immediate relevance to the instant case and I was referred to paragraphs 241–243 of Archbold's Criminal Pleading, Evidence and Practice, 34th ed., p. 88, as providing an adequate simplified summary of the meaning of section 6 of that Act. It is stated in paragraph 243: "Under the Assizes Relief Act, 1889, if a person "committed for trial at sessions is not tried at the next sessions, "the next court of assize may *on his application* try or discharge "him or release him on bail, unless the delay is due to special "reasons, such as the impossibility of producing the witnesses "for the Crown. Section 3 (1), (3). If the next court of quarter "sessions has not tried him before the next subsequent assizes, "the judge of assize must try or discharge him. Section 3 (2)."

The offence in respect of which Campbell is indicted is not triable at quarter sessions: see Quarter Sessions Act, 1842, section 1.

The court in which I sit is a Janus-like hybrid in that it has functions both for the purpose of exercising such jurisdiction as is commonly conferred on courts of assize by the commissions of oyer and terminer and gaol delivery (section 1 (1) of the Criminal Justice Administration Act, 1956), and in that capacity it is known as "the Crown Court at Liverpool" (subsection (1) (*a*)), and it also, under section 3 of the same Act, has (I use the marginal note) additional jurisdiction as a court of quarter sessions for Liverpool. It is clear that I must deal with this matter in the context of section 1 of the Act constituting this court. The Central Criminal Court was constituted in 1834 by the Central Criminal Court Act, 1834. It took the place of the former sessions at the Old Bailey, which had been held from very early times under special commissions of gaol delivery for Newgate, and oyer and terminer for the City of London and the County of Middlesex. The court now sits under a general commission of gaol delivery and oyer and terminer, and has power to proceed thereunder until the commission is renewed: see section 2. The court sits 11 times each year. In these respects the Central Criminal Court is in pari materia with this court. The Central Criminal Court is part of the High Court of Justice (sections 18 and 70 of the Supreme Court of Judicature (Consolidation) Act, 1925; and see note (*g*), Halsbury's Laws of England, 3rd ed., vol. 9, at p. 407). It is a court of assize also (see section 13 (4) of the Interpretation Act, 1889). In my view, the definition of assizes in that subsection would include this court.

I now turn to a consideration of section 6 of the Habeas Corpus Act, 1679. I do not find myself able, after reading with care and frequency that section, to feel that it is as easily construed as the simplicity of the explanation in Archbold would suggest. It is true that Sir William Holdsworth in his History of English Law, vol. 9, p. 118, also gives a very simple summary of section 6, but he fails, in my respectful opinion, to note the procedural conditions precedent, to which point I will later refer, which, in fact, find an echo in the Assizes Relief Act, 1889.

It must be remembered that this is an old Act conditioned in its terms by the law and procedure of its day. The report in Ventris' Reports of an anonymous case [1] heard in banc in the King's Bench in Hilary term of 1680—within a year after the passing of the Act—reads: "A person who was committed to the Tower for conspiring "the death of the King was brought up by habeas corpus and "prayed to have bail taken, unless an indictment were found "against her this term, according to the new Act of 31 Car. II "for habeas corpus's. The court said that they which would "have the benefit of that Act, must pray it before the first week "of the term expires; but in regard it appeared, that she had

[1] *Anon.* (1680) 1 Vent. 346.

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"prayed it before by her counsel, and her habeas corpus was "taken out in time, the court said, the benefit of the Act should "be saved to her, for the prayer is not necessary to be made in "person, but Mr. C. G. was refused the advantage, he having "omitted to make the prayer during the first week, either in "person or by counsel."

The Act is set out in the Statutes at Large, edited by Danby Pickering and published in Cambridge in 1763. (The present notation, consecrated by the official Statutes of the Realm, of the relevant section is 6, in Pickering it is 7.) It is clear that the anonymous Ventris case [1] was regarded as good law, as it is therein marginally cited. I do not regard *Reg.* v. *Bowen* [2] as of great value to me, but it does, by reason of the careful argument of Mr. Greaves of counsel, shows that in 1840 also it was recognised that the benefit of the Act of 1679 depended on the observance of certain procedural conditions precedent.[3]

It may be, that in terms of today, it is difficult if not impossible to comply with the requirements of the statute. That may be an argument of validity and force for amending or reconstructing the law of habeas corpus, but today I must construe the Act of 1679 as it is. In the first place, this application is made to me by the Crown and not by the prisoner. In the second place, I hold that the procedural conditions precedent of the Act of 1679 have not been complied with. In these circumstances, I hold that no case exists for the application of the Act of 1679.

The preamble to the Act of 1679 makes clear the abuses aimed at—abuses which do not obtain in modern times. It is perhaps not improper to add that the decision of Williams J. in *Bowen's* case [2] seems to accord with the common sense of the matter, albeit no reasons are given, and it is not easy to follow the phrases "human law" and "humanly interpreted." [3] I have looked at *Reg.* v. *Oliver* [4] which was cited to me. That case does not appear to me to assist in this matter. I may add that, despite my researches, I can find no evidence of a matter arising in pari materia with this matter before me from which, in terms of its treatment aliunde, I could gain guidance. I note with interest that in the learned article on habeas corpus in the Encyclopaedia of the Laws of England, 2nd ed., vol. 6, edited by Renton and Robertson, it is stated at p. 471: " . . . at the present day,

[2] (1840) 9 C. & P. 509.

[3] In that case A. was committed for trial at the Spring Assizes, 1840, for shooting B. The trial was postponed to the Summer Assizes because B. was too ill to give evidence. Before the Summer Assizes B. died and a true bill for his murder was found against A. An application was made by the prosecution to postpone the trial to the next Spring Assizes because of the illness of a material witness.

"Williams J.: "I am bound to "postpone this trial. Who can pre-"vent such an occurrence as this? I "have as great a respect as any man "for the Habeas Corpus Act; but it "is a human law, and must be "humanly interpreted. The proviso "is, that the prisoner should be in-"dicted and tried at the second "assizes: now he is indicted, but his "trial must be subject to human "contingency."

[4] (1958), 42 Cr.App.R. 27.

"indeed, the writ of habeas corpus is almost invariably issued by "virtue of the common-law jurisdiction, and not under the "statute."

Campbell is not, however, without remedy. I conceive myself within the law to have a discretionary power to give a direction as to the future of this matter. In my opinion, the justice of the case will be met if I order that this case lie on the file and be not further proceeded with without an order of the court.

Order accordingly.

Solicitors: *T. Alker, Liverpool; Kenneth Maxwell Brown, Liverpool.*

[CHANCERY DIVISION.]

* *In re* POOLE'S SETTLEMENTS TRUSTS. POOLE AND ANOTHER *v.* POOLE AND OTHERS.

1959
April 7, 8.
Roxburgh J.

[1958 P. 2619.]

Husband and Wife—Settlement—Variation—Effect—Order of Divorce Division extinguishing rights, powers and interests of wife "as if "she were now dead"—Post-nuptial settlement—Power of appointment exercisable by survivor of husband and wife — Whether husband survivor—Whether sole appointment by husband valid.

Trust and Trustee—Variation of trusts—Act of 1958*—Protective trusts —Protection of unborn persons—Judicial discretion—Trustee Act,* 1925 (15 *&* 16 *Geo.* 5, *c.* 19), *s.* 33; *Variation of Trusts Act,* 1958 (6 *&* 7 *Eliz.* 2, *c.* 53), *s.* 1 (1) (*d*).

By post-nuptial settlements dated April 8, 1931, and December 22, 1937, a father settled certain investments upon trust to pay the income therefrom to the husband, who was his son, and wife jointly during their joint lives and then to pay the entirety to the husband for his life if he survived the wife. The settlor gave to the husband and wife jointly, and in default to the survivor of them, a power of appointment over the capital and income in favour of the issue of the marriage. The income payable to any beneficiary was to be held on protective trusts for the persons mentioned in section 33 of the Trustee Act, 1925. The husband and wife were married on August 7, 1929, and there was one child of the marriage, a son, who was born on November 9, 1932. The marriage was dissolved on June 16, 1947, by a decree absolute of divorce granted on the petition of the husband. By an order of the Probate, Divorce and Admiralty Division of the High Court, dated March 17, 1952, made on the husband's application, it was ordered ". . . that the [two] "settlements . . . be varied and that all the rights powers and "interests of the respondent in and under the said settlements be

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[Reported by MARGARET THOMAS, Barrister-at-Law.]

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"extinguished absolutely as if she were now dead." On May 2, 1952, the husband irrevocably appointed a moiety of the capital of both funds to be vested in his son at 21 years, payment to be postponed in any event until he attained the age of 25. The husband married a second time on January 16, 1948; there was no issue of that marriage. The son was married on July 8, 1953, and had one child, a daughter, born on January 14, 1956.

On a summons to determine whether the appointment of May 2, 1952, under the settlements as varied by the order of March 17, 1952, was valid, having regard to the fact that the husband's first wife was still living:—

Held, that the order varying the settlements did not merely extinguish the rights, powers and interests of the wife under the settlements but extinguished them "as if she were now dead" and that it was a necessary implication from those words that the husband was to be treated as the survivor of them as from that date. The subsequent appointment by the husband, therefore, was valid.

Whitton v. *Whitton* [1901] P. 348 followed.

On an application for an order under section 1 of the Variation of Trusts Act, 1958, approving an arrangement varying the trusts of the settlements:—

Per Roxburgh J., approving the arrangement. In applications under section 1 of the Act of 1958, the court, in the exercise of its general equitable jurisdiction, will have regard to the interests of future unborn persons.

ADJOURNED SUMMONS.

By a post-nuptial settlement dated April 8, 1931, and made between William Sandford Poole, the settlor, his son, Geoffrey Sandford Poole, his son's wife, Mab Poole, and the trustees, the Trustees Corporation Ltd., the settlor settled certain investments, so far as is here material, in the following manner: "Upon trust "to pay the annual income of the trust fund to the husband "[Geoffrey Sandford Poole] and wife [Mab Poole] jointly during "their joint lives and then to pay the entirety thereof to the hus-"band for his life if he survives the wife. . . . After the death of "the survivor of the husband and the wife the capital and income "of the trust fund shall be held in trust for all or such one "or more exclusively of the others or other of the issue of the "marriage of the husband and wife and of any subsequent mar-"riage of the husband (whether children or remoter issue) at "such time and if more than one in such shares and with such "gifts over and such provisions for maintenance advancement "and otherwise at the discretion of any named persons and "generally in such manner for the benefit of such issue or some "or one of them as the husband and wife shall by deed revocable "or irrevocable from time to time or at any time jointly appoint. "And in default of and subject to any such appointment then as "the survivor of them shall by deed revocable or irrevocable or "by will or codicil appoint. Provided that under any appoint-"ment a child shall not otherwise than by way of advancement

"take a vested interest except upon attaining the age of twenty-"one years or upon marriage. And in default of and subject to "any such appointment in trust for all or any of the children or "child of the marriage of the husband and wife or of any subse-"quent marriage of the husband who attain the age of twenty-one "years and if more than one in equal shares. . . ." The settlement also provided: "Income payable to any beneficiary under "the provisions of this settlement shall be held by the corporation "on protective trusts for the benefit of such beneficiary and "otherwise as mentioned in section 33 of the Trustee Act, 1925." By another post-nuptial settlement dated December 22, 1937, and made between the same parties, the settlor settled further investments upon trusts which were in all material respects similar to those in the earlier settlement.

Geoffrey Sandford Poole, who was born on October 29, 1901, married Mab Poole on August 7, 1929; there was one child of the marriage, Michael Sandford Poole, born on November 9, 1932. The marriage was dissolved on June 16, 1947, by a decree absolute made on the petition of the husband. On March 17, 1952, on the application of the husband, an order was made in the Probate, Divorce and Admiralty Division of the High Court, which, after referring to a report made pursuant to rule 53 (1) of the Matrimonial Causes Rules, 1950 (S.I. 1950, No. 1940/L.27), by the registrar (to whom an application for variation of the settlements had been referred for investigation), ordered: ". . . "that the said report be confirmed, that the said post-nuptial "settlements dated respectively April 8, 1931, and December 22, "1937, be varied and that all the rights powers and interests of "the respondent in and under the said settlements be extin-"guished absolutely as if she were now dead."

On May 2, 1952, the husband irrevocably appointed a moiety of the capital of both funds to vest in his son at 21 years, provided that if he should attain a vested interest in that moiety during the life of the husband, then payment should be postponed until the death of the husband and in any case until the son attained 25 years.

On January 16, 1948, the husband married his second wife, Frederica Poole; there was no issue of that marriage. The son was married on July 8, 1953, and had one child, Sarah Leslie Poole, who was born on January 14, 1956.

By this summons the husband and his second wife sought (1) a declaration whether, upon the true construction of the settlements as varied by the order of March 17, 1952, and having regard to the fact that the husband's first wife was alive when the appointment of May 2, 1952, was executed, that appointment took effect as a valid appointment of one moiety of the funds subject to the trusts of the settlements, as varied, in favour of Michael Sandford Poole, or was ineffective; and (2) if the appointment were valid, for an order under section 1 of the Variation of

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Trusts Act, 1958,[1] approving an arrangement varying the trusts of the moiety.

Under the arrangement it was proposed that the moiety, which at the date of the hearing amounted to £21,500, after payment of costs should be held as to one-half upon the following trusts: (1) to raise £500 to be held upon trust for Sarah Leslie Poole if and when she should attain 21 years or previously, and subject thereto on trust for Michael Sandford Poole; (2) to pay £875 for an insurance policy for £5,000 on the life of Geoffrey Sandford Poole should he die within five years, and to hold any policy moneys upon trust for Michael Sandford Poole absolutely; (3) to discharge arrears of surtax owed by Geoffrey Sandford Poole, and (4) for Geoffrey Sandford Poole absolutely; and as to the other half: (1) to raise £500 for Sarah Leslie Poole to be held upon the same trusts as the other £500, and (2) in trust for Michael Sandford Poole absolutely.

J. A. Plowman Q.C. and *W. S. Wigglesworth* for the plaintiffs, the husband and the second wife.

F. B. Marsh for the first defendant, Michael Sandford Poole.

F. Bower Alcock for the second defendant, Sarah Leslie Poole.

G. C. D. S. Dunbar for the trustees.

The following cases, in addition to those referred to in the judgment, were cited in the course of argument: *Scollick* v. *Scollick*[2]; *Alexander* v. *Alexander*[3]; *Bowles* v. *Bowles*,[4] and *In re Rouse*.[5]

ROXBURGH J. stated the facts and continued: The question raised by the summons is whether the husband, Geoffrey Sandford Poole, had power to make an appointment as the survivor under the settlements when his former wife was still alive. It is impossible, in my view, to consider that question without at

[1] Variation of Trusts Act, 1958, s. 1: "(1) Where property, whether "real or personal, is held on trusts "arising . . . , under any . . . settle- "ment . . . , the court may if it thinks "fit by order approve on behalf of— ". . . (*d*) any person in respect of any "discretionary interest of his under "protective trusts where the interest "of the principal beneficiary has not "failed or determined, any arrange- "ment (by whomsoever proposed, and "whether or not there is any other "person beneficially interested who is "capable of assenting thereto) vary- "ing or revoking all or any of the "trusts . . . Provided that except by "virtue of paragraph (*d*) of this sub- "section the court shall not approve "an arrangement on behalf of any "person unless the carrying out "thereof would be for the benefit of "that person. (2) In the foregoing "subsection 'protective trusts' means "the trusts specified in paragraphs (i) "and (ii) of subsection (1) of section "thirty-three of the Trustee Act, "1925, or any like trusts, 'the prin- "'cipal beneficiary' has the same "meaning as in the said subsection "(1) and 'discretionary interest' "means an interest arising under the "trust specified in paragraph (ii) of "the said subsection (1) or any like "trust."

[2] [1927] P. 205.

[3] (1929) 45 T.L.R. 193.

[4] [1937] P. 127; [1937] 2 All E.R. 263.

[5] [1959] 1 W.L.R. 372; [1959] 2 All E.R. 47.

the same time considering whether he was entitled to the entirety of the annual income after the variation of the settlements by the order of March 17, 1952.

It is to be noted that the form of that order, which is certainly not uncommon, does not say that the settlement is thenceforth to take effect as if the former wife were dead, a comment which Vaisey J. made in *In re Allsopp's Marriage Settlement Trusts*,[1] a case which does not otherwise resemble the present. Had those words been used, the matter would have been beyond question, but the argument is that the phrase "as if she were "now dead" is to be confined to the extinguishment of the former wife's rights, powers and interests, and has no bearing upon the question of the former husband surviving the former wife; in other words, that the former husband has to fulfil a condition which is to be judged by the normal conditions of affairs and not upon the artificial hypothesis of the former wife being dead when she is still alive. Indeed, it is curious that, after so many years when this form of order has been common, its validity should never have been tested except in so far as it was tested in *Whitton* v. *Whitton*.[2] The very point arose there, but the respondent appeared in person and plainly it was not argued. Jeune P. treated the matter quite shortly by saying[3]: "Therefore I am prepared to treat the husband's interests as "abolished, as if he were dead, which will enable the wife to "make the appointment I have mentioned." The wife could only make the appointment if she were the survivor, and therefore there is no doubt that the President proceeded upon the footing that the words "as if she were now dead" were not to be limited in their operation to the extinguishment of, in that case, the husband's interests, but would have an effect in considering whether the wife was the survivor.

The matter comes for decision after serious argument for the first time today, and I have had the benefit of a very full investigation of the problem, but I see no reason for differing from Jeune P.

I do not think that the two trusts and powers, that is to say the trusts for the annual income and the power of appointment, can be considered in isolation. I start with this: What is the purpose of a variation of a marriage settlement by the Divorce Court? It is, surely, to readjust so far as possible the matrimonial balance for the benefit of the parties to the marriage and their children, and, that being so, it is not the function of the court to punish a wife for being an unfaithful wife except in so far as the innocent party, including the children, is thereby benefited. On that basis I look at this trust of the income. It is to pay the entirety thereof to the husband for his life if he survives the wife. If the word "survives" is to have its natural

[1] [1959] 1 Ch. 81; [1958] 3 W.L.R. 78; [1958] 2 All E.R. 393.

[2] [1901] P. 348.

[3] Ibid. 353.

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Poole's Settlements Trusts, *In re.*

Roxburgh J.

meaning and is treated as being unaffected by the order of the Divorce Court, obviously it would be impossible to know whether or not the husband would survive the wife, so that presumably, if he did not survive, there would be a resulting trust of the income during that period, the wife's interest having been extinguished by the order; that could not be for the benefit of the husband or the children. But I do not think that that difficulty arises because, in my judgment, the order does not merely extinguish the wife's interest but extinguishes it as if she were dead at the date of the order, and that by necessary implication involves the artificial proposition that the husband has survived the wife; that seems to me to be the true basis upon which the former husband was entitled to the entirety of the income as from the date of the order of variation.

It is not, in my view, a case of acceleration at all, because the problem is whether the husband can be said to be the survivor at a time when his wife was still alive, and that problem can only be solved by the necessary implication which I have suggested; otherwise there would be a resulting trust.

The same reasoning applies in relation to the power of appointment, which is the actual subject-matter of the present case. It is not merely that the wife's powers are extinguished; they are extinguished as if she were dead at the date of the order, and that involves by necessary implication the proposition that the husband is to be treated as the survivor of them as from that date. Accordingly, in my judgment, the former husband had the power to make the appointment.

Declaration accordingly.

The hearing was then adjourned into chambers for argument on an application on behalf of the plaintiffs that the application for the order under section 1 of the Variation of Trusts Act, 1958, should be heard in chambers, which application was refused.

Roxburgh J. As to the proposed arrangement under the Variation of Trusts Act, 1958, some provision ought to be made for possible future issue of the son. Under the Act of 1958 it is no longer essential for me to consider unborn persons, but I do not think that it is equitable to ignore them. A judge has not yet been deprived of his judicial discretion. I shall have to be satisfied that this arrangement is equitable in the circumstances of this case. It is not my duty under this Act to formulate, or to assist in the formulation of, an arrangement, but merely to sanction, or not to sanction, one. If I am not satisfied, the arrangement will not be sanctioned, but without prejudice to an amended arrangement being brought before me.

Plowman Q.C. We have agreed to amend the arrangement to the extent that instead of £1,000 to be held on trust for the

son's daughter, £1,250 will be held upon trust for such of his children born in his father's lifetime as attain 21, or being females marry under that age, if more than one in equal shares.

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POOLE'S SETTLEMENTS TRUSTS, *In re.*

ROXBURGH J. I approve the amended scheme. The order should be in the following form: "This court doth pursuant to "the above-mentioned Act think fit to approve and doth hereby "approve the arrangement set out in the schedule hereto."

Order accordingly.

Solicitors: *Charles Russell & Co. for Smallpeice & Merriman, Guildford; Simmons & Simmons; Middleton, Lewis & Co.; Slaughter & May.*

[QUEEN'S BENCH DIVISION.]

* EVANS *v.* BROOK.

1959
April 30.

Lord Parker C.J., Donovan and Salmon JJ.

Rates and Rating—Distress warrant—Application to magistrates—Question whether rates due—Jurisdiction of magistrates to determine—Rating and Valuation (Miscellaneous Provisions) Act, 1955 (4 *&* 5 *Eliz.* 2, *c.* 9), *s.* 8 (1) (*c*).

Rates and Rating—Playing field—Fact or law—Rating and Valuation (Miscellaneous Provisions) Act, 1955, *s.* 8 (1) (*c*).

Fact or Law.

A bowling club, having paid part of the total rates levied in respect of its bowling green and premises, claimed that the remainder, namely, £126 11s. 8d., was the sum in which they were entitled to relief under section 8 (1) (*c*) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, as being a "hereditament "used as a playing field (that is to say, land used mainly or "exclusively for the purposes of open-air games or of open-air "athletic sports) occupied for the purposes of a club. . . ." The rating authority applied for a distress warrant in respect of the sum alleged to be due. Both the bowling club and the rating authority agreed that the primary facts were not in dispute and that the magistrates had jurisdiction to decide whether the club was entitled to the relief claimed or not, and that, if it was not, the sum claimed was due. The magistrates held that they had no jurisdiction to decide whether the club was entitled to rating relief under section 8 of the Act of 1955, and, accordingly, issued the distress warrant. On appeal:—

Held, that, although the club might have appealed to quarter sessions against the rate, petty sessions had on all such applications for a distress warrant jurisdiction to determine whether the amount claimed was due, subject to the possible exception (based, *semble*, on convenience and not on any rule of law) which arose if the facts were not agreed and were complicated; and in the present case there was a perfectly simple issue which came within the jurisdiction of the magistrates.

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Per Donovan J. If all the primary facts bearing on the question whether the bowling green and premises constituted a hereditament used mainly for the purposes of open-air games or for open-air sports are agreed, and the only problem remaining is the true conclusion to be drawn from them, that circumstance is not sufficient to deprive the magistrates of jurisdiction.

Whenman v. *Clark* [1916] 1 K.B. 94 and *West Hartlepool Corporation* v. *Northern Gas Board* [1957] 1 W.L.R. 445; [1957] 1 All E.R. 394 applied.

Case stated by Crewe justices.

The town clerk of the Borough of Crewe, Alan Brook, acting on behalf of the borough rating authority, preferred a complaint against the defendant, Wilfred Evans, that he being duly rated and assessed in respect of general rates upon a hereditament described as a bowling green, pavilion and premises, Crewe Road, Crewe, had not paid £126 11s. 8d., but had refused or neglected to do so.

The following facts were proved or admitted before the justices: The true defendants to the complaint were the Crewe Bowling Club, but by arrangement, Wilfred Evans, the club secretary, was served with the summons and made the nominal defendant. The valuation of the premises was £110. The total amount of rates levied by the rating authority for the period from April 1, 1956, to September 30, 1958, inclusive, was £275 9s. 2d. The Crewe Bowling Club had paid £148 17s. 6d. If the provisions of section 8 of the Rating and Valuation (Miscellaneous Provisions) Act, 1955,[1] applied to the hereditaments no further sum was owing, but if the section did not apply, the sum claimed was due. An application for relief under section 8 had been made on March 8, 1958. When counsel for the rating authority had opened his case, but before he called any evidence, the magistrates intimated that they wished to deal as a preliminary point with the question whether they had jurisdiction to hear the defendant's objection that the club was entitled to the relief provided by section 8 of the Act of 1955, or to determine the question whether the club was so entitled. Counsel for the rating authority informed the magistrates that he was instructed not to object to their jurisdiction on that issue, but that he was ready to assist them by addressing them, and at their request both counsel then addressed them.

It was contended on behalf of the defendant that as no facts were in dispute the magistrates should determine whether the club was entitled to the relief provided for by section 8 in order to ascertain whether or not any rates were due and owing.

[1] Rating and Valuation (Miscellaneous Provisions) Act, 1955, s. 8: "(1) This section applied to the following hereditaments, that is to say— . . . (c) any hereditament consisting of a playing field (that is to say, land used mainly or exclusively for the purposes of open-air games or of open-air athletic sports) occupied for the purposes of a club, society or other organisation which is not established or conducted for profit and does not (except on special occasions) make any charge for the admission of spectators to the playing field: . . ."

Counsel for the rating authority expressly did not contend that the magistrates were without jurisdiction, and having said that the question for their decision was itself one of fact, conceded that the material facts on which they should base their decision were not in dispute, but argued that the club could have appealed against the rate and further, that while it might be alleged that the rating authority had acted erroneously in the exercise of their jurisdiction, they had not exceeded their jurisdiction.

The following cases were cited to the magistrates: *Birmingham (Churchwardens)* v. *Shaw*[2]; *Dixon* v. *Blackpool and Fleetwood Tramroad Co.*[3]; *Whenman* v. *Clark*[4]; *Reg.* v. *Barclay*[5]; *Shillito* v. *Hinchliffe*[6]; *West Hartlepool Corporation* v. *Northern Gas Board.*[7]

The magistrates were of the opinion that they did not have jurisdiction to determine whether or not the club was entitled to the relief provided by section 8 or to hear the defendant's objection. After having so held, counsel for the rating authority called evidence to prove the facts set out above and, counsel for the defendant having neither called any evidence nor desired to address the magistrates further, they issued a warrant for distress.

The magistrates stated that they had declined to hear the objection which the defendant sought to raise, namely, that the club was entitled to a partial relief from rates by virtue of the provisions of section 8 of the Act of 1955 for the following reasons: They had examined with care the cases cited to them, in particular *Birmingham (Churchwardens)* v. *Shaw*,[8] *Whenman* v. *Clark*[9] and *Shillito* v. *Hinchliffe*,[10] and had also considered the view of the editors of Ryde on Rating. It appeared to them to be extremely doubtful whether an objection of the kind in question could be entertained by justices on an application for the issue of a distress warrant where the material facts were in dispute. Counsel had told them that the facts were not disputed but in their view the question whether or not the Crewe Bowling Club was a playing field within the meaning of section 8 was essentially a question of fact. They had been informed by counsel that they would not raise any objection on the ground of jurisdiction. The magistrates thought, however, that in that, as in any other matter which came before them, they had to be satisfied that they had jurisdiction and if, in fact, it did not exist it could not be conferred by consent of the parties.

Robin David appeared for the defendant.

The rating authority did not appear and was not represented.

The cases cited in argument are referred to in the judgment.

[2] (1849) 10 Q.B. 868.
[3] [1909] 1 K.B. 860; 25 T.L.R. 323.
[4] [1916] 1 K.B. 94.
[5] (1882) 8 Q.B.D. 486.
[6] [1922] 2 K.B. 236.
[7] [1957] 1 W.L.R. 445; [1957] 1 All E.R. 394.
[8] 10 Q.B. 868.
[9] [1916] 1 K.B. 94.
[10] [1922] 2 K.B. 236.

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Lord Parker C.J. This is an appeal by way of case stated by justices acting in and for the Borough of Crewe, before whom an application was made by the town clerk of the Borough of Crewe, acting with the authority of the mayor, aldermen and burgesses, the rating authority, for a distress warrant against the defendant, who was the secretary of the Crewe Bowling Club, for the sum of £126 11s. 8d., general rates, alleged to be due upon the hereditament known as a bowling green, pavilion and premises in Crewe Road.

The facts are quite simple. The total amount of rates levied by the rating authority for April 1, 1956, to September 30, 1958, was the sum of £275 9s. 2d. Of that, £148 17s. 6d. had been paid by the bowling club. Accordingly, there was due still £126 11s. 8d. unless, as the bowling club claimed, they were entitled to relief under section 8 of the Rating and Valuation (Miscellaneous Provisions) Act, 1955.

The relevant provisions of that section for this purpose are: "(1) This section applies to the following hereditaments, that is "to say—(*a*) any hereditament occupied for the purposes of an "organisation (whether corporate or unincorporate) which is not "established or conducted for profit and whose main objects are "charitable or are otherwise concerned with the advancement of "religion, education or social welfare; (*b*) any hereditament held "upon trust for use as an almshouse; (*c*) any hereditament consist-"ing of a playing field (that is to say, land used mainly or exclu-"sively for the purposes of open-air games or of open-air athletic "sports) occupied for the purposes of a club, society or other "organisation which is not established or conducted for profit and "does not (except on special occasions) make any charge for the "admission of spectators to the playing field."

Then, by subsection (2), it is provided: "For the purposes "of the making and levying of rates in a rating area, for the year "beginning with the date of the coming into force of the first new "valuation list for that area (in this section referred to as 'the "'first year of the new list'), and for any subsequent year, the "amount of rates chargeable in respect of a hereditament to "which this section applies shall, subject to the following pro-"visions of this section, be limited as follows, ..." and then there are set out certain limitations.

The bowling club had put in an application for relief under that section, and it had been turned down by the rating authority. What the reason for that was we do not know, but it is suspected that it was because they were not satisfied it was used mainly or exclusively for the purposes of open-air games. At any rate, relief was refused, and, accordingly, this application was made for a distress warrant in respect of the amount alleged by the rating authority to be due.

The magistrates, and I personally have every sympathy with them, quite clearly struggled to find that they had no jurisdiction

to determine the question whether relief was due or not, and they declined jurisdiction. It is against that that the defendant appeals. It is only right to say that before the magistrates the rating authority combined with the defendant to try to persuade the magistrates to deal with the matter. No doubt, in a case such as this, which is perfectly simple and where, as we are told, the facts are not really in dispute, it is convenient for both the ratepayer and the rating authority to have the matter determined by the magistrates. But, from the magistrates' point of view, if they have jurisdiction in this case, they may be thought to have jurisdiction in the more difficult cases that arise under section 8 (1) (*a*).

The position seems to have been that for a long time it was held that in an application for a distress warrant the magistrates had no jurisdiction to go into the question of the validity of the amount claimed if that could be the subject of an appeal, and I confess that at one time I felt on that line of case that here there was an appeal to quarter sessions and, the right of appeal not having been exercised, it was not for the magistrates to deal with the matter.

The leading case on what I may call the earlier practice was *Birmingham* (*Churchwardens*) v. *Shaw*.[1] The matter was put by Lord Denman C.J. in this way: "We are driven, therefore, to "consider the second ground on which the rule is supported, "whether namely, as regards the present rates, the society is "deprived of the benefit of its exemption, because it has not "appealed against them. And, as it cannot be successfully "contended that the president might not have appealed, the "question is narrowed to this, whether, there being a remedy by "appeal, and that remedy passed by, the law will allow an action "to be brought for the enforcement of a rate, good on its face, "and made by a competent authority, on a person, and in respect "of the occupation of property, apparently within the jurisdiction "of that authority. This is not a new question; nor is the "principle of decision unsettled or difficult. The only difficulty "lies in its application. The right of appeal is co-extensive with "the operation of the rate. Whether it has defects which make "it even a nullity in law, or be objectionable only as excessive in "amount, or unequal in its assessment, anyone who is grieved by "it may appeal; but the right of action is limited, as well for the "sake of convenience, as on principles of law and justice." Accordingly, it was held in that case that the magistrates had no jurisdiction. That was in 1849.

By 1916 and, indeed, earlier, the position had been rather changed, cf. *Whenman* v. *Clark*.[2] Similar questions there arose, and Swinfen-Eady L.J. in the Court of Appeal referred to *Birmingham* (*Churchwardens*) v. *Shaw*,[3] and he went on to refer

[1] (1849) 10 Q.B. 868, 878.
[2] [1916] 1 K.B. 94, 109, 110.
[3] 10 Q.B. 868.

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to a dictum of Bowen L.J. in *Reg.* v. *Hannam*.[4] He said[5]: "'I "'desire to reserve a further possible exception, upon which I "'express no opinion—namely, where the exemption from rating "'is enacted by a public Act of Parliament of which the whole "'world has notice, and which the rating authority must or ought "'to know, and which, as soon as the statute is read, destroys "'the rateability without throwing any onus upon the occupier of "'proving anything so as to gain the exemption for his property. "'I am not sure whether the justices may not in that case refuse "'to enforce the rate.'" He then went on[6] to *Wixon* v. *Thomas*,[7] decided in 1911, where Lord Alverstone C.J. said: "'It is "'impossible at the present day to apply in all its strictness the "'old rule that justices are not entitled to entertain on an applica- "'tion for a warrant any matter which might be raised on an "'appeal.'" Swinfen-Eady L.J.[8] approved a rule which was laid down by Bray J. and Atkin J.[9] in the Divisional Court in these terms: "'that the justices have jurisdiction if the question is "'whether the defendant ought to have been rated at all, or, if "'at all, for the full rateable value.' In my opinion this is a "good working rule, and ought to be followed, where the material "facts are not really in dispute." To the same effect was Phillimore L.J. and Pickford L.J., Pickford L.J.[10] pointing out that there is really no principle that can be found underlying all the cases, but that it is a question of the balance of convenience. At any rate, ever since that case it is clear that when there is no substantial dispute on the facts, it is for the magistrates to inquire whether the amount claimed is due, having regard to some exceptions in relief.

The latest case dealing with the matter is *West Hartlepool Corporation* v. *Northern Gas Board*,[11] where Lord Goddard C.J. stated categorically: "It is said that the justices had no power to "inquire into what was the amount leviable, but the rating "authority had gone to the justices for the purpose of enforcing "arrears of rates; in other words, they were asking for a distress "warrant, and the first thing the justices have to do is to be "satisfied that some sum was due and owing."

In the present case, at any rate, the facts are largely agreed. It is a perfectly simple issue and, reluctant as I am to come to this decision, I feel that the authorities force one to hold that this was a matter within the jurisdiction of the magistrates. Indeed, such matters are always within their jurisdiction, subject to the possible exception that arises if the facts are not agreed and are complicated. That exception is, however, as it seems to me, an exception based on convenience and not on any rule of law. In

[4] (1886) 34 W.R. 355.
[5] [1916] 1 K.B. 94, 110.
[6] Ibid.
[7] [1911] 1 K.B. 43, 53.
[8] [1916] 1 K.B. 94, 111.
[9] [1915] 1 K.B. 548, 559.
[10] [1916] 1 K.B. 94, 121.
[11] [1957] 1 W.L.R. 445, 450; [1957] 1 All E.R. 394.

my judgment, the appeal must be allowed and the matter remitted to the magistrates.

DONOVAN J. I agree. The only doubt I have had in this case is whether the right of appeal to quarter sessions against the rate, on which appeal this point could be raised, must be regarded as exclusive of any right to do so when a distress warrant is applied for at petty sessions. I think the decisions cited by Lord Parker C.J. resolve this doubt quite clearly in a case like the present, where the primary facts relating to the question of relief are not in dispute. The magistrates say: "The question whether or not "the Crewe Bowling Club is a playing field within the meaning "of section 8 of the 1955 Act is essentially a question of fact." So expressed, I should have thought the question was one of law rather than fact, but I suspect that the real question is whether the admitted facts mean that the bowling green and the pavilion constitute a hereditament used mainly for the purposes of open-air games or for open-air athletic sports within the meaning of section 8. But if all the primary facts bearing on that question are agreed, and the only problem remaining is the true conclusion to be drawn from them, I do not think that that circumstance is enough to deprive the magistrates of jurisdiction. I agree, therefore, that the case should go back to the magistrates for further consideration.

SALMON J. I agree.

Appeal allowed.

Solicitors: *Gibson & Weldon.*

C. J. E.

[PROBATE, ETC., DIVISION.]

* ROBERTS *v.* ROBERTS AND PETERS.

1959
March 3.

Stevenson J.

Husband and Wife—Practice (in matrimonial causes)—Rescission of decree—Co-respondent an infant—Guardian ad litem not appointed —Application to rescind decree—Procedure—Matrimonial Causes Rules, 1957 (*S.I.* 1957, *No.* 619), *r.* 66 (3).

Subsequent to the granting of a decree nisi against a respondent wife on the ground of her adultery with the co-respondent, it was discovered that the co-respondent was an infant. No guardian ad litem, as required by the Matrimonial Causes Rules, 1957, r. 66 (3) * had been appointed.

On an application by summons to rescind the decree nisi:—

Held that, when it was desired to obtain the rescission of a decree nisi in such circumstances, the proper procedure was by notice of motion to the Divisional Court under rule 36 (1) of the Rules of

* For footnote see p. 664.

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1957,* and that the present application must, therefore, be dismissed.

Summons to rescind decree nisi.

The petition alleging adultery between the respondent wife and the co-respondent was filed on January 20, 1958. The co-respondent was at all material times an infant, and no guardian ad litem was appointed to represent him, as required by rule 66 (3) of the Matrimonial Causes Rules, 1957.

On June 24, 1958, a decree nisi dissolving the marriage on the ground of adultery between the respondent and the co-respondent was pronounced, and an order for costs was made against the co-respondent. A few days after that was done the mistake was discovered and on September 29, 1958, the petitioner took out a summons to rescind the decree nisi and to appoint the father of the co-respondent as guardian ad litem.

That summons came before Stevenson J., in chambers, in December of 1958, having been referred to a judge by the registrar before whom it first came and was adjourned for argument on the appropriate procedure. At the adjourned hearing the Queen's Proctor was represented.

N. H. Curtis-Raleigh for the petitioner.
Brian Neill for the Queen's Proctor.

The cases cited in argument are referred to in the judgment.

Stevenson J. stated the facts and continued: *Stanga* v. *Stanga*[1] makes it abundantly clear that non-compliance with rule 66 (3) of the Matrimonial Causes Rules, 1957, which prescribes the way in which service on, or on behalf of, an infant is to be effected, vitiates all the proceedings which follow upon that defective service. *Gore-Booth* v. *Gore-Booth*[2] demonstrates the same proposition. That was a case where service purported to be effected on a person then under care and treatment in a mental home and, on a motion to the Divisional Court, the decree was set aside and a rehearing ordered so that the Official Solicitor might be appointed as guardian ad litem of the respondent in that case to carry on the proceedings on his behalf.

* Matrimonial Causes Rules, 1957, r. 36 (1): "An application for re-"hearing of a cause heard by a judge "alone, where no error of the court "at the hearing is alleged, shall be "made to a Divisional Court of the "Probate, Divorce and Admiralty "Division. The application shall be "by notice of motion stating the "grounds on which it is based . . ."

R. 66 (3): "Where service of any "document in a cause to which these "rules apply is required to be effected "on an infant, the document shall, "unless otherwise directed, be served "on the father or guardian of the "infant or, if he has no father or "guardian, on the person with whom "he resides or under whose care he "is, and service so effected shall be "deemed good service on the infant, "so however that a registrar may "order that service effected or to be "effected on the infant shall be "deemed good service."

[1] [1954] P. 10; [1954] 2 All E.R. 16.

[2] [1954] P. 1; [1953] 2 All E.R. 1000.

Mr. Curtis Raleigh on behalf of the petitioner has put before me the cases of *Usey* v. *Usey*,[3] *Griffiths* v. *Griffiths*[4] and *Rutter* v. *Rutter* (*No. 2*).[5] He has in particular relied upon *Griffiths* v. *Griffiths*,[6] which may be described as the high water mark which his argument reached, as justifying me in rescinding the decree in the present case.

That was a case where a wife petitioned for dissolution of marriage, or in the alternative for a judicial separation. The husband did not enter an appearance and filed no answer, and on June 11, 1909, a decree nisi of dissolution was pronounced. In 1912 the respondent applied by summons that the decree nisi should be rescinded and the petition dismissed for want of prosecution on the ground that the decree had never been made absolute. The petitioner opposed that application and asked for a rescission of the decree nisi and for a decree of judicial separation in lieu thereof and it was held by Sir Samuel Evans P. that the decree nisi should be rescinded and a decree of judicial separation pronounced. The judgment of Sir Samuel Evans P. is a very short one[6]: "In this case the guilty husband entered "no appearance, and the wife, for some reason, I do not require "to know what, wants her decree nisi for dissolution changed "to a decree of judicial separation. I do not think the guilty "party has a say in this matter, and therefore I see no cause "why the petitioner should not have the change she requires "effected. The decree nisi will be rescinded, a decree of judicial "separation pronounced, and I give the petitioner the custody "of the children and costs."

The result of that case appears to be that the wife in her application for a final decree sought what was in effect a change of the relief from dissolution to judicial separation for which she had originally asked in the alternative in her petition. It does not appear from the report that the question of jurisdiction was very closely argued and I am unable to regard that case as an authority which would justify me in doing what I am asked to do on the present summons, particularly having regard to the effect of the judgments in the cases of *Stanga* v. *Stanga*[7] and *Gore-Booth* v. *Gore-Booth*.[8]

Reliance has also been placed by Mr. Curtis Raleigh on *Rutter* v. *Rutter* (*No. 2*),[9] a case of a husband's petition for dissolution in which a decree nisi had been granted to the wife respondent on the cross-charges in her answer. The wife, who was a minor without a guardian, filed a petition for maintenance and the husband took out a summons to dismiss the petition for maintenance and asked that the costs already paid to the wife might be paid into court until the decree was made absolute. The wife moved to rescind the decree nisi. "Held, that the

[3] (1875) 1 P.D. 1.
[4] (1912) 28 T.L.R. 281.
[5] [1921] P. 421; 37 T.L.R. 967.
[6] 28 T.L.R. 281.
[7] [1954] P. 10.
[8] [1954] P. 1.
[9] [1921] P. 421.

1959

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"husband being the guilty party could have no relief. The wife's "motion was dismissed, with an intimation that if renewed it "must be by a guardian." What is significant about this case is that Sir Henry Duke P. refused to make any order rescinding the decree and dismissed the wife's motion saying, however, that he was satisfied that he had power to make such an order if the circumstances of the case warranted it but, if the wife applied again, she must apply by her guardian who, at any rate, would be responsible for his costs.

I am equally unable to regard that as an authority which will justify me in saying that I could rescind the decree in the present case. I can see no escape from the conclusion that the husband petitioner must move the Divisional Court in this case to rescind the decree and to order a rehearing because the original trial was completely vitiated by the defect in service.

Application dismissed.

Solicitors: *Pothecary & Barratt for Ottaways, St. Albans; Queen's Proctor.*

E. J.

[PROBATE, ETC., DIVISION.]

1959
April 27.

Lord Merriman P.

* TATE *v.* TATE.

PRACTICE NOTE.

Husband and Wife—Divorce—Insanity—Care and treatment—Continuous—Evidence—Residence in hospital or other institution—Evidence of status thereof—Divorce (Insanity and Desertion) Act, 1958 (6 & 7 Eliz. 2, c. 54), s. 1 (1) (3).

During the hearing of a divorce suit on the ground of insanity, LORD MERRIMAN P. gave the following direction:

The status under section 1 (1) (*a*) of the Divorce (Insanity and Desertion) Act, 1958,[1] of "the hospital or other institution" in

[1] Divorce (Insanity and Desertion) Act, 1958, s. 1 (1): "Notwithstanding anything in subsection (2) of "section 1 of the Matrimonial Causes "Act, 1950, or subsection (3) of section 6 of the Divorce (Scotland) Act, "1938, a person shall be deemed to "be under care and treatment for the "purposes of the said section 1, and "under care and treatment as an "insane person for the purposes of "the said section 6, at any time "when he is receiving treatment for "mental illness—(*a*) as a resident "in a hospital or other institution "provided, approved, licensed, registered or exempted from registration "by any Minister or other authority "in the United Kingdom, the Isle of "Man or the Channel Islands; or "(*b*) as a resident in a hospital or "other institution in any other "country, being a hospital or institution in which his treatment is

which the patient is received should be established in some way, for example, by affidavit of the medical superintendent of the hospital or institution concerned. Likewise under section 1 (3) [2] evidence should be given, if it be the fact, that the care and treatment of the patient has been continuous, save for the permitted interruptions.

"comparable with the treatment provided in any such hospital or institution as is mentioned in paragraph (a) of this subsection."

[2] S. 1 (3): "In determining for the purposes of the said section 1 or the said section 6 whether any period of care and treatment has been continuous, any interruption of such a period for 28 days or less shall be disregarded."

[CHANCERY DIVISION.]

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March 17, 18, 19.

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Revenue—Income tax—Employment—Perquisite—Option to purchase shares—Purchase of option to subscribe for shares in employing company—Whether perquisite—Whether emolument—Whether taxable in the year of purchase or the year of exercise—Income Tax Act, 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 10), *Sch.* 9, *r.* 1.

In October 1954, the appellant, who was at all material times secretary of a company, was granted an option to purchase 2,000 ordinary shares in the company at the price of 68s. 6d. per share. The price of the option was £20, and it was expressed to be non-transferable and to expire after 10 years or on the earlier death or retirement of the appellant. In March 1956, when the market price of the shares was 82s. per share, the appellant exercised the option in respect of 250 shares. The appellant was assessed to income tax under Schedule E of the Income Tax Act, 1952,[1] in the year 1955–56 on the difference between the option price and the market price of the shares (with a deduction of a proportionate part of the cost of the option), as being an emolument received by him by virtue of his employment. The appellant appealed against the assessment being made in the year 1955–56 and contended that it should have been made in the year 1954–55:—

Held, that the benefit of the option contract was not remuneration for services, but was a chose in action, which the appellant was enabled to purchase on beneficial terms for valuable consideration, because of his employment, and which, since it could have been realised at or soon after the date of the contract, could be turned to pecuniary account and was, therefore, a perquisite within the meaning of rule 1 of the rules applicable to Schedule E [1]; and

[1] Income Tax Act, 1952, Sch. 9, r. 1: "Tax under Schedule E shall be annually charged on every person having or exercising an office or employment of profit mentioned in Schedule E, . . . in respect of all salaries, fees, wages, perquisites or profits whatsoever therefrom for the year of assessment."

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that an option contract bought for valuable consideration was in the nature of a capital transaction and not a revenue item so that the value of the option should be capitalised and assessed to income tax in the year of assessment 1954–55 when it was received and was not taxable as additional remuneration; and that, since the perquisite consisted of the benefit of the contract to have allotments of shares on certain terms, the shares when allotted could not be taxed in another year as a new or different perquisite or profit.

Bridges v. *Hewitt* [1957] 1 W.L.R. 674; 37 T.C. 289 and *Forbes' Executors* v. *Inland Revenue Commissioners* (1959) 38 T.C. 12 distinguished.

Case stated by the Commissioners for the Special Purposes of the Income Tax Acts.

The appellant, Edward Cranfield Abbott, appealed to the special commissioners against an assessment for the year 1955–56 made upon him under Schedule E of the Income Tax Act, 1952, in respect of emoluments from his employment. The question for the decision of the commissioners being whether the appellant was assessable for the year 1955–56 in respect of an option granted to him by his employing company to subscribe for shares, such option having been exercised in the year 1955–56, or whether he was not so assessable (as he contended) but was assessable in the previous year in which the option was purchased by him.

The following facts were proved or admitted before the commissioners: The appellant was at all material times the secretary of a company, E. S. & A. Robinson Ltd., which carried on business as wholesale stationers. At the annual general meeting of the company held on June 28, 1954, the following resolution was passed: "That 250,000 of the 290,319 unclassified shares of "£1 each in the capital of the company be and they are hereby "classified as ordinary shares and that the directors be and that "they are hereby authorised to grant options over such 250,000 "ordinary shares or any of them to executives of the company "or its subsidiaries (including managing and other directors who "may for the time being hold office in the management of the "business of the company or any of its subsidiary companies "for the time being) at such times and generally on such terms "and subject to such conditions as they think proper."

Pursuant to that resolution the directors at a board meeting held on October 6, 1954, considered the terms under which options were to be granted. The relevant minute of that board meeting stated that "The secretary produced a list of executives "of the company and its subsidiaries whom the managing direc- "tors had nominated as grantees of share options showing against "the name of each individual the number of shares over which "his option would extend. It was noted that the total number

"of shares affected was 243,000 and that the middle price ruling "on the Bristol Stock Exchange today was 68s. 6d. per share.

"It was resolved that pursuant to the resolution of the com- "pany passed at the annual general meeting held on June 28, "1954, options in accordance with the said list to subscribe for "ordinary shares of the company at 68s. 6d. per share be and they "are hereby granted upon the terms and subject to the conditions "set out in a letter to be addressed to each grantee, a copy of "such letter having been produced to the meeting approved and "signed by the chairman for the purpose of identification.

"The secretary was instructed to dispatch today to each "grantee letters in the said form."

The salient conditions of the letter, a copy of which was annexed to the case stated, were that the employee was granted, at the price of £1 for every 100 shares involved, an option to purchase a specified number of shares at the price of 68s. 6d. per share, such option to be exercisable at any time within 10 years from the date of the grant of the option. The option was expressed to be not transferable and was to expire upon the death or retirement of the employee prior to the 10 years. If the employee desired to purchase the option, he was required to send in a form of application which accompanied the letter (together with his cheque for the amount specified being the price of the option), whereupon an option certificate would be issued to him. Option certificates were not in fact issued until May 6, 1955, by which time the company had obtained, in response to its application on March 4, 1955, the consent of H.M. Treasury to the issue of shares in response to the exercise of options, and by letter dated May 9, 1955, option holders were so advised.

The appellant was included in the selected list of executives in respect of 2,000 shares in the company, and, on October 7, 1954, he sent in an application to the company to purchase an option in respect of such 2,000 shares on the terms of the letter, forwarding with the application his cheque for £20, which was duly cashed by the company. Owing to the circumstances mentioned above he was not given a certificate until May 6, 1955. The terms and conditions applicable to the option were endorsed on the certificate. The option was expressed to be not transferable and to expire on the holder's death or retirement, or on the tenth anniversary of the date of the grant of the option.

Under the terms of the option any number of shares up to the number of 2,000 could be applied for by the appellant, and on March 28, 1956, the price of the company's shares having then risen to 82s., the appellant applied to the company for 250 ordinary shares at the option price of 68s. 6d. per share, sending with such application the sum of £856 5s., and he was duly allotted the 250 shares.

The appellant was assessed to tax under Schedule E for the year 1955–56 in the sum of £7,086, which included the sum of

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£166 in respect of the share transaction, that sum of £166 being made up as follows:

	£ s. d.	£ s. d.
250 shares taken up on March 28, 1956, when the middle market price was 82s.		1,025 0 0
Deduct: option price 68s. 6d.	856 5 0	
cost of option at £1 per 100 shares	2 10 0	858 15 0
		£166 0 0

Such assessment charged the appellant to tax under Schedule E for the year 1955–56 in respect of the benefit received by him by virtue of his employment of being able to purchase shares worth 82s. at a cost of 68s. 6d. (plus a proportionate part of the price of the option).

It was contended on behalf of the appellant that the contract of option vested a right of property in him forthwith; that such right represented money's worth and was inherently capable of realisation; that such right was, to the extent of any excess in value over the price paid therefor, an emolument of his employment assessable under Schedule E in the year of assessment 1954–55 and not otherwise; that the shares issued to him in the year 1956 were issued in virtue only of the right of property acquired by him in the previous year of assessment; and that any excess in value of the shares, when issued, over the price paid therefor represented an appreciation in the value of an item of property owned by him, and was not an emolument of his employment.

It was contended on behalf of the inspector of taxes that when the shares were issued to the appellant there arose or accrued to him a profit from his employment assessable to tax for the year 1955–56; that the profit so assessable amounted to £166; and that the appeal should therefore be dismissed and the assessment confirmed.

The commissioners gave their decision in writing on April 9, 1958. They considered that the case was indistinguishable from that of *Forbes' Executors* v. *Inland Revenue Commissioners*,[2] and that the decision of the Court of Session in that case given on January 16, 1958, was binding upon them; that although the appellant in the present case had paid a small sum for his option, whereas Mr. Forbes was given his option, that difference was not material, since in each case it was common ground that a benefit accrued to the appellant as part of his remuneration, and in each case the rights granted were personal to the appellant. They stated that it was suggested on behalf of the appellant that the decision in *Forbes'* case [2] may have turned on some pecularity of Scots law, but that they could find no support for such a suggestion in the judgment of the Court of Session, and considered that

[2] (1958) 38 T.C. 12.

case decisive of the present one. Accordingly, they held that the appeal failed. Figures were subsequently agreed in accordance with their decision and the assessment was confirmed on May 22, 1958.

The appellant appealed. The commissioners further stated that in making suggestions in the usual course on the draft case, the solicitors to the appellant stated (in effect) that the suggestion that the decision in *Forbes'* case [2] might have turned on some peculiarity of Scots law did not represent one of the appellant's contentions; and the commissioners agreed that the suggestion arose incidentally during the course of argument.

F. Heyworth Talbot Q.C. and *Desmond Miller* for the appellant.

Roy Borneman Q.C. and *Alan Orr* for the Crown.

No cases, other than those referred to in the judgment, were cited in argument.

ROXBURGH J. At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts held on February 24, 1958, the appellant appealed against an assessment for the year 1955–56 made upon him under Schedule E of the Income Tax Act, 1952, in respect of emoluments from his employment, the question for the decision of the special commissioners, as stated in the case, being "whether the appellant was assessable for the "year 1955–56 in respect of an option granted to him by his "employing company to subscribe for shares, such option having "been exercised in the year 1955–56, or whether he was not so "assessable (as he contended) but was assessable in the previous "year in which the option was purchased by him."

Rule 1 of the rules applicable to Schedule E provides: "Tax "under Schedule E shall be annually charged on every person "having or exercising an office or employment of profit men-"tioned in Schedule E, . . . in respect of all salaries, fees, wages, "perquisites or profits whatsoever therefrom for the year of "assessment" after making certain possible deductions.

The question is not whether the emolument in question does or does not fall within that rule as an emolument taxable under Schedule E because the appellant has throughout this case conceded that it is so taxable. Mr. Heyworth Talbot, as indeed he was bound to do, conceded that at once; but he did advance the view that it was a perquisite and that it came within the schedule on that ground. Mr. Borneman has assured me that he does not attach any importance to that question because the emolument is within the schedule. As he did not contend that it is not a perquisite (he asked me not to say that he conceded it), I see no reason why I should explain why I think Mr. Heyworth Talbot was right in describing it as a perquisite. In my judgment,

[2] 38 T.C. 12.

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the emolument was a perquisite and no contention has been advanced before me to the contrary.

One of Mr. Borneman's principal arguments was that once the item, which I am now going to call a perquisite, is in the Schedule E "box," to adopt his metaphor, all considerations as to its quality are exhausted; and that one does not look any further into whence it was derived or why it was paid. That proposition seems to me to be contrary to logic, jurisprudence and the whole trend of authority.

I will deal, first of all, with logic. You do not deprive persons of all symbols of identity by putting them into a box. When Noah put the animals into his box he did not deprive them of both species and gender. That is the logic of the thing. From the point of view of jurisprudence, the question is not whether they are in the box but when they got into it. In other words, were they perquisites from the employment for the year of assessment? There would be no question at all for me to consider if it were true that, once the perquisite got into the box, all considerations as to its quality are exhausted, and that one does not have to look any further into whence it was derived or why it was paid. Thirdly, the process which counsel disclaims is precisely that process which every other judge who has had to deal with this question has adopted. I need say no more about that proposition, but all the same there are some very difficult points in this case.

[His Lordship referred to the facts found by the commissioners and continued:] In passing, I should refer to *Ede* v. *Wilson*,[1] decided by Wrottesley J. In that case, according to the headnote, "the directors of company A, as a reward for "past services and a stimulus to future efforts, decided to "allow the respondents, who held managerial offices in a "subsidiary company B, to subscribe for certain shares in "company A at their par value, which was considerably less "than their current market value, on giving a verbal under-"taking that they would not sell such shares without the permis-"sion of the directors of company A so long as they remained in "the employ of company B. The respondents took advantage "of the privilege and gave the required undertaking; and they "were assessed to income tax under Schedule E on the difference "between the par value of the shares so taken up and allotted "to them and their market value at the time of the allotment. "On appeal they contended that they were not employed by, and "rendered no services to, company A; that they were debarred "from realising profits on these shares by the verbal undertaking "they had given; that they had received no income by the trans-"action, and that the profit (if any) should be assessed only when "realised. The General Commissioners were of the opinion that "no profit could reasonably arise from the transaction owing to

[1] (1945) 26 T.C. 381; [1945] 1 All E.R. 367.

"the tie; and discharged the assessments. *Held*, that the commissioners had come to a wrong conclusion, and that the privilege granted to the respondents represented money's worth and was assessable to income tax as a profit of their respective offices in company B, but that the cases must go back"—and this is what I am at the moment referring to—" . . . in order that the commissioners might decide the proper amounts of the assessments having regard to the restriction under which the respondents accepted the allotments." Mr. Hills, at the end of the judgment, said [2]: "It will go back just to find the amount in accordance with your Lordship's judgment. Wrottesley J.: 'It may be very different in the hands of different persons.' Mr. Talbot: 'It may be possible to agree it, of course, before 'we come to the commissioners.'" I may say that, if most of these awkward questions regarding valuation have been resolved by agreement, that does not absolve the court from considering the principles upon which valuations ought to be made if the parties do not agree a figure. There is no doubt as to what Wrottesley J. meant when he said: "It may be very different in the hands of different persons . . . To a well-to-do person with capital of his own already it may be worth the stock exchange value; to another man it may not."

[His Lordship referred to the case stated and continued:] Rule 1 of the rules applicable to Schedule E groups together for the purpose of taxation a number of transactions or happenings which are essentially different in character. Parliament can do anything it likes and can say that transactions essentially different in character are to be taxed under a particular schedule; but, unless Parliament has said so in express terms, I dissent from the view that such a process amalgamates essentially different transactions for all purposes. The general law should not be overruled or overriden, except in so far as it is necessary to give effect to the provisions for taxation embodied in the Act. That is the fundamental ground upon which I reject Mr. Borneman's argument. Admittedly these perquisites are in the box, admittedly salaries are in the box; but that does not mean that salaries and perquisites have essentially the same characteristics, any more than if you put Jack and Jill in the box they would become of one sex together. It is necessary to remember, upon any sensible view, that salaries are a revenue item, but that transactions in relation to shares are not generally a revenue item. I believe that that distinction has been and ought to be preserved in dealing with perquisites.

It is, in my view, necessary to consider the character of this perquisite. Was it primarily a revenue item; or was it primarily a purchase, on favourable terms, of a capital asset or a right to purchase on favourable terms a capital asset? I think that that distinction will reconcile the authority at present existing on

[2] 26 T.C. 381, 389.

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this point, with the exception of *Forbes' Executors* v. *Inland Revenue Commissioners*,[3] to which I shall refer later. There are, of course, other cases to which I have been referred, and I have not ignored them in what I have just said. Undoubtedly, Mr. Borneman's argument rested mainly, although not entirely, upon three passages in *Bridges* v. *Hewitt*.[4] His main submission, apart from that with which I have already dealt, can be summarised as follows: he contended that the proper appreciation of the contract, in the particular cases to which I have just referred, made it necessary to isolate the option contract from the subsequent application for and allotment of shares, and that when this process had been carried out the benefit of the option contract was not a perquisite because it could not be turned to pecuniary account. He preferred to make use, for this purpose, of an extract from the speech of Lord Halsbury L.C. in *Tennant* v. *Smith*.[5] I do not suggest that there is any distinction between that passage and the passage which is very commonly cited from the speech of Lord Watson [6]; but if there be any distinction—and I am not saying that there is—I shall be in fashion if I prefer, as I do, the following extract from the speech of Lord Watson [6]: "Is it, then, a perquisite or a profit of his office? I do not think "it comes within the category of profits, because that word, in its "ordinary acceptation, appears to me to denote something "acquired which the acquirer becomes possessed of and can dis-"pose of to his advantage—in other words money—or that which "can be turned to pecuniary account." In the present case the taxpayer paid money, he did not receive it; but the question is: did he acquire something which could be turned to pecuniary account? Mr. Borneman submitted—and this submission is, I think, the actual basis of the judgment in the *Forbes* case [7]—that the option contract merely—and I stress the word "merely"—gave the appellant a right to exercise the option and that, as it was not transferable, it was of no value. I propose, before commenting on that submission, to read the headnote and some passages in the *Bridges* case.[8] The headnote reads: "The "respondents were at the material times respectively managing "director and a director of a limited company which they had "served for many years in those and other capacities. They had "greatly helped in building up the business and in running it "when it had become established. Most of the shares in the "company were held in trust, under the will of the former prin-"cipal shareholder (who died in 1936), for his widow during her "life and thereafter for his two sons in equal shares absolutely. "The respondents wished to have a fairly substantial holding in "the company. They had been under the impression that the

[3] (1958) 38 T.C. 12.

[4] [1957] 1 W.L.R. 59, 674; 37 T.C. 289.

[5] [1892] A.C. 150, 156; 3 T.C. 158, 164.

[6] [1892] A.C. 150, 159.

[7] 38 T.C. 12.

[8] [1957] 1 W.L.R. 674; 37 T.C. 289.

"former principal shareholder would bequeath them shares by "his will, but he had not done so. In due course they "approached the sons about the matter and in 1945 the sons "entered into covenants"—and this is important—"under "which the respondents, in consideration of their continuing their "engagements with the company for four years, were each to "receive 8,000 of the shares within three months of the death "of the widow. These shares were transferred to the respondents "in July 1953. On appeal to the special commissioners against "assessments to income tax under Schedule E made on them for "1953–54 in sums which included the value of the shares at the "date of transfer, the respondents contended that the transfers "were pure acts of bounty, and in no sense rewards for past "or future services; and that the stipulations that the covenants "were in consideration of continued services were conventional" —whatever that might mean—"and inserted simply to give the "respondents a procedural right to sue on the documents effec-"tively. Alternatively, it was contended"—and this is the important part of the case—"that, if the value of the shares "transferred was income assessable under Schedule E, such "income either arose on the execution of the deeds or should be "spread over the four years 1945–46 to 1948–49. The special "commissioners found that the transfers and covenants were not "remuneration for the respondents' services in their current "offices, and held that neither the value of the shares nor the "value of the covenants represented income assessable under "Schedule E. *Held* (Jenkins L.J. dissenting)"—and it is extremely important in this case to follow its vicissitudes—"that "the shares were not profits from the respondents' current offices "because they were not remuneration for services in those offices "but testimonials (which under the covenants might not have "accrued until after retirement) for what they had done, including "what they had done before holding those offices."

The judgment of Danckwerts J. was in favour of the Crown. It was reversed on appeal but for this purpose it is not irrelevant to read what Danckwerts J. said at a time when his decision, unless reversed, would have stood. He said [9]: "Two alternative "contentions were put forward on behalf of the taxpayers. The "first of these was that if the transaction fell within the terms of "Schedule E, the income of the taxpayers was the value of the "rights acquired in December, 1945, by the taxpayers under "the deeds of covenant; this would mean that those values would "have to be estimated in December, 1945, and the assessment on "them now, or at the material date of the assessments under "appeal, would be out of time. Evidence was tendered that it "was possible for a valuer to make an estimate of some sort "as to the value in question. The commissioners treated the "estimates as being such an uncertain matter that they could not

[9] [1957] 1 W.L.R. 59, 68.

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"amount to money's worth and, therefore, they were not a "possible part of the taxpayers' income." Pausing there, I can see what great difficulties regarding valuation would have occurred not merely regarding questions of fact but also questions of principle; but I do not think that it could be arguable that a piece of property could not be turned to pecuniary account, not because it was incapable of being sold at a profit, but because the commissioners could not value it. I cannot see how the question as to whether it amounts to money or money's worth could possibly depend upon whether the commissioners could or could not think of means of valuing it. I say that because I am very anxious to make it plain that I do think that very difficult questions of valuation will arise in this case if my judgment stands without being reversed. However, it has not been submitted to me that a valuation cannot be made.

Danckwerts J. went on: "I do not think that this is the "correct answer, but I do not think that the contention can "succeed. Mr. Mustoe, in support of this contention, relied upon "*Tait* v. *Smith* [10] as well as *Salmon* v. *Weight*,[11] which I have "already mentioned. But I do not think that those cases have "any application on the facts of the present case." There is a clear example of a judge not adopting the submission which Mr. Borneman made to me and with which I dealt at the beginning of my judgment. Danckwerts J. continues: "If the conclusion is "correct that the transfers of the shares were profits of the respon-"dents' offices and remuneration for the services to be performed "by them"—and I stress those words "were profits of the "respondents' offices," about which there is no doubt in the present case, and those words "and remuneration for the services "to be performed by them," as those two propositions are a condition precedent to that which Danckwerts J. went on to say and, in my view, disclose the kernel of the problem—"they were "paid for those services when the shares were transferred to them "(though the shares were not immediately realised) and assess-"able accordingly." Although Danckwerts J.'s judgment was reversed, it was not reversed, as far as I can see, on that point.

I now come to the judgment of Jenkins L.J. in the Court of Appeal. He was in a minority and, therefore, what he says on this topic may, in one sense, be obiter dictum; but I should be both disrespectful and unrealistic if I lightly disposed of what he said on that ground. On the contrary, I agree with him completely, bearing in mind one of the premises upon which Danckwerts J.'s statement of the law was founded, and which recurs in Jenkins L.J.'s statement of what he thinks would have been the position if his judgment had been the judgment of the majority. He says [12]: "As to the alternative contention to the

[10] (1954) 35 T.C. 79.

[11] (1935) 51 T.L.R. 333; 19 T.C. 174.

[12] [1957] 1 W.L.R. 674, 689; 37 T.C. 289, 316.

"effect that the proper subject of assessment consisted of the "value of the rights acquired by the appellants under the deeds "of covenant in December, 1945, which constituted income of the "appellants for the financial year 1945 to 1946: on the footing that "the appellants fail in their main contention the position was "that by the deeds of covenant the Hornby brothers covenanted "that, in consideration of the appellants continuing their respec-"tive engagements with the company for four years from the "date of the deeds, the Hornby brothers would transfer to them, "on the death of Mrs. Hornby, the specified number of shares in "the company by way of remuneration for the services rendered "by them to the company during that period. The time at which "the appellants were to receive this additional remuneration for "their services to the company for this further period was thus "fixed by the terms of the bargain as the death of Mrs. Hornby, "or, to be strictly accurate, the expiration of three months from "her death. In fact, the appellants duly completed their four "years' further service in Mrs. Hornby's lifetime, and the shares "were transferred to them shortly before her death, although "the Hornby brothers would have been entitled to withhold such "transfer until three months after the happening of that event. "I see no reason for treating the stipulated remuneration"—and I stress those words "the stipulated remuneration"—"that is, "the shares, as received or receivable on any earlier date than "that on which the shares were actually transferred, which, as I "have said, was in fact earlier than the date on which the Hornby "brothers were obliged under the deeds of covenant to transfer "the shares to the appellants. In *Salmon* v. *Weight* [13] the bene-"fit held to constitute remuneration consisted of an immediate "right to subscribe at par for shares worth in the market sub-"stantially more than par. In *Tait* v. *Smith* [14] it was held that "the taxpayer was wrongly assessed for the year 1949 to 1950 in "respect of the surrender value of an endowment policy on his "life which, under the terms of his service he had become "entitled to have immediately transferred to him in 1946. I do "not think that either of these cases, on which Mr. Mustoe relied, "supports his contention that in the present case the taxable "profit consisted of the value of the rights conferred by the deeds "of covenant at the date of those deeds, and not of the value of "the shares at the date when they were transferred." I agree in toto with this passage in the judgment of Jenkins L.J.

Morris L.J. did not deal with this point; but Sellers L.J. said [15]: "It is not, in my view, in harmony with the tax provisions that "if the transactions fell within the terms of Schedule E the "income was the value of the rights acquired by the appellants "when the deeds were entered into. I agree with the learned "judge when he says:"—and then he makes a citation from the passage which I have read from the judgment of Danckwerts J.

[13] 51 T.L.R. 333.
[14] 35 T.C. 79.
[15] [1957] 1 W.L.R. 674, 703; 37 T.C. 289, 327.

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The argument which Mr. Heyworth Talbot presented to me involves the proposition that a contractual right to receive payments in future, which is a chose in action, can, as it were, be capitalised at the date of the deed and be taxed as a perquisite. The difficulty presented by this argument is that, if you try to apply it to an ordinary contract of service you come to a complete standstill as regards common sense. I do not think that the Crown or the taxpayer has ever suggested that salaries should be dealt with in this manner. At any rate, no case has been cited to me and I should not think that one exists. You do not deal with salaries as being the benefit of a chose in action which can be turned to pecuniary account. You deal with them as sums of money received de anno in annum and taxed in the year in which they are received or receivable. I emphasise those words "received or receivable" because I would have thought that proposition could not be disputed or argued. That was the problem which, in a modified form, confronted Jenkins L.J. because he, and also Danckwerts J., quite clearly took the view that in that particular case the shares were additional remuneration. They both used words to that effect, which I have already cited; and, of course, you could not possibly have a method of dealing with additional remuneration which was different from the method of dealing with the ordinary remuneration of the particular individual under his service contract. Therefore, in my view, the three dicta in the *Bridges* case [16] are right.

In what respects does the *Bridges* case [17] differ from the present case? First of all, although I think this is not the most important distinction but, nevertheless, a real one, this is not an option case at all. Secondly, it is distinguishable because it relates to a payment under a contract of service and not to a payment which comes as a result of service, which is quite a different matter. Most important of all—and here I differ completely from the special commissioners—it was not, in the present case, a reward for services at all; but a thing that was bought. The price paid is immaterial. It was bought, whether £20 or £20,000 was paid for it; and, therefore, it could not have been extra remuneration for services. That is exactly what Jenkins L.J. thought in the *Bridges* case.[18] If it had been taxable at all—and we know, in fact, that it was decided that it was not—as what would it have been taxable?

Is it possible to say that this case differs in principle from the *Bridges* case? [19] For reasons which I shall give, I think that the *Bridges* case [19] helps the Crown more than the *Forbes* case.[20] In my judgment, not all the cases are on the same side of the line as the *Bridges* case.[21] The cases must be reconciled by some principle; and I think there is a principle which quite plainly

[16] [1957] 1 W.L.R. 59, 68; 674, 689, 703 (C.A.).
[17] [1957] 1 W.L.R. 674.
[18] Ibid. 689.
[19] Ibid.
[20] 38 T.C. 12.
[21] [1957] 1 W.L.R. 674.

corresponds with the normal business sense of the community. That principle is that salaries, whether original or additional, fees derived in the course of one's employment, and wages, are quite plainly revenue items, and are, therefore, not to be capitalised and taxed on the capitalisation basis. On the other hand, however, option contracts bought for a valuable consideration are clearly, in the ordinary sense of the word, capital transactions. I do not think that anyone would suggest that a self-employed shareholder was taxable under Schedule D for profits which he might derive from having allotted to him, as a shareholder, a certain number of shares at a price well below the market value which he sold on the Stock Exchange at the market value. It is a well-known and frequent transaction in these days; and I believe —and it certainly has not been contended to the contrary before me—that the profit on such a transaction is not taxable under Schedule D, because it is not an income item. It is a capital profit. Of course, Schedule E cannot be dealt with in that way because it includes something which is not in Schedule D, namely, perquisites. However, I do not think that a perquisite is to be treated as changing its whole nature and character merely because it is brought into the "box" in an omnibus provision dealing with salaries and wages. If the item is a perquisite—and I have held that it is—the court must see what is the nature of the animal, to adopt a phrase which counsel used himself. The court must look at the nature of the animal by applying the ordinary principles of English law—and I emphasise the word "English." Looking at this transaction, it may be that I shall be entitled to say that it is the sort of transaction which ought to be capitalised and taxed on the basis of a chose in action and not on the basis of a salary. If that is not so, it seems to me that Mr. Heyworth Talbot's argument would necessarily fail; and it is only because I have come to the conclusion that it is so that I have not called upon him to reply.

The distinction to be drawn is this: is this additional salary, or is it a perquisite and something which is not income in any sense, except that it has been derived by virtue of the taxpayer's employment with the company? If it is the latter, it gets out of the category of the *Bridges* case [22] and gets into another category.

Before I go further with that matter I want to deal with the *Forbes* case.[23] It is important, in that case, to realise what the document was upon which the question was raised. I will read from the case stated and not from the headnote, because one very important feature of the contract is not mentioned in the headnote. Sub-paragraph (vii) of clause 11 of the case stated reads [24]: "On September 18, 1944, a new minute of agreement was agreed "and executed between Watt Torrance Ltd., of the first part, "Watt Torrance Woolwich Ltd., of the second part, and Mr.

[22] [1957] 1 W.L.R. 59, 674.
[23] 38 T.C. 12.
[24] Ibid. 13.

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"Forbes of the third part. The eleventh clause of this agreement"—and that is what does not appear in the headnote—"provided that: 'So long as Mr. Forbes remains the managing "'director of the company (i.e., Watt Torrance Ltd.) and of the "'Woolwich company he shall have the right to apply for and to "'be allotted shares of any denomination up to the number of "'ten thousand in either or each of the companies on payment in "'cash of the nominal or par value of the shares applied for.'"

In *Forbes* case [25] there was an option; but I do not think that is the decisive factor. However, there is the eleventh clause of the service contract and that, in my view, is the decisive factor. There is also a factor which, if not decisive, is important, namely, that the employee did not have to pay anything for this option. He had to render services under his service contract. It seems to me that this Scottish case [25] is plainly a case of additional remuneration, and that it falls into the group to which Jenkins L.J. referred.[26] For my own part, if the *Forbes* case [27] had come before me in an English court, I have little doubt that I should have reached the same conclusion as the Scottish court reached, not upon the same grounds as the Scottish court, but upon the grounds which I have already stated: that we are here concerned with additional remuneration and that it is impossible to treat additional remuneration on a different basis from what I might call the primary or principal remuneration—if it is in truth remuneration.

That being so, I must state what I understand to be my relation to a Scottish case. It has been put to me that there is some sort of principle for construing contracts which can be built up out of these two authorities [28]; but to that view I cannot assent. The Income Tax Acts apply, with certain immaterial modifications, to both England and Scotland, and I recognise that I ought, if possible, to follow, if only as a matter of comity, the decision of a Scottish court on the construction of the Income Tax Acts; any contrary view would result in sending every case to the House of Lords where alone the question is open. However, I have always understood that not only are Scottish decisions not binding in England but that they are not followed, even as a matter of comity, where there is a possibility that Scottish law may differ from English law. In an income tax case there is a very special reason why that should be so. Under the general law Scottish law is a question of fact; and it is the duty of the commissioners and not the duty of the judge to find facts. Therefore, if the court, under an income tax appeal, had to be informed as to what the Scottish law was, the case would have to be remitted to the commissioners if they did not find it as a fact. I cannot imagine anything more absurd than remitting a case to the special commissioners in order to find as a fact what Scottish law is. Surely the answer must be this:

[25] 38 T.C. 12.
[26] [1957] 1 W.L.R. 674, 689.
[27] 38 T.C. 12.
[28] [1957] 1 W.L.R. 674; 38 T.C. 12.

that I do not take judicial notice of Scottish law because it is not my duty to apply it, except to the undoubtedly limited extent that they may have expressed a view on the construction of something in the Income Tax Acts; and I am certainly not bound to assume that it is the same as English law. Indeed, it would seem, from the following passage, that it probably is different, although I am not holding as a fact that it is.

Lord Russell said [29]: "Prima facie, therefore, it would seem "that the obligation of the companies to allot shares to Mr. "Forbes was dependent on the existence of a condition and was "not enforceable until the condition was purified, viz., the "delivery of cash representing the par value of the shares." The word "purified" is not a word in the English legal vocabulary. It is not a term of art in England but it obviously is a term of art in Scotland. Lord Russell has explained its meaning; but it seems to me to envisage some doctrine which, as far as I know, is quite alien to English law. Therefore, I decline to assume that, in approaching this contract, it makes no difference that the court which approached it was a Scottish court and not an English court.

The ratio decidendi of that case was, in my view, a conclusion reached upon the construction of the contract. The Lord President said [30]: "It may be that some forms of option could "involve a pecuniary benefit from the moment that they are "granted, but the option in this case in my opinion did not. For "the option itself could not be turned to pecuniary account." That shows that the Lord President was not intending to lay down any general principle of construction applicable either to England or Scotland but merely to construe the contract with which he was concerned. However, there are certain propositions in his judgment which I should find very difficult to accept as an English judge; and they are propositions of law. Whereas they may be excellent propositions of Scottish law, I am not satisfied that they are propositions of English law at all. The Lord President said [31]: "In my opinion the right which Mr. Forbes obtained "on signing the agreement in 1944 was a right merely to apply "for the shares: it gave him no right in or to any shares, for this "could only emerge when he exercised his right and when he "delivered to the company the par value of the shares he "demanded." I assume that that is a proper statement of Scottish law; but I cannot accept it as a proper statement of English law which, of course, has been very much influenced by the reaction of the principles of equity upon the common law. It is true that the contract which the Scottish court was construing gave no right in or to any shares; but according to English law it certainly did give him a right to some shares. In England, the right may be contingent or conditional, but it is none the less a right. The right in the Scottish case was plainly contingent or

[29] 38 T.C. 12, 20.
[30] 38 T.C. 12, 18.
[31] 38 T.C. 12, 17.

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conditional; but it was none the less a right. In Scottish law, apparently that is not so, because the right could only emerge when the option was exercised. That is not so in English law. The right emerges from the contract giving the right however many conditions there may be precedent to the obligation upon the other party to perform the contract.

Somewhat similar observations may perhaps be made as regards Lord Carmont's judgment.[32] Sitting in an English court I should have regarded the option contract as a complete conditional contract. By "complete" I mean complete as a contract but containing conditions. I could not have construed it, as Lord Carmont appears to have done, as containing a continuing offer which did not give any rights until it was accepted by the employee, not by accepting the contract but by exercising the option. It will be seen that he does do that, and I need not read the whole of his speech. However, I should have construed it as a contract for value to allot shares upon application and payment for the shares. That is a very common transaction. Then there is the passage in Lord Russell's speech [33] to which I have already referred, and which so clearly seems to reflect some Scottish doctrine. Sitting as an English judge I could not accept it as a proposition of English law.

My view of the benefit of this option contract is that it is not to be assimilated to and is not additional remuneration. It is a chose in action which the employee was enabled to purchase, because of his employment, on beneficial terms; and that is why it is a perquisite. None the less, it is not in any sense remuneration for his services. I have never heard of any employee having to pay for his own remuneration; and that is why I think this £20 is so important. It is not the amount, it is the effect. That feature is absent from every case which has hitherto been decided on this topic. The option contract might have been a dead loss, the opposite of additional remuneration. The figure here was £20 and the shares went up. Therefore, of course, it did enable a profit to be made. However, the shares might have gone down until the company went into liquidation, and then the £20 which had been spent, so far from being additional remuneration, would have been a dead loss. In my view, it was a perquisite, and it was a perquisite which could be turned to pecuniary account.

How could it have been turned to pecuniary account? It would have been necessary to exercise the option by applying and paying for the shares at some time within the period permitted by the option contract. That was, in fact, done. The company's employee, in this case the appellant, having made the application for a number of shares, and having paid for them at the rate of 68s. 6d. per share, could, before any shares had been allotted to him, have sold those shares to a purchaser at a higher price. A higher price was, in fact, available because these happen to be

[32] 38 T.C. 12, 19.

[33] 38 T.C. 12.

shares which are marketable and the price went up to at least 82s. If the company had refused to allot the shares direct to the purchaser—I doubt whether they could have done so, but supposing that they had—the effect would have been that the vendor, the employee, would have had to take the shares up as trustee for the purchaser and, subject to getting any consents to transfer that might be necessary, he would have immediately transferred the shares to the purchaser. If the company had, for some reason, refused to register the transfer, the result would have been that the vendor would have continued indefinitely to be trustee for the purchaser, unless and until the company was willing to register the transfer, accountable to and entitled to be indemnified by the purchaser under the general law of trusts. I do not know whether Scottish law is different in that respect. It may well be. If so, I can quite understand why Lord Clyde in the *Forbes* case [34] arrived at the conclusion that the chose in action could not be turned to pecuniary account. However, if the law in Scotland is the same as the law in England—and it may well not be, because the law of trusts is not always the same in Scotland—perhaps no one suggested this method to the Lord President.

It would, therefore, have been possible for the appellant to realise a profit on the shares if he had wanted to. I dare say he did not; but that is not the point. The point is whether it could be realised, not whether it was realised. If the appellant had gone into Bristol Stock Exchange, he could have realised a profit on these shares without the slightest difficulty very soon after the grant of the option. It is not necessary that the profit should be capable of realisation within the year of assessment. If it were, this case on its facts might present some difficulty because of the necessity of obtaining Treasury consent. Putting that aside, however, he could, immediately after the acceptance by him of the contract, have put in an application form and he would have been in a position to carry out the transaction I have indicated the next day.

I think it must follow that, if the chose in action was a perquisite received in the tax year year 1954–55, and as it consisted of the benefit of the contract to have allotments of shares on certain terms, the shares, when allotted, could not be taxed in another year as a new or different perquisite or profit. At any rate, no such contention has been put before me. Any other view of the proper method of dealing with the option contract would have curious results. The price paid was for an option to acquire, from time to time during a period of years, not more than 2,000 shares. Why is the price apportionable, as the case stated suggests? This question is not material because of what I have held; but, on the other footing, why would it be apportionable, as the case stated suggests? There might never be a further

[34] 38 T.C. 12, 20.

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exercise because it is not worth exercising. If that be so, why should the whole price not be set against the realised profits? On the other hand, it might be exercised again two, three or more times, in which case it might be that the cost price would have to be apportioned. However, the true position which would have to be known in order to make a proper apportionment could not be known until the option was fully exercised or had expired. That comment on apportionment is obiter dictum because, in my view, the special commissioners were wrong; and the benefit of the option contract was a perquisite which fell to be taxed in the financial year 1954–55.

It does not fall to me on this appeal to indicate whether it can be taxed owing to difficulties of valuation; and, if it can, upon what principle it ought to be valued. Those are matters which will only arise if and when some assessment is raised in respect of the year 1954–55. Accordingly, I allow the appeal.

Order accordingly.

Solicitors: *Allen & Overy; Solicitor of Inland Revenue.*

J. F. L.

[COURT OF APPEAL.]

C. A.

1959
April 28.

Hodson and Morris L.JJ. and Pilcher J.

* BRUEN *v.* BRUCE and Another.

Practice Note.

Court of Appeal—County court—Appeal from—Judge's note—Note of judgment below agreed by counsel—Not seen by judge—To what extent receivable—R.S.C., Ord 58, *r.* 18 (5).

Appeal.

At the hearing of an appeal from a county court judge there were produced the judge's note of evidence, signed by him, and a note of the judgment which had been compiled by and agreed between counsel on either side, but by inadvertence had not been submitted to the judge.

Ian Percival and *David Wild* for the first defendant.

Michael Hoare for the plaintiff.

The second defendant did not appear and was not represented.

Hodson L.J. (at the conclusion of his judgment): I desire to say a word on another matter which has arisen in this case. There was no note of the judge's reasons for his decision and, as is common practice, counsel's note was written out and agreed with

the other side. But unfortunately it was not submitted to the judge, to give him an opportunity of checking it, before the appeal came on for hearing. I desire to draw attention to the terms of R.S.C., Ord. 58, r. 18 (5) [1]—which this court has previously done in *Hayman* v. *Rowlands*.[2] It is, I think, convenient, where there are only notes of evidence and no notes of the judge's judgment, except a very brief one, that counsel's note should be available; but the correct practice is that that should only be used after it has been submitted to the judge. The judge not having had the document submitted to him for approval, this court had to decide what course it should take, and we decided to hear the appeal. But if this court had been in favour of the appellant's argument we said at the outset that we should not give judgment in a final form until the county court judge had had an opportunity of seeing the judgment which was being criticised in this court. The appeal having failed, no further question arises.

Solicitors: *T. D. Jones & Co. for Tearle & Herbert Jones, Luton; Machin & Co.*

F. R. D.

[1] R.S.C., Ord. 58, r. 18 (5): "It "shall be the duty of the appellant "to apply to the judge of the county "court for a signed copy of any note "made by him of the proceedings "and of his decision, and to furnish "the said copy for the use of the "Court of Appeal; and in default of "production of such a note, the Court "of Appeal may hear and determine "the appeal upon any other evidence "or statement of what occurred before "the judge of the county court which "appears to the Court of Appeal to "be sufficient."

[2] [1957] 1 W.L.R. 317; [1957] 1 All E.R. 321.

[CHANCERY DIVISION.]

* BOLTON'S (HOUSE FURNISHERS) LTD. *v.* OPPENHEIM.

1959
May 8.
Danckwerts J.

[1958 B. No. 3685.]

Landlord and Tenant—Business premises (Security of tenure)—Notice to quit — Form — Notice of intention to demolish premises — No reference to requirement of possession in notice—Application to court for new tenancy—Sufficiency of notice—Landlord and Tenant Act, 1954 (2 *&* 3 *Eliz.* 2, *c.* 56), *ss.* 25 (1), 30 (1) (*f*).

Practice and Procedure—Originating summons—Preliminary point of law arising—Issue of pro forma summons.

In a notice under section 25 (1) of the Landlord and Tenant Act, 1954, terminating the tenancy of business premises the landlord stated: "I [the landlord] would oppose an application to the "court under Part II of the Act for the grant of a new tenancy "on the ground that on the termination of the current tenancy I

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"intend to demolish the premises comprised in the holding and "thereafter to carry out substantial work of construction on the "holding. . . ."

The tenants applied to the court by originating summons for an order under Part II of the Act for the grant of a new tenancy and at the hearing it was contended as a preliminary point of law that the notice did not comply sufficiently with paragraph (*f*) of section 30 (1) of the Act[1] since it did not state that the landlord required possession of the premises in order to carry out the work:—

Held, that the same strictness should not be imported into a landlord's notice determining a tenancy under section 25 (1) of the Act as was imported into a landlord's notice to quit at common law, and that the notice in the present case, notwithstanding that it did not comply exactly with the words of paragraph (*f*) of section 30 (1), contained a sufficient indication of the grounds upon which the tenants' application would be resisted to comply with the requirements of the Act.

Biles v. *Caesar* [1957] 1 W.L.R. 156; [1957] 1 All E.R. 151 applied.

Observations on the procedure to be adopted where it is sought to determine a preliminary point of law arising in proceedings started by originating summons under the Act.

Summons.

By a notice dated July 15, 1958, under section 25 (1) of the Landlord and Tenant Act, 1954, a landlord, one Abraham Louis Oppenheim, gave notice to his tenants, Bolton's (House Furnishers) Ltd., terminating their tenancy of business premises situate at 395, Brixton Road, London, S.W., on March 25, 1959. The notice stated: "I [the landlord] would oppose an application "to the court under Part II of the Act for the grant of a new "tenancy on the ground that on the termination of the current "tenancy I intend to demolish the premises comprised in the "holding and thereafter to carry out substantial work of construc-"tion on the holding. . . ." The notice did not state that the landlord required possession of the premises for the purpose of carrying out the work of demolition.

The tenants took out an originating summons asking for an order for the grant pursuant to Part II of the Act of a new tenancy. When the summons came on for hearing his Lordship was told that the only question then arising for argument was the validity of the notice under section 30 (1) (*f*), and in accordance with his Lordship's direction (post) a pro forma summons was taken out for a declaration as to that question.

[1] Landlord and Tenant Act, 1954, s. 30: "(1) The grounds on which a "landlord may oppose an application "[for a new tenancy] under subsec-"tion (1) of section 24 of this Act are "such of the following grounds as "may be stated in the landlord's "notice under section 25 of this Act, "or, as the case may be, under sub-"section (6) of section 26 thereof, "that is to say . . . (*f*) that on the "termination of the current tenancy "the landlord intends to demolish or "reconstruct the premises comprised "in the holding or a substantial part "of those premises or to carry out "substantial work of construction on "the holding or part thereof and that "he could not reasonably do so without "obtaining possession of the holding."

R. E. Megarry Q.C. and *S. N. Bernstein* for the tenants.

L. A. Blundell Q.C. for the landlord.

The following cases, in addition to those cited in the judgment, were referred to in the argument: *McMullen* v. *Great Southern Cemetery and Crematorium Co. Ltd.*[2]; *Betty's Cafés Ltd.* v. *Phillips Furnishing Stores Ltd.*[3]

DANCKWERTS J. This matter arises under the Landlord and Tenant Act, 1954, between tenants, Bolton's (House Furnishers) Ltd., and their landlord, Abraham Louis Oppenheim. The landlord has served on the tenants a notice of termination under section 25 (1) of the Landlord and Tenant Act, 1954, and the question before me is whether the form of that notice entitled the landlord to object to the grant of a new tenancy under the terms of the Act. The matter has come to me on the footing that this whole point is referred to me for decision as a preliminary matter, which in a certain event will dispose of the whole question at present between the parties. It is certainly a convenient way of dealing with what is purely a point of law on the construction of the terms of the landlord's notice of termination. While, however, it is a convenient course, it is preferable that in such cases a pro forma summons be taken out in the proceedings started by originating summons under the Act, asking, for instance, for a declaration on the point which the parties desire to have decided. Subject to that, this seems to me to be a convenient and proper way of dealing with the matter.

The matter turns really upon the terms of the landlord's notice. [His Lordship referred to the notice and continued:] The question is whether that notice states sufficiently the grounds on which the landlord intends to oppose the grant of a new tenancy.

The grounds upon which he may oppose the grant of a new tenancy are contained in section 30 (1) of the Act. [His Lordship referred to section 30 (1) (*f*) of the Landlord and Tenant Act, 1954, and continued:] What has happened is that the notice refers to an earlier part of that paragraph but makes no reference to the concluding words "and that he could not reasonably do so "without obtaining possession of the holding." It is plain, in my view, that the concluding words are an essential condition of the grounds which are provided for by that paragraph. It must, in any case, be necessary for the landlord to obtain possession of the holding in order to carry out the works which he intends to do. It is not quite clear why it should be a necessary statutory condition of that provision, but that is not for me to say.

The argument advanced by Mr. Blundell on behalf of the landlord that the final provision in paragraph (*f*) only applies to

[2] C.A., Nov. 19, 1958 (unreported).

[3] [1959] A.C. 20; [1958] 2 W.L.R. 513; [1958] 1 All E.R. 607.

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the part which relates to carrying out substantial work of construction on the holding, and not to the earlier part which relates to demolition, does not seem to me to be sound. I think that the condition of requiring possession applies to the whole of paragraph (*f*).

One further thing should be noticed. On the back of the statutory form on which notice has to be given there are notes indicating that the landlord may oppose the grant of a new tenancy and what has to be done in pursuance of the Act, the procedure being roughly this: Under section 24, a tenancy to which the Act applies is to continue until it is determined in accordance with the provisions of the Act. The landlord cannot therefore give the ordinary notice to quit, but the tenant can give the ordinary notice to quit because he is given that right by section 24. If the landlord wants to determine the tenancy he has to adopt the procedure which the landlord in the present case has attempted to adopt, namely, the giving of a notice to determine. The notes, after prescribing those various matters, reproduce paragraphs (*a*) to (*g*) of section 30 (1). It is curious that the paragraphs are not reproduced word for word in one sense, because throughout, instead of referring to "the holding," which has a statutory definition in the Act, the draftsman of the form has chosen to use the word "premises." For instance, paragraph (*f*), the paragraph here relevant, reads in the notes: "that on the termination of the current tenancy the landlord "intends to demolish or reconstruct the whole or a substantial "part of the premises or to carry out substantial work of con-"struction on the whole or part of them and that he could not "reasonably do so without obtaining possession of the premises." Mr. Blundell suggested that that indicated that the matter was not one of precision and therefore that the landlord ought not to be tied too much to the precise terms of the Act, but I do not think that that argument has any substance.

It is plain what the Act requires the landlord strictly to do: he may oppose an application on "such of the following grounds as "may be stated." Therefore, it would seem at first sight at any rate that everything that is necessary must be stated in the notice, and that to leave a thing to be discovered by reference to the Act or some other similar process would prima facie appear not to be compliance with the requirements of the Act.

Mr. Megarry referred me to a case on rather a different provision showing that "stated" is not equivalent to "ascer-"tainable," but refers to something that must be expressed. That was *In re Hawkins*,[1] which was decided on the construction of section 25 of the Finance Act, 1941. That case is some way from the present and it does not perhaps assist; but there is

[1] [1943] Ch. 67; 59 T.L.R. 105; [1943] 1 All E.R. 39.

much force in Mr. Megarry's argument that as this is the method under the Act which enables a landlord to determine a tenancy in place of the notice to quit which might provide for the determination of the tenancy under the terms of the original lease, the same rules of strictness ought to be applied as in the case of a notice to quit under the general law. There is no doubt that in the case of the general law notices to quit have to be in precise terms, and a mistake (even though it is quite easy to see what the landlord intended and it may be purely a mistake in drafting) is sufficient to render a notice to quit invalid: see *Hankey* v. *Clavering*.[2]

If there were no relevant authority of the Court of Appeal, I should have thought it was clear that the landlord must state in his notice exactly the grounds upon which he is permitted to resist the grant of the new tenancy and on which he relies, and that he does not fulfil the requirements of the Act if he merely refers to one of the two necessary conditions on which he may resist the grant of a new tenancy—in one of which he has a choice under the terms of paragraph (*f*), that is to say demolition or the carrying out of substantial work of construction on the holding or part of it—the other necessary condition being that he cannot do the work without obtaining possession of the holding. But in *Biles* v. *Caesar*,[3] the Court of Appeal considered the provisions of this section and this paragraph and made certain observations to which it is necessary to refer. In that case the notice referred to the grounds in these terms: "To demolish and reconstruct the whole of the premises "comprised in your holding." No question arose as to the requirement of possession being necessary, the point now before me, but the actual point was that the landlord did not in fact propose to demolish and reconstruct the whole of the premises comprised in the holding but only a substantial part thereof, and it was argued that therefore his notice was not sufficiently precise to comply with the terms of the Act. The point that I have to decide was not before the court, but there are these observations by the Court of Appeal to which I must pay some attention. Denning L.J. said[4]: "But Mr. Blundell says that they ought "not to be allowed to avail themselves of the subsection because "in their notice of opposition and in their answer they relied "on 'the whole' of the premises; and they ought not to be "allowed, he says, to rely on 'a substantial part.' In my "judgment, the tenant's argument on this point is not correct. "It is sufficient for the landlords in their notice of opposition "to specify the particular paragraph—(*a*), (*b*), (*c*), (*d*), (*e*), (*f*) "or (*g*) of section 30 (1) upon which they rely. It is not "necessary for them to specify any of the subsidiary portions of

[2] [1942] 2 K.B. 326; [1942] 2 All E.R. 311.

[3] [1957] 1 W.L.R. 156; [1957] 1 All E.R. 151.

[4] [1957] 1 W.L.R. 156, 158.

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"a paragraph, so long as they make clear which is the paragraph "on which they rely. It seems to me quite plain that the "landlords here in their notice and in their answer were relying "on ground (*f*)." Hodson L.J. said[5]: "All that they had to "do was to indicate the ground—that is, ground (*f*)—and that "they have done. The fact that they did not go the whole "way and prove the widest extent to which sub-paragraph (*f*) "went does not mean that they failed because they only suc-"ceeded in proving the 'substantial part,' which means that "they travelled a lesser distance than the distance which they "would cover by their notice." Morris L.J. said[6]: "It seems "to me that by the notice of termination and by the answer, "which was amended to accord with the notice of termination, "the landlords were clearly referring to ground (*f*) of section "30 (1). I think that paragraph (*f*) of section 30 (1) constitutes "one ground of opposition, which ground may be satisfied in a "variety of ways. Mr. Blundell submits that a landlord may "discard something, but may not add to what he has asserted. "It does not seem to me that the landlord is adding anything "in this case. It seems to me that the greater includes the "less, and that the landlord here has proved enough to bring "him within ground (*f*) of section 30 (1)."

It is also plain from the decision in *Sidney Bolsom Investment Trust Ltd.* v. *E. Karmios & Co. (London) Ltd.*[7] that matters of inference may be admissible. In that case the tenant was making a request for a new lease; the Act required him to state the terms and the request had to be given by notice in a prescribed form, and had to set out the tenant's proposal as to the property to be comprised in the tenancy and the rent to be payable under the new tenancy and as to other terms in the new tenancy. The tenant in fact required a new tenancy at a new stated rent, and as to the other terms of the new tenancy upon the terms of the current tenancy set out in the original lease. It appeared when the case came to hearing that the tenant was hoping to get a term of fourteen years, whereas in fact his previous tenancy had only been one for seven years. There was a good deal of discussion about the admissibility of evidence to show that what he really wanted was a term of fourteen years which has nothing to do with the point which I have to decide now; but it is material that the Court of Appeal held that the reference to "terms" was sufficient by inference to import a period of seven years into the request for a new tenancy. As Harman J., who put the matter quite shortly, said[8]: "I must agree with my Lords that 'terms' here in "this section includes the length of the term. I cannot help "thinking that it would be well if hereafter those who make

[5] [1957] 1 W.L.R. 159, 160.
[6] Ibid. 160.
[7] [1956] 1 Q.B. 529; [1956] 2 W.L.R. 625; [1956] 1 All E.R. 536.
[8] [1956] 1 Q.B. 529, 544.

"these requests should express the term of years which they "want and should not leave it to be gathered by implication, "as it was left in this case. I do agree, nevertheless, that it "is a necessary implication from the notice which was sent "that a term of seven years was being asked for. Actually the "tenant did not want seven years; he wanted fourteen, and, by "giving evidence of that, sought to say that what appears to "have been a notice giving his proposals did not really give them "and was therefore no effective request. I must protest against "that method of construing a document." But it is clear from that case that a notice, under the other provisions at any rate, may be sufficient if a material part of it is merely imported by implication. Section 30 certainly requires the grounds to be stated, and the question is how far you can say that they are stated when they are not expressed but are to be implied.

It seems quite clear that the Court of Appeal in *Biles* v. *Caesar* [9] would have regarded it as sufficient for the landlord to have given the notice by saying: "I rely upon the grounds stated in "paragraph (*f*) of section 30, subsection (1)." If he had done that, I think the conclusion of the Court of Appeal would have been quite plain; but the Court of Appeal went further than that, and the question is: how far is one entitled to infer matters into a notice which is given?

The point does not seem to me to be one which is free from difficulty; but on the whole I think that I am bound to treat the decision of the Court of Appeal in *Biles* v. *Caesar* [10] as inferring that I must not require to import into the provisions of the Act as regards the landlord's notice to determine the complete strictness of a notice to quit under the ordinary law of landlord and tenant, and as it is a necessary condition of reliance on ground (*f*) that possession should be essential for the carrying out of work, I think that I am entitled to infer that when a landlord states that the grounds on which he relies are demolition, he must by inference also be importing a reference to the requirement that the work cannot be carried out reasonably without obtaining possession of the whole of them. As Harman J. said in the *Bolsom* case,[11] it was not a very admirable way of doing business, and the old rule that when one had to comply with the terms of a statute one had to be careful to use the same words which the statute used might well hold good in this case as in many others; but on the whole I have come to the conclusion in the present case, as Hodson L.J. said in *Biles* v. *Caesar*,[12] that the notice given by the landlord does indicate fairly to the tenant the grounds on which his application will be resisted, and it is sufficient to comply with the provisions of the Act. I will make a declaration that the landlord's notice

[9] [1957] 1 W.L.R. 156.
[10] Ibid.
[11] [1956] 1 Q.B. 529.
[12] [1957] 1 W.L.R. 156.

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is sufficient to enable him to oppose the grant of a new tenancy on the grounds specified in paragraph (*f*) of section 30 (1) of the Landlord and Tenant Act, 1954.

Declaration accordingly.

Solicitors: *Harold Benjamin & Collins; Harris, Chetham & Co.*

I. G. R. M.

[CHANCERY DIVISION.]

1959
May 4.

Roxburgh J.

* E. LTD. *v.* C. AND ANOTHER.

[1957 E. 961.]

Practice and Procedure—Writ—Renewal—Failure to serve within twelve months—Application for renewal out of time—Defendant deprived of defence of limitation by renewal—Jurisdiction of court—Discretion of court—R.S.C., Ord. 8, *r.* 1; *R.S.C., Ord.* 64, *r.* 7.

On August 29, 1957, the plaintiff company issued a writ against the defendants claiming that a deceased director of the plaintiff company and the defendants, his widow and daughter, who were also directors of the plaintiff company, were guilty of misfeasances and breaches of trust; but no dates were given as to when the misfeasances began or ended. The writ was never served on the defendants, but it was shown to their solicitors on September 10, 1957, when it was arranged that service of the writ should be withheld, the existence of the proceedings being regarded, by both sides, as no more than a protection in respect of the Limitation Act, 1939. On August 26, 1958, on an application under R.S.C., Ord. 8, r. 1,[1] a renewal of the writ for six months was granted which expired on February 29, 1959. On an application made in April 1959 for a further renewal of the writ:—

Held, that the court had jurisdiction under R.S.C., Ord. 8, r. 1, and R.S.C., Ord. 64, r. 7,[1] to grant the renewal if in its discretion it thought fit, but that a writ ought not to be renewed when such renewal would deprive a defendant of a statutory defence based

[1] R.S.C., Ord. 8, r. 1: "No original writ of summons shall be in force for more than twelve months from the day of the date thereof, including the day of such date; but if any defendant therein named shall not have been served therewith, the plaintiff may, before the expiration of the twelve months, apply to the Court or a Judge for leave to renew the writ; and the Court or Judge, if satisfied that reasonable efforts have been made to serve such defendant, or for other good reasons, may order that the original or concurrent writ of summons be renewed for six months from the date of such renewal inclusive, and so from time to time during the currency of the renewed writ. . . ."

R.S.C., Ord. 64, r. 7: "A Court or a Judge shall have power to enlarge or abridge the time appointed by these Rules, or fixed by an order enlarging time, for doing any act or taking any proceeding, upon such terms (if any) as the justice of the case may require, and any such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed. . . ."

on a limitation which had accrued before the date of the renewal, and, since the parties were attempting to use the rules for the very purpose for which they were not intended the court, in the exercise of its discretion, would refuse to renew the writ.

Battersby v. *Anglo-American Oil Co. Ltd.* [1945] 1 K.B. 23; 61 T.L.R. 13; [1944] 2 All E.R. 387 applied.

Holman v. *George Elliot & Co. Ltd.* [1944] K.B. 591; 60 T.L.R. 394; [1944] 1 All E.R. 639 not followed.

Summons adjourned into open court.

On August 29, 1957, the plaintiff, a limited company, issued a writ claiming a declaration that one G. E. W. C., deceased, and his widow, M. W. C., and daughter, G. J. C., the first and second defendants, were respectively guilty of misfeasances and breaches of trust in relation to the company as directors thereof in that they wrongfully occupied the company's freehold premises and part of the company's leasehold premises as private residences free of rent and expended the moneys of the company in the improvement, repair or maintenance or otherwise in respect thereof, and that the estate of the deceased and the defendants were jointly and severally liable to account to the company (a) for the benefits which the deceased and the defendants or any of them thereby obtained during such time as they were respectively in occupation of the premises and directors of the company, and (b) for the money expended as aforesaid. The writ also claimed, inter alia, all accounts and inquiries as might be necessary to determine the amounts due from the deceased's estate and from the defendants on the footing of the aforesaid declaration; that the deceased's estate and the defendants be charged with an occupation rent in respect of the time during which they were in possession or occupation of the premises in the taking of such accounts; and payment by the executors of the deceased, the defendants and one P. G., and the defendants, of the amounts shown to be due as a consequence of such accounts and inquiries.

The writ was amended on April 25, 1958, by deleting P. G. as a defendant. On August 26, 1958, an application was made to the master to renew the writ; and a renewal for six months was granted, which expired on February 29, 1959. In April 1959 the company applied ex parte for a further renewal of the writ. The summons was adjourned to the judge in chambers, who adjourned it into open court.

Further facts are stated in the judgment.

T. M. Shelford for the plaintiff company.

No cases, other than those referred to in the judgment, were cited in argument.

Roxburgh J. stated the facts set out above and continued: The matter depends upon two rules, and I am not going to enter into the rather disputable legal question as to whether the

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application is wholly under one, or partly under one and partly under the other. [His Lordship read R.S.C., Ord. 8, r. 1, and continued:] It is clear that any application under that rule has to be made before the expiration of the relevant period; and in this case it is common ground that no such application was made. Accordingly, reliance has to be placed on R.S.C., Ord. 64, r. 7, which is a general rule. [His Lordship read that rule and continued:] In my judgment, there is no lack of jurisdiction to grant this application made under the two rules in combination if, in my discretion, I think fit. The only relevance of the question whether the application is to be treated as a whole under R.S.C., Ord. 64, r. 7, or whether it is partly under R.S.C., Ord. 8, r. 1, is that in R.S.C., Ord. 8, r. 1, the discretion is qualified by the words "if satisfied that reasonable efforts have been made to "serve such defendant, or for other good reasons"; while R.S.C., Ord. 64, r. 7, is not so qualified. But, as the words "or for other good reasons" are in themselves very wide, I doubt if it makes much difference whether I proceed under the one rule, or partly under one and partly under the other. As there is some rather difficult authority on that point, I do not propose to embark on the question.

Although criticised in one important respect by the Court of Appeal in *Sheldon* v. *Brown Bayley's Steel Works and Dawnays Ltd.*,[1] it seems to be that the last word so far about these matters has been spoken by the Court of Appeal in *Battersby* v. *Anglo-American Oil Co. Ltd.*[2] The judgment of the court was read by Lord Goddard, and I call attention to the fact that it was the judgment of the court. First of all, it appears to me that that case does show that *Holman* v. *George Elliot & Co. Ltd.*,[3] a previous decision of the Court of Appeal, ought not to be followed because in *Battersby* v. *Anglo-American Oil Co. Ltd.*[4] the court said[5] of *Holman's* case[6]: "That is a decision of this "court, but, in our opinion, it is in conflict with the earlier cases "also decided in the Court of Appeal. Accordingly, in conformity "with the decision of the full court in the recent case of *Young* v. "*The Bristol Aeroplane Co.*,[7] we are at liberty to disregard it, "and, in our opinion, we ought to follow the earlier decisions."

Battersby v. *Anglo-American Oil Co. Ltd.*[8] first laid down a proposition which has some relevance to the present case, though it does not conclude it. In that case the deceased was killed by an explosion on a specified date, October 20, 1941, so that it was quite easy to see when the relevant statutory period of limitation would expire. The writ was issued on October 19, 1942, but was not served before the expiration of the statutory period on October 20, 1942. The Court of Appeal said, in effect, that the

[1] [1953] 2 Q.B. 393; [1953] 3 W.L.R. 542; [1953] 2 All E.R. 894.
[2] [1945] K.B. 23; 61 T.L.R. 13; [1944] 2 All E.R. 387.
[3] [1944] K.B. 591; 60 T.L.R. 394; [1944] 1 All E.R. 639.
[4] [1945] K.B. 23.
[5] Ibid. 32.
[6] [1944] K.B. 591.
[7] [1944] K.B. 718; 60 T.L.R. 536; [1944] 2 All E.R. 293.
[8] [1945] K.B. 23.

court would not allow a writ to be renewed when such renewal would deprive a defendant of a statutory defence based on a limitation which had accrued before the date of the renewal. The court said [9]: "We conclude by saying that, even when an "application for renewal of a writ is made within twelve months "of the date of issue, the jurisdiction given by the rule ought to "be exercised with caution. It is the duty of a plaintiff who "issues a writ to serve it promptly, and renewal is certainly not "to be granted as of course on an application which is necessarily "made ex parte. In every case care should be taken to see that "the renewal will not prejudice any right of defence then exist-"ing, and in any case it should only be granted where the court "is satisfied that good reasons appear to excuse the delay in "service, as, indeed, is laid down in the order. The best reason, "of course, would be that the defendant has been avoiding "service, or that his address is unknown, and there may well "be others, but ordinarily it is not a good reason that the plaintiff "desires to hold up the proceedings while some other case is "tried or to await some future development." Those are very material words in the present case. The judgment goes on: "It "is for the court and not for one of the litigants to decide "whether there should be a stay, and it is not right that people "should be left in ignorance that proceedings have been taken "against them if they are here to be served." The curious thing in this case is that not only are they here to be served, but the writ has been brought to the notice of their solicitors and yet it has not been served.

That decision has been criticised in one respect by the Court of Appeal in *Sheldon* v. *Brown Bayley's Steel Works Ltd. and Dawnays Ltd.*,[10] but there has never been any criticism by any court of the propositions in *Battersby* v. *Anglo-American Oil Co. Ltd.* [11] to which I have referred.

What are the facts in the present case? The first application for renewal was supported by an affidavit in these terms: "The "writ of summons herein was issued on the 29th August, 1957, "and was then issued inter alia for the purpose of avoiding the "operation of the Limitation Act, 1939, in respect of the subject-"matter of the company's claim." So that was one of the purposes for which the writ was issued.

Later on the solicitor making the affidavit said: "The matters "said to constitute those misfeasances and breaches of trust "arose, according to my instructions, wholly or in part sufficiently "long ago as to make it prudent to issue the said writ and, "indeed, counsel advised that unless the proceedings were insti-"tuted the new directors might themselves be guilty of breach "of trust. (5) Both prior to and since the issue of the said writ "negotiations have been taking place between the company and

[9] [1945] K.B. 23, 32.
[10] [1953] 2 Q.B. 393.
[11] [1945] K.B. 23, 32.

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"the defendants' advisers with respect to numerous matters "arising in connection with the affairs of the company including "the shareholdings of the defendants coupled with the liabilities "of the company. (6) In these circumstances the service of the "said writ has not been effected although the defendants' "advisers are fully aware that the proceedings have been issued. "In my respectful opinion service of the writ would be prejudicial "to the negotiations above referred to and, moreover, to the "interests of the company's creditors, provision for whose satis-"faction is an integral part of those negotiations, and it is desired "therefore that service of the writ should be deferred in the hope "that a satisfactory result will emerge from the said negotiations. "(7) Under the circumstances aforesaid I respectfully request "that leave be given for the writ to be renewed so as to keep alive "the cause of action dealt with by the indorsement thereon until "such time, if ever, as it becomes necessary to serve the same "and proceed with the company's claim."

The master granted a renewal on that affidavit; but, in my view, he ought not to have done so. It appears to me that the course which the parties followed is the course which is not allowed to be pursued; that is clear from the passage in the judgment of the court in *Battersby's* case,[12] which I have read. It is plain that the point of the writ was to stop the statutory period of limitation running. That is a very suspicious circumstance on any view, having regard to the law. No explanation is given as to when the misfeasances were supposed to have begun, how long they continued or what particular limitation was feared; but there is a plain admission that that was one of the objects of the action and later it is said that it was the primary object. Very little information was given on that application; and, in my view, that extension should never have been granted, though, on that occasion, the application was made in due time.

On April 16, 1959, that is to say, after time had expired, the same solicitor made a further affidavit in which he said: "It is desired further to renew the writ for the same reasons as "those mentioned in paragraphs 5, 6 and 7 of my said affidavit. "The negotiations there referred to have not yet been concluded, "though they are expected to fructify shortly. Service of the "writ has still been withheld." There is no explanation of why they did not make the application within due time.

After the matter was adjourned into court a further affidavit was filed by the same solicitor in these terms: "The primary "object"—and now it is the "primary object"—"in issuing "the writ in this action was to protect the interests of the "company's creditors having regard to the possibility that the "Statute of Limitations might apply. Moreover, the present "directors (who had been appointed to the board in 1956 on

[12] [1945] K.B. 23, 32.

"the resignation from the board of the company [of certain per-
"sons]) were advised that failure to institute the present action
"might involve them in personal liability at the instance of the
"creditors of the company. (4) Negotiations with a view to
"the adjustment of the position between the company and the
"defendants were entered into over a year before these proceed-
"ings were begun, and the same negotiations have been and still
"are actively proceeding. They are complex and in many
"respects delicate, particularly as it seems from knowledge which
"I have acquired while acting for the company that the late
"Mr. [C.], who was until his death the governing and sole
"managing director (holding with the defendants 78 per cent.
"of the issued share capital) tended to run the company without
"always a strict regard for legal formalities as though its assets
"belonged to him and his family. A great deal of progress has
"been made towards concluding a final arrangement between
"the company and the defendants, and there is a distinct possi-
"bility of a conclusion being reached in the near future.
"(5) During the course of a meeting, at which I was present,
"with the defendants' solicitors at their offices on the 10th Sep-
"tember, 1957, the writ in this action was produced and shown to
"them. It was by arrangement then made that service of the
"writ has been withheld, the existence of the proceedings being
"regarded by both sides as no more than a protection in respect
"of the matters referred to in paragraph 3 hereof in the event of
"its proving impossible after all to bring negotiations to a
"successful conclusion." It was not an undertaking to accept service or anything of that sort, which might have made all the difference. This was an attempt by the two parties to do the one thing which the Court of Appeal in *Battersby's* case [12] said did not lie in their power. It is not for them to decide whether writs should be renewed; but for the court to decide.

"Moreover," the affidavit continues, "the defendants in
"meetings with the present director at which I have been present
"have shown themselves to be sensitive of any criticism of the
"late Mr. [C.] so that for this reason also it has been considered
"inadvisable to serve the writ. It has been made clear to the
"defendants, through their solicitors, that, if it should become
"necessary to prosecute this action, the present directors as
"shareholders would not accept any personal benefit from any
"judgment which might eventually be obtained. (6) It is my
"respectful view that, by refraining from serving the writ and
"acting as in the previous paragraph mentioned, the negotiations
"with the defendants have been materially assisted. To go back
"on the arrangement made with the defendants' solicitors would,
"in my respectful opinion, have had an unsettling and prejudicial
"effect on the negotiations and might have given rise to a risk of
"their failure." Then two lines of explanation are given of the

[12] [1945] K.B. 23, 32.

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failure to make the application within due time: "The fact that "the writ had expired was inadvertently overlooked due to a "faulty diary entry."

Having regard to all those facts it seems to me that this is quite clearly a case in which I ought not to exercise my discretion in favour of a renewal of the writ. I need not analyse the facts, because the proper course is to look at all the facts together and see what is the general weight of them. In my view, the general weight of the facts is to show that the parties have been trying to use these two rules for the very purpose for which they are not intended. It is because nothing of this sort normally emerges in open court unless the case gets to the Court of Appeal and because, apparently (to judge by the previous history of this case), there has been some latitude in the administration of this rule that I have given permission for this judgment, without the names of the parties, to be made public. I dismiss the application.

Order accordingly.

Solicitors: *Warren & Warren.*

J. F. L.

[COURT OF APPEAL.]

C. A.

1959
April 22.

Lord Evershed M.R., Lord Jenkins and Willmer L.J.

*LAWS *v.* LONDON CHRONICLE (INDICATOR NEWSPAPERS) LTD.

[Plaint No. O. 1362.]

Master and Servant—Wrongful dismissal—Disobedience of servant—Whether wilful disregard of essential condition of service. Contract—Repudiation.

A few weeks after the plaintiff had joined the employ of the defendant company she was dismissed summarily for disobeying an order given by the chairman and managing director. During a business meeting which the plaintiff had been required to attend, the plaintiff's immediate superior, D., had an altercation with the chairman and managing director and D. left the meeting, inviting the plaintiff and another employee to accompany him. The chairman and managing director told the two employees to stay where they were but they both left the room. Having been summarily dismissed, the plaintiff brought proceedings:—

Held, that this single act of disobedience did not justify the summary dismissal of the plaintiff; it was not an act showing a wilful disregard of the essentials of the contract of service which amounted to a repudiation of the contract by the plaintiff; accordingly the plaintiff was entitled to damages for wrongful dismissal.

Dictum of Lord James of Hereford in *Clouston & Co. Ltd.* v. *Corry* [1906] A.C. 122, 129 applied.

Turner v. *Mason* (1845) 14 M. & W. 112 distinguished.

APPEAL from Judge Dale, sitting at the Westminster County Court.

By a letter dated May 28, 1958, the defendant company offered the plaintiff employment as an "advertisement representative" at a weekly salary of £10 with 5 per cent. commission. The employment was expressed to be terminable on either party giving one month's notice. The letter was signed by one Delderfield, the manager of the advertising staff. On Friday, June 20, the plaintiff and the other members of the advertisement staff were required to attend a meeting in the room of the chairman and managing director, a Mr. Brittain. The meeting was convened to hear observations of a Mr. Blakey, on matters of business efficiency. During the meeting Mr. Brittain had an altercation with Delderfield. It was suggested that Delderfield was drunk and that he needed black coffee to calm him. He said that he would stand no more and would go "taking the staff" with him. He did leave, inviting his two juniors to accompany him. Brittain said to them "Stay where you are," but they both left the room.

On the following Monday, June 23, when the plaintiff attended the defendants' premises she was handed a letter, addressed to her by the secretary, which stated: "It is impossible for the company to overlook your behaviour and actions in leaving the conference last Friday in defiance of the managing director's request that you remain." As a result the plaintiff left the service of the defendant company.

She brought proceedings for wrongful dismissal and claimed damages. The defendants denied that she had been dismissed, but said that, if there was dismissal, it was not wrongful. The county court judge awarded her £45 damages and costs, and the defendants appealed on the issue of wrongful dismissal only.

Owen Stable for the defendant company.
Stephen Stewart for the plaintiff.

In addition to the cases referred to in the judgment of Lord Evershed M.R., the following were cited in argument: *Bouzorou* v. *Ottoman Bank* *; *Spain* v. *Arnott*.†

LORD EVERSHED M.R. stated the facts and continued: It is the corner-stone of Mr. Stable's case that there was in truth nothing that a self-respecting employer could do but to dismiss summarily: for here was an order given—"Stay where you are"—and disobeyed. Mr. Stable has cited authority—of antiquity, but none the less of respectability—to show that disobedience (as he contends) of any order that is lawful entitles the employer to dismiss the servant summarily. In *Turner* v. *Mason* [1] a domestic servant—quite deliberately, because she had made a request

* [1930] A.C. 271.
† (1817) 2 Stark. 256.
[1] (1845) 14 M. & W. 112.

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which was rejected—absented herself during a certain night when she should have been on duty; and her plea of justification was that her mother was desperately ill—though it is not clear that she so informed her employer. She was dismissed; and the court of Queen's Bench affirmed the view that the dismissal was justified. I will not read the judgments of Parke C.B. and Barons Alderson and Rolfe; but it would in my judgment be going too far to say that any of those judges laid it down as a proposition of law that every act of disobedience of a lawful order must entitle the employer to dismiss. I think that cannot be extracted from the judgments; and I am satisfied that it is too narrow a proposition as one of law.

The law to be applied is stated (for example) in the paragraphs of Halsbury's Laws of England, 3rd ed., Vol. 25, at pp. 485 and 486, to which Mr. Stable referred us in reply; and I will cite a sentence or two as a foundation to what follows. "Wilful disobedience to the lawful and reasonable order of the "master justifies summary dismissal." Then, a little later, "Misconduct, inconsistent with the due and faithful discharge "by the servant of the duties for which he was engaged, is good "cause for his dismissal, but there is no fixed rule of law defining "the degree of misconduct which will justify dismissal." Later, again, "There is good ground for the dismissal of a servant if he "is habitually neglectful in respect of the duties for which he "was engaged." And in one of the footnotes on that page there is a further statement, in reference to *Edwards* v. *Levy*,[2] observing that in that case "it was pointed out that a single "instance of insolence in the case of a servant in such a position "as that of a newspaper critic would hardly justify dismissal."

To my mind, the proper conclusion to be drawn from the passages I have cited and the cases to which we have been referred is that, since a contract of service is but an example of contracts in general, so that the general law of contract will be applicable, it follows that the question must be—if summary dismissal is claimed to be justifiable—whether the conduct complained of is such as to show the servant to have disregarded the essential conditions of the contract of service. It is, no doubt, therefore, generally true that wilful disobedience of an order will justify summary dismissal, since wilful disobedience of a lawful and reasonable order shows a disregard—a complete disregard—of a condition essential to the contract of service, namely, the condition that the servant must obey the proper orders of the master, and that unless he does so the relationship is, so to speak, struck at fundamentally.

In the passages which I have read, it will be remembered, there is a statement ". . . there is no fixed rule of law defining "the degree of misconduct which will justify dismissal." That statement is derived from the judgment of the Privy Council delivered by Lord James of Hereford in the case to which Mr.

[2] (1860) 2 F. & F. 94.

Stewart referred of *Clouston & Co. Ltd. v. Corry*.[3] I will read a rather larger passage which provides the context. Lord James said: "Now the sufficiency of the justification depended upon "the extent of misconduct. There is no fixed rule of law defining "the degree of misconduct which will justify dismissal. Of "course there may be misconduct in a servant which will not "justify the determination of the contract of service by one of "the parties to it against the will of the other. On the other "hand, misconduct inconsistent with the fulfilment of the ex-"press or implied conditions of service will justify dismissal."

In the present case, the judge, in the course of his judgment, said: "It is clear and sound law that to justify dismissal for "one act of disobedience or misconduct it has to be of a grave "and serious nature"; and later he concluded, in the plaintiff's favour, that what she had done, or not done, on June 20 was not sufficiently grave to justify dismissal.

With all respect to the judge, I think that his proposition is not justified in the form in which he stated it. I think it is not right to say that one act of disobedience, to justify dismissal, must be of a grave and serious character. I do, however, think (following the passages which I have already cited) that one act of disobedience or misconduct can justify dismissal only if it is of a nature which goes to show (in effect) that the servant is repudiating the contract, or one of its essential conditions; and for that reason, therefore, I think that you find in the passages I have read that the disobedience must at least have the quality that it is "wilful": it does (in other words) connote a deliberate flouting of the essential contractual conditions.

If I have stated correctly the basis of the law to be applied, let me return to the facts of this case. I do not narrate again the circumstances in the chairman's room on the afternoon of June 20, 1958. But the plaintiff said: "I left because I owed "loyalty to Mr. Delderfield who was my direct superior and I "was very embarrassed and felt it impossible to stay. I did "not know what to do I was so upset." I have no doubt that the judge (who saw the witnesses) believed her: for, in the final paragraph of his judgment, he said: "She had served loyally up "to then. There was this row between her immediate superior, "Delderfield, and Brittain. The only thing Brittain said to her "was 'You stay where you are.' She did not do so but walked out "of the room. Till then she had been a good girl. This was "the one and only act of disobedience. She was put in a diffi-"cult position." As I have said, I take it (and no ground for a contrary view has been put to us) that the judge did accept her as a witness of truth. The situation was plainly one which was as embarrassing as it was unpleasant for her; and in the circumstances, with her immediate superior walking out and asking her to follow, I am satisfied that it cannot be said that her conduct

[3] [1906] A.C. 122, 129.

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Laws v. London Chronicle (Indicator Newspapers) Ltd.
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did amount to such a lawful disobedience of an order, such a deliberate disregard of the conditions of service, as justified the employer in saying "I accept your repudiation: I treat the "contract as ended: I summarily dismiss you."

I am a little comforted, I must say, by the circumstance that, when Mr. Campbell wrote his letter on Monday, June 23, he did, after all, refer to Mr. Brittain's remark "You stay where you "are," not as an order, but as a "request." It was in truth not really an order related to her duties as advertisement representative: it was a wise direction for him to have given in order to try to create out of disorder something more seemly in his room on the afternoon in question.

For those reasons, though I have, as I say, felt that the judge in his brief statement may not quite correctly have stated the law to be applied, and to that extent I accept the argument put to us by Mr. Stable, none the less in the end I come—and I come, I must say, unhesitatingly—to the same conclusion as the judge; and would dismiss the appeal.

Lord Jenkins. I agree; and cannot usefully add anything.

Willmer L.J. I also agree.

Appeal dismissed.

Solicitors: *Oswald Hickson Collier & Co.; Tyrrell Lewis & Co.*

E. D.

[COURT OF APPEAL.]

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1959
April 21.
Lord Evershed M.R. and Willmer L.J.

* WATSON *v.* CAMMELL LAIRD & CO. (SHIPBUILDERS AND ENGINEERS) LTD.

[Plaint No. 1957 W. 394.]

Practice and Procedure—Discovery—Privilege—Documents made in contemplation of litigation—Copy made of document not privileged—Hospital case notes—Copy prepared by solicitors for litigation.

The plaintiff in an action for personal injuries objected to the production of a copy made by his solicitors of the case notes prepared by a hospital which he had attended for treatment after the accident. The copy was made to assist the solicitors in advising their plaintiff in connection with his claim:—

Held, that the copy was obtained by the solicitors for the purposes of the action and, accordingly, that it was privileged.

The Palermo (1883) 9 P.D. 6 applied.

Chadwick v. *Bowman* (1886) 16 Q.B.D. 561 distinguished.

Appeal from Elwes J.

The plaintiff, Robert James Watson, in an action for damages

for personal injuries, claimed that a copy of the case notes prepared by the Birkenhead Hospital Management Committee in respect of his attendance for treatment at St. Catherine's Hospital, Birkenhead, were privileged and should not be produced to the defendants. The claim in the action was based on disablement resulting from meningitis which the plaintiff had developed early in 1957 when he returned to work after an accident. The defendants wanted to see the reports before the trial of the action because meningitis could be infective in origin or traumatic, that is resulting from an injury. The information in the reports would, therefore, be relevant to the preparation of the defence and to the desirability, or otherwise, of making a payment into court. The writ in the action was issued on December 4, 1957, but it had been made plain by the plaintiff's advisors soon after he had developed meningitis that proceedings would be taken, so that when the copies of the reports were made, litigation was in active contemplation. The copies were made by the plaintiff's legal advisers to assist in advising their client in making his claim. The defendants applied to the hospital Management Committee to see the reports but were refused permission.

In February 1959 Elwes J. refused an application by the defendants for discovery of the copy and they appealed.

C. M. Clothier for the defendants.
David McNeill for the plaintiff.

In addition to the cases referred to in the judgments, the following case was cited in argument: *Lyell* v. *Kennedy*.[1]

LORD EVERSHED M.R. I am clearly of opinion that the judge rightly rejected the defendants' claim to disclosure of the document with which we are concerned. [His Lordship stated the facts and continued:] I ventured to point out to Mr. McNeill that the bare statement made by the plaintiff in his affidavit of documents that he objected to production "on the ground that "such documents are privileged" might not have sufficed of itself. But that point was not taken in this court, in the exercise of what probably is common sense; because the facts are clear: this document, this copy of the case notes, was undoubtedly, and admittedly, prepared by the solicitors for the plaintiff after the litigation had either commenced or was—clearly—contemplated; and also it is not in doubt that the document was prepared by the solicitors for the purpose of assisting and advising their client, the plaintiff, in connection with his claim.

Prima facie, therefore, it would appear clear that the document is privileged, being of the class which is described in the notes at p. 691 of the Annual Practice, 1959—copies which have come into existence or have been made "for the purpose of

[1] (1884) 27 Ch.D. 1.

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"obtaining for or furnishing to the solicitor evidence to be used "in the litigation, or information which might lead to the ob-"taining of such evidence. . . ." It has, however, been contended with vigour by Mr. Clothier that that general rule ought not to apply where the document is a mere verbatim copy of a document not itself the subject of privilege, because, he says, the making of such a copy involves in itself no exercise of skill, properly so called. He says that if the solicitor had exercised some kind of eclectic judgment in making the copy, leaving out bits that were irrelevant or unhelpful, then it would be another matter: but since (says he) the actual case notes would be liable to be produced at the trial, on service on the appropriate hospital officer of a subpoena duces tecum, and since therefore the original would never be privileged, in any proper sense, so a mere verbatim copy can be in no better position.

I am unable to accept that view. The question of privilege does not really have any significance in regard to the original: that is a document which is not, and never has been, in the possession or power of the plaintiff. It is a document which is in the possession of a third party; and undoubtedly by the appropriate means it can be produced at the trial. But that fact seems to me to have very little to do with the question whether this document—this copy document—did or did not come into existence in the way I have indicated, namely, by being obtained by the solicitor for the purpose of advising his client in regard to the litigation.

Mr. Clothier relied upon a decision of the Divisional Court of the Queen's Bench Division in *Chadwick* v. *Bowman*.[1] That, however, as it seems to me, was a different case; because there the essential fact was that certain letters which the defendant had received, and copies of letters which he had written, had been at some stage destroyed by the defendant, and in order to replace them the defendant obtained from the third party, from and to whom they had been written, copies, which therefore would be available as secondary evidence of the original documents which he himself had lost or destroyed. The court said, accordingly, that these copies, the mere replacements of something which he would have had to produce himself, must be produced. As Mathew J. put it: "It does not appear to me that these docu-"ments really came into existence for the purpose of the action "within the true meaning of the rule upon which the defendant's "counsel relied."

But the copy document with which we are concerned undoubtedly did so come into existence. There can have been no conceivable reason for the solicitor having made the copy save for the purpose of the action which was then contemplated or pending; and in so far as skill is involved it was part of his professional skill in assisting his client to go to the hospital and

[1] (1886) 16 Q.B.D. 561.

get it. It seems to me, therefore, that the case is within the scope of the principle illustrated in *The Palermo*.[2] In that case there had been a collision between two vessels, the *Rivoli* and the *Palermo*; and under the Merchant Shipping Act, 1854, certain depositions had been taken by the Board of Trade from the master and members of the crew of the *Rivoli*. The owners of that vessel brought the proceedings against the owners of the *Palermo*, and the *Palermo* sought to obtain from the plaintiffs copies of the Board of Trade depositions which the plaintiffs' solicitors had obtained. It was, on the face of it, I should have thought, a parallel case. The court pointed out that it did not see why the Board of Trade should give copies to one side rather than to the other; but that was neither here nor there; and Butt J., at first instance, said[3]: "Here discovery is sought of copies of "certain depositions, and these were obtained for the purposes "of this action, and as the phrase is, 'to form part of the brief.' "Therefore, I think that they are privileged, and I shall not "inquire for what purpose the original depositions were taken, "since it is the copies of which discovery is sought, and which "were obtained for the purposes I have stated." Then it is observed that the defendants appealed, and that this court dismissed the appeal without calling upon the counsel for the respondents.

It seems to me that in this case (as in *The Palermo*) the document with which we are concerned is a copy which was made by the plaintiff's advisers for the purposes of the litigation in which the solicitors were acting for the party. That being so, it seems, I think, clear that the judge was right to say that he could not make the order.

As a matter of common sense, I felt sympathy with Mr. Clothier, for the defendants, because plainly his conduct of the defence (including the matter of possible payment into court) would be materially affected by the medical evidence that the case notes would supply. I am, however, happy to say that anxiety and sympathy on those grounds is greatly lessened because Mr. McNeill has pointed out that he has, or that those advising him have—very sensibly, if I may say so—offered to disclose these documents provided that a similar courtesy or facility is shown on the other side—that offer being expressed to be without prejudice to what the strict rights may be; and that Mr. Clothier has not accepted that offer, preferring (I gather) to treat this as a matter of right or principle which, he says, may be important, at any rate in the area of Liverpool and Birkenhead. If it is important as a matter of principle, I have stated the answer; and, as my brother Willmer has observed, if the answer were otherwise, if we accepted Mr. Clothier's argument that some slight exercise of selection in making the copy would make all the difference, perhaps it would not amount to very much anyway

[2] (1883) 9 P.D. 6.
[3] Ibid.

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if we decided the case in Mr. Clothier's favour. However that may be, I conclude, for the reasons I have stated, that the appeal cannot succeed. I add, again, that I am happy to think that those advising the parties in practice have shown good sense in trying to assist to a conclusion of the matter.

I would dismiss the appeal.

WILLMER L.J. I am of the same opinion. Apart from the other reasons which my Lord has given and with which I wholly agree, we are, in my judgment, bound by the decision in *The Palermo*,[4] which was a decision of this court. That, in my judgment, of itself is sufficient to conclude this appeal.

Appeal dismissed.
Leave to appeal to House of Lords refused.

Solicitors: *Carpenters for Laces & Co., Liverpool; Field, Roscoe & Co. for Berkson & Berkson, Birkenhead.*

E. D.

[4] 9 P.D. 6.

[QUEEN'S BENCH DIVISION.]

1959
April 23, 24.
Winn J.

* ACKROYD & SONS *v.* HASAN.

[1957 A. No. 1297.]

Agency—Estate agent—Commission—Whether "prepared to" means "does"—Payable upon introduction of a person "prepared to enter "into a contract to purchase on certain terms or on such other "terms to which you may assent"—Agreement to sell property "subject to contract"—Contract to purchase signed by purchaser—Refusal by vendor to sign contract—Meaning of "prepared to enter "into a contract"—Meaning of "assent"—Whether agent's commission payable.

The plaintiffs, a firm of estate agents, were consulted by the defendant, who wished to sell her leasehold interest in certain premises. The terms of the contract between the parties were contained in a letter written by the plaintiffs, which set out the terms upon which the defendant was prepared to sell the lease and continued: "We would take this opportunity of confirming that in the "event of our introduction of a party prepared to enter into a "contract to purchase on the above terms or on such other terms to "which you may assent you will allow us commission upon the "scale of the Estate Agents' Institute."

The plaintiffs introduced two applicants who were interested

[Reported by GROVE HULL, Esq., Barrister-at-Law.]

jointly in purchasing the lease, and negotiations proceeded between the applicants and the defendant "subject to contract." At the conclusion of these negotiations the solicitors acting respectively for the applicants and for the defendant prepared counterparts of the proposed contract of sale. The applicants signed their part of the contract, and it was forwarded to the defendant's solicitor, who sent the defendant's part of the contract to her for signature. The defendant then decided not to sign her part of the contract and, in consequence, no enforceable contract came into existence.

In an action by the plaintiffs claiming that they had earned their commission under the contract with the defendant:—

Held, (1) that as a matter of construction, having regard to the relationship of the parties, the words "introduction of a party "prepared to enter into a contract" meant "introduction of a "party who does enter into a contract."

Decision of Lord Goddard C.J. in *Peter Long & Partners* v. *Burns* [1956] 1 W.L.R. 413; [1956] 2 All E.R. 25 applied.

(2) That in the context in which it occurred, the word "assent" meant a final assent at the last moment at which the defendant could give her concluded and considered assent to the terms of the contract.

(3) That, in consequence, the event stipulated in the contract between the plaintiffs and the defendant as that upon which the plaintiffs' commission would be earned had never occurred, and the plaintiffs' claim failed.

ACTION.

The following statement of the facts is taken in substance from the judgment.

In 1956 the defendant, Mrs. Ida Hasan, held premises at No. 11, Wardour Street, London, W.1, under a lease. In the basement and on the ground floor of the premises the defendant carried on a catering business known as the Stage Door Grill. On the second floor of the premises the defendant's husband carried on the business of conducting a non-residential club. The defendant and her husband assisted each other in the conduct of their respective businesses, and the defendant permitted her husband to use a room on the first floor of the premises as a store for goods needed for the club.

In July 1956 the defendant decided to sell the lease of the premises, subject to the reservation of a sub-tenancy of the second floor to her husband to enable him to continue the club business. She consulted Ackroyd & Sons, estate agents, the plaintiffs in the present action, and on July 23, 1956, a meeting took place between the defendant's husband, acting for her, and a Mr. Smalley, a partner in the plaintiff firm. At this meeting an oral agreement was concluded, and on July 24, 1956, the following letter was written by the plaintiffs to the defendant's husband. It was alleged and admitted by the pleadings that the letter accurately set out the terms of the agreement between the plaintiffs and the defendant.

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"*Re* 11, *Wardour Street*, *W*.1.

"Following our meeting of yesterday, we are pleased to confirm with thanks, receipt of your instructions to offer for sale your leasehold interest in the above property together with the business of the Stage Door Grill on the ground floor and basement, in the sum of £12,000 S.A.V.,"—meaning stock at value—"it being agreed that you shall take a tenancy of the second floor at a rent of £500 per annum exclusive . . .

"We would take this opportunity of confirming that in the event of our introduction of a party prepared to enter into a contract to purchase on the above terms or on such other terms to which you may assent you will allow us commission upon the scale of the Estate Agents' Institute."

The plaintiffs introduced two applicants, who were interested jointly in purchasing the lease, and negotiations took place between the parties "subject to contract." During these negotiations it was agreed, inter alia, that the purchase price of the lease should be £9,750, and the terms of the proposed underlease were approved. Counterparts of the proposed contract were then prepared by the solicitors acting respectively for the applicants and for the defendant. The applicants signed their part of the contract, and it was forwarded by their solicitor to the defendant's solicitor, who then sent the defendant's part of the proposed contract to her for signature. The correspondence relevant to these steps is set out in the judgment.

The defendant then realised for the first time that she had omitted to reserve the store-room or any other part of the first floor for her husband's use in his club business, and as a result she declined to sign her part of the proposed contract and the transaction went off.

The plaintiffs claimed that they were entitled to their commission on the grounds that they had introduced parties prepared to enter into a contract on terms to which the defendant had assented. By her defence the defendant contended that her assent was "subject to contract," and that the applicants were not prepared to enter into a contract to purchase the lease upon terms to which she had assented within the true construction of the letter of July 24, 1956. It was common ground between the parties that if the plaintiffs had earned their commission, it would amount to £404 7s. 6d.

Harold Lightman Q.C. and *Edward Secley* for the plaintiffs.

D. P. Croom-Johnson Q.C. and *Peter Ripman* for the defendant.

The judgment is reported solely on the question of the construction of the agreement under which the plaintiffs claimed commission.

The following cases, in addition to those referred to in the

judgment, were cited in argument: *Jones* v. *Lowe* [1]; *McCallum* v. *Hicks* [2]; *Graham and Scott (Southgate) Ltd.* v. *Oxlade* [3]; *E. P. Nelson & Co.* v. *Rolfe* [4]; *Midgley Estates Ltd.* v. *Hand* [5]; *Dennis Reed Ltd.* v. *Goody* [6]; *Christie, Owen and Davies Ltd.* v. *Stockton* [7]; *Eccles* v. *Bryant and Pollock* [8]; *Bennett, Walden & Co.* v. *Wood.* [9]

WINN J. This action is a claim for commission by a firm of estate agents. There is a great body of authority on this topic which, in a very tantalising way, almost touches the point which I have to decide; but as has been repeatedly recognised, each of these cases is in reality a new case. I am quite confident about one matter, and that is that I could not have had more or better help than I have received from counsel.

[His Lordship stated the facts and continued:] In July 1956, the plaintiffs were consulted and received certain instructions. I think one might conveniently look at the two termini of this transaction, the origin and the terminus ad quem—the end of it. The letter dated July 24, 1956, was written by the plaintiffs to the husband of the defendant and sets out the terms of the contract between the two parties, the plaintiffs being the agents of the defendant. I would emphasise that there has been no suggestion that the terms purported to be recorded in that letter differ in one single iota from the terms orally agreed when Mr. Hasan, acting for his wife, met Mr. Smalley the day before the letter was written. There is no suggestion that the agents overreached the defendant by trying to put upon her terms more generous to themselves than the terms which she and her husband understood to be the terms of the contract. [His Lordship referred to the first paragraph of the letter and continued:] In this letter there occur the essential words which I have to consider: "We "would take this opportunity of confirming that in the event "of our introduction of a party prepared to enter into a contract "to purchase on the above terms or on such other terms to "which you may assent you will allow us commission upon the "scale of the Estate Agents' Institute."

The end of this matter came in about the middle of January 1957. By that time there were solicitors acting for the defendant, the potential vendor, and for the applicants who were negotiating to acquire the premises. On January 10, 1957, the two solicitors being in close touch with each other, the applicants'

[1] [1945] K.B. 73; 61 T.L.R. 57; [1945] 1 All E.R. 194.
[2] [1950] 2 K.B. 271; 66 T.L.R. (Pt. 1) 747; [1950] 1 All E.R. 864.
[3] [1950] 2 K.B. 257; 66 T.L.R. (Pt. 1) 808; [1950] 1 All E.R. 856.
[4] [1950] 1 K.B. 139; 65 T.L.R. 494; [1949] 2 All E.R. 584.
[5] [1952] 2 Q.B. 432; [1952] 1 T.L.R. 1452; [1952] 1 All E.R. 1394.
[6] [1950] 2 K.B. 277; 66 T.L.R. (Pt. 1) 918; [1950] 1 All E.R. 919.
[7] [1953] 1 W.L.R. 1353; [1953] 2 All E.R. 1149.
[8] [1948] Ch. 93; [1947] 2 All E.R. 865.
[9] (1950) 66 T.L.R. (Pt. 2) 3; [1950] 2 All E.R. 134.

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solicitor sent to the vendor's solicitor a letter saying: "We "now enclose herewith our clients' part of the contract signed, "together with draft underlease approved . . . Please let us "have your client's part of the contract in exchange as soon as "possible." On January 11 the vendor's solicitor acknowledged receipt of that letter. On January 14 the vendor's solicitor wrote to the applicants' solicitor saying: "I have further considered "the draft underlease and I return your copy herewith. Please "note the further amendments I have made. I have forwarded "the contract to my client for signature on the basis that you "agree these amendments." There was no difficulty about those amendments being agreed, and one reaches, on January 14, 1957, the position that the applicants had authorised their solicitor to send forward to the vendor's solicitor one part of a contract which, as far as the legal provisions set out in that contract were concerned, had been agreed between the solicitors. When I use the words "one part of a contract" I mean a document which set out the terms which, if they became binding, would constitute the terms of the contract. The applicants had clearly authorised their solicitor to send forward with their signatures upon it one part of such a document, whereas the vendor's solicitor, as appears from the letter I have read, was going to send and in fact did send the other part to his client. No doubt one is justified in inferring that he sent it to her with an intimation that as far as the legal provisions were concerned, he was satisfied that the document was in order and could be signed by her as a proper legal instrument giving effect to what he understood her to intend.

There it might be said that one had reached the point of the flowering of the tree which the agents had been tending so carefully up to that time, in so far as agents ever do tend a tree once they have planted it and seen that it is beginning to grow in the right way. Then things began to go wrong. In its simple form this is a case in which the contemplated transaction very nearly came off, but in fact no contract enforceable in law or equity came into existence between the defendant and the applicants, because she never signed her part of the contract. On the other hand, it is quite plain that the agent had done all that he could possibly be expected to do in the circumstances, and probably rather more than he could have been called upon to do, because he appears to have smoothed out certain little hitches which arose and encouraged both parties to think they were getting a good bargain. The case is very peculiar in its circumstances because there was nothing more for the solicitors to do either; they had negotiated between themselves all the legal points and phraseology which it is necessary for solicitors to agree on behalf of their respective clients. In those circumstances one turns to consider whether the event stipulated in the commission contract, as that upon which the right to commission would accrue, did or did not occur.

It seems to me to be perfectly plain, as a general proposition of the law of contract, and not by any means as a special rule relating to estate agents or commission contracts, that where there is provision for a reward, one must always look to see what is the precise definition in the contract of the event upon which that reward will be earned. Such a contract does not necessarily provide that one party will render services to the other. Thus, estate agents do not agree to render services to the owners of property. The proposition applies to any contract whereby one party agrees that if services are rendered to him by the other, or if he gains an advantage as a result of having availed himself of some facility or knowledge of the other party, he will reward that other party. So, in this case, one comes back to the words: "in the event of our introduction of a party "prepared to enter into a contract to purchase on the above "terms or on such other terms to which you may assent you "will allow us commission . . ."

After a careful survey of the relevant cases, I have come to the conclusion that there is no case precisely in point here. *John E. Trinder & Partners* v. *Haggis* [1] is so very near to it that I feel difficulty, but no logical difficulty, in taking a view of this present case which arrives at a result opposite to that arrived at by the majority of the Court of Appeal in that case. I think that in this sort of contract one must look with very great precision at the definition of the event upon which the reward will be earned, and I am of opinion that, whatever might have been the position had I been deciding this case in the 1940's, shortly after *Luxor (Eastbourne) Ltd.* v. *Cooper*,[2] I am now constrained, not by any express direction from the Court of Appeal, but by the philosophy implicit in the judgments in the cases decided in 1951 and 1952, to regard the phrase "prepared to enter into" as a nullity, if that phrase is sought to be construed against the owner of the property. One must ignore any such phrase as "prepared to enter into" and construe the document as a matter of law as though it did not contain those words but read "a party "who enters into a contract" in place of "a party prepared to "enter into a contract."

I need not at this late stage in the line of authorities, and after they have been so carefully examined in this court, refer to the repeated observations, not only by Lord Denning, but by others, to the effect that it makes no difference whether one says "introduce a party who purchases," "introduce a party who is "ready to purchase," "introduce a party who is prepared to "purchase," or "introduce a party ready, willing and able to "purchase." In all those cases the meaning is equivalent to "introduce a party who does purchase." I hold that this phrase "introduction of a party prepared to enter into a contract"

[1] [1951] W.N. 416.

[2] [1941] A.C. 108; 57 T.L.R. 213; [1941] 1 All E.R. 33.

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means, as a matter of construction, precisely the same as "introduction of a party who does enter into a contract." I find the greatest help in this connection in the judgment of Lord Goddard C.J. in *Peter Long & Partners* v. *Burns*.[3] In that case the relevant words were "introducing a person ready, willing and "able to enter into a binding contract to purchase." There was no doubt in that case that the applicant was perfectly ready and able and willing to enter into a binding contract; he signed a contract which was not binding only ex post facto, because it was induced by an innocent misrepresentation upon a town and country planning matter.

Mr. Croom-Johnson submitted that for the sake of certainty and clarity, and because of the necessity of being able to say at what point if any the contract bites upon the owner of the property in favour of the estate agent, it is necessary to have the one clear and undoubted criterion: has there been a contract? That submisssion was convincing. In a case such as this, where the parties had been negotiating "subject to contract," all appreciating that until counterparts of the contract had been exchanged there would be a locus poenitentiae for each party that criterion means: have contracts been exchanged?

I find some help in arriving at that view when I look at the last paragraph of the letter of July 24, where I notice the disjunctive effect of the word "or." It seems to me that that is consistent with the general approach which the courts have urged that judges should make towards this type of contract, and the submission which Mr. Croom-Johnson has made to me. The meaning of that word "or" must be this, that the terms effectively contemplated and communicated to the agents were that they were to offer for sale the leasehold interest in the property together with the business of the Grill for the sum of £12,000, subject to the grant of an underlease of the second floor to Mr. Hasan at a rent of £500 per annum; then there was to be commission payable on the introduction of "a party prepared to "enter into a contract to purchase on the above terms"—"or," by contrast to that, "on such other terms to which you may assent." I think, and this is part of my reason for coming to the conclusion I have formed, that in that context the word "assent" means: finally assent at the last moment of time at which you, the property owner. will be entitled, when the negotiations have proceeded to that final stage, to say: "These are the terms precisely "to which I give my concluded and considered assent." I do not think it permissible to construe in favour of the estate agent and against the property owner in such a contract as this the word "assent" as meaning: "give a half-considered assent on the "basis that it seems at the moment to be all right, but possibly "with a mental reservation, due to advice received from the

[3] [1956] 1 W.L.R. 413; [1956] 2 All E.R. 25 (on appeal [1956] 1 W.L.R. 1083; [1956] 3 All E.R. 207).

"solicitor, that there is no final commitment on this matter until "the time comes for exchanging the formal contracts."

For the reasons which I have endeavoured to indicate, and without pretending that I have found this case anything but difficult as well as interesting, in my judgment this claim fails.

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Judgment for the defendant.

Solicitors: *Pratt & Sydney Smith; R. C. de M. Blum.*

[QUEEN'S BENCH DIVISION.]

*ROSS v. RIVENALL.

1959 *May* 1.

Lord Parker C.J., Donovan and Salmon JJ.

Road Traffic—Taking and driving away—Passenger—Evidence of association between driver and passenger—Facts sufficient for prima facie case.

A motor-car, which was left locked, with no ignition key in it and only sufficient petrol to travel six miles, was taken and driven away without the owner's consent. At 1.55 a.m. the car was found stranded without petrol six miles away, with four men in it, one of whom was the defendant, who was sitting in the back seat. The car's lights were on, but there was no ignition key and the wiring had been tampered with. When the defendant was told he was going to be arrested he made no reply, but when he got to the police station, according to a police officer, he said: "A bloke "stopped and asked me if I wanted a lift so I got in." The defendant was convicted before a magistrates' court of unlawfully taking and driving away a motor-vehicle, and unlawfully using the vehicle without there being in force a policy of insurance. On appeal, at the end of the prosecution case, the recorder held that the prosecution had failed to make out a case on either charge for the defendant to answer; the prosecutor appealed:—

Held, that, taking into account the time and all the surrounding circumstances, there was sufficient evidence of association between the defendant and the driver of the car to constitute a prima facie case for the defendant to answer on the offences charged.

CASE STATED by Recorder of West Ham Quarter Sessions.

The defendant, Raymond Kenneth Ross, was convicted by the West Ham Magistrates' Court on two informations preferred by the prosecutor, John Rivenall, a detective-constable of the Metropolitan Police, namely, that (1) he between August 29 and 30, 1958, at Frederick Street, Stratford E.15, did unlawfully take and drive away a motor-vehicle, namely, a Ford Consul motor-car, registration No. XKO 213, without having either the consent of the owner or other lawful authority, contrary to section 28 of the Road Traffic Act, 1930, and (2) he between August 29 and 30, 1958, at Frederick Street did unlawfully use a motor-vehicle without there being in force in relation to the user of the vehicle a policy of insurance or such security in respect of third party risks

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as complies with Part II of the Road Traffic Act, 1930, contrary to section 35 of the Act. The defendant appealed to quarter sessions.

The recorder found the following facts: A Ford Consul motor-car, registration No. XKO 213, the property of the Stratford Car Hire Co., was unlawfully taken and driven away from the company's premises at Frederick Street, Stratford, E.15, without the owner's consent or other lawful authority, between the hours of 7.30 p.m. on August 29, 1958, and 8.30 a.m. on August 30, 1958. The car had been left locked and closed (though one of its window catches was faulty), and with no key left in it. The car had only enough petrol in it to run for a distance of about six miles. At 1.55 a.m. at the junction of Woolwich Road and Westcombe Hill the car was seen being driven by a man called Richards. A man called Goodier was the front passenger; a man called Waddington was the rear offside passenger, and the defendant was the rear near-side passenger. When the car was seen by the police, Waddington and the defendant were sitting very low in the rear seat with their feet outstretched and their heads back. When the police sergeant went up to question them, leaning through the door of the car, they stayed in the same position. Neither made any attempt to run away. At the road junction the car apparently ran out of petrol and Richards and Goodier started to push it back off the crown of the road (where it had been driven by Richards in order to turn right) on to its nearside kerb. Goodier also asked a nearby policeman where to get petrol. Apart from those movements by Richards and Goodier nobody either left or entered the vehicle until all four men were arrested by police from a patrol car a minute or so later. When all four men were then told they would be arrested for being in unlawful possession of the car, neither made any reply after caution. At Westcombe Park police station, the defendant was asked how he came to be in the car, and he said in reply: "A bloke stopped and asked me if I wanted a lift, "so I got in." When all four men were seen at the car, the car's ignition and oil lights were both on but there was no ignition key in the lock. An examination of the wiring showed that one fuse had been removed and placed between the wires of the starter (thus enabling the car to be run without ignition). There was also no damage to the doors.

At the end of the case for the prosecution, on the above facts, it was contended by the prosecutor that no further evidence by the prosecution of association between the driver (Richards) and the defendant was necessary to make out a prima facie case; that the prosecution need only prove two facts in order to make out a prima facie case, namely, (1) that the vehicle concerned had been unlawfully taken and driven away by somebody without the owner's consent or other lawful authority, and (2) that the defendant was a passenger in the circumstances of the present case; that it was for the defendant to give evidence to satisfy the court that he had, or reasonably thought he had, lawful authority

for being where he was when arrested, and until such time as such evidence was given by him or on his behalf then a prima facie case against him remained; and further than that, in any event, the prosecution had proved that the defendant was using this vehicle for which there was no insurance.

On the above facts the recorder came to the conclusion that the prosecution had failed to make out a case on either charge for the defendant to answer. He was of opinion that the facts in the present case were reasonably consistent with the conclusion that the defendant might well (as he stated to the police) have been an innocent passenger and that the prosecution had failed to prove the contrary. He therefore allowed the appeals.

The prosecutor appealed.

Paul Wrightson for the prosecutor.
R. J. Trott for the defendant.

The following cases were cited in argument: *Reg.* v. *Richardson* [1]; *Reg.* v. *Surrey Justices* [2]; *Webster* v. *Wishart.* [3]

Lord Parker C.J. This is a case stated by the Recorder of West Ham before whom the defendant appealed from two convictions of a magistrates' court sitting at West Ham. The defendant had been charged before the magistrates, first, with unlawfully taking and driving away a motor-vehicle and, secondly, unlawfully using the motor-vehicle without there being in force in relation to the user a policy of insurance. The magistrates convicted him on both charges and he appealed to the recorder, who allowed the appeals.

The short facts are these: Some time after 7.30 in the evening of August 29 a Ford Consul motor-car was taken and driven away without authority. It was left by the owner locked and closed with no ignition key and with only enough petrol in it to travel some six miles. At five minutes to two in the morning of August 30 the car was found stranded just about six miles away with four men in it. There was a man called Richards driving, a man sitting in the passenger seat beside him and two men, one of whom was the defendant, sitting in the back. The defendant was lolling in the back seat with his feet outstretched and his head back. No ignition key was there, yet the lights were on and clearly somebody had been tampering with it and had managed to start the car and keep the lights on without the ignition key. When the defendant was told that he was going to be arrested, he made no reply.

At the end of the prosecution case the recorder appears to have taken the point that there was no prima facie case made that the defendant was acting in concert with the driver of the car or the other people in the car. The prosecution maintained

[1] (1958) Unrep. May 19 (C.C.A.).
[2] [1892] 2 Q.B. 719.
[3] 1955 S.L.T. 243.

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that there was sufficient evidence of association to make out a prima facie case. Thereupon, the recorder ruled that there was no prima facie case. He says in the case stated: "On the above "facts I came to the conclusion that the prosecution had failed "to make out a case on either charge for the [defendant] to "answer." The question left to this court is: "Whether, on the "above statement of facts, I came to a correct determination and "decision in point of law."

I confess, for my part, that where, as here, four men are found in a motor-car at five minutes to two in the morning, out of petrol six miles from where the car was taken, and when arrested say nothing, I think there was clearly a case to go to the jury, if there was a jury, a case that these four men were acting in concert. If that does not constitute evidence of acting in association together, I, for my part, think it would be well nigh impossible in cases of this sort to prove a case against anyone but the driver of the car.

The recorder, I think, was clearly impressed by the fact that a police officer gave evidence that when these men had been taken to the police station and the defendant was questioned, he said to the police officer: "A bloke stopped and asked me if I wanted "a lift, so I got in." On that the recorder seems to have thought that that was a possible reason for his being there and, accordingly, a prima facie case of acting in concert had not been made out. For my part, I cannot read that evidence given by the police officer as in any way destroying what appears to me to be the prima facie view that one would take, that these four men were acting in concert. After all, it was the excuse which a guilty man would make and, secondly, it was only what the police officer said the defendant had said. It clearly called for the defendant to give evidence on oath to that effect before it could be said that that was a reasonable excuse for his presence in the car. I am quite satisfied on the facts of this case that a prima facie case of association between the defendant and the driver of the car was made out and, accordingly, I would allow the appeal and remit the case to the recorder.

DONOVAN J. I thought initially in this case, it seems mistakenly, that Mr. Wrightson was contending for the proposition that mere presence in a car which had been taken and driven away without the owner's consent was evidence of complicity in the offence. I should find any such proposition unacceptable, but I understand the contention really to be that the presence of the defendant in the car in the circumstances of this case raises a prima facie case against him of acting in concert with the other occupants. Those circumstances were the time, 2 a.m., the fact that the car was stationary, having run out of petrol; the fact that the defendant, who said he was an innocent passenger who had been offered a lift, was making no attempt to resume his journey independently, but was sitting very low in the rear seat with his

feet outstretched and his head back, and the fact that none of the others in the car at any time spoke up for him in support of his story, as would be the natural expectation if the story were true. I agree that these circumstances when taken together did call for an answer on the defendant's part.

There has been some discussion whether the recorder decided as a matter of law that no prima facie case was disclosed or that, as a matter of fact, it was too weak to justify conviction. I think the first of these alternatives represents the position, and I agree that the case should go back to him with the direction proposed.

As regards the point raised on the proviso to section 28, namely, that the recorder could be satisfied of the defendant's bona fides on the evidence given that the defendant alleged that he was an innocent passenger, I think the answer is that that is not what happened. The recorder treated this testimony as equivocal, and, accordingly, Mr. Trott's argument is not, to my mind, of any weight.

Salmon J. The only doubt I have felt in this case is as to what the recorder really did decide. This doubt springs from the somewhat nebulous way in which the case is stated. If, at the end of the prosecution case, he had found that there was in law some evidence against the defendant, but that it was not in his view strong enough to call for an answer, I have grave doubt whether this court could have interfered. The recorder's view might have been mistaken, but the mistake would not have been a mistake in law and, accordingly, not one to be successfully challenged in this court. I, however, have come to the conclusion that on a fair reading of the case the recorder decided that there was no evidence to support the charges. This, in my judgment, was a wrong conclusion on a point of law, since it is always a question of law as to whether there is or is not evidence. I do not propose to refer to the evidence, which has been stated by my Lords. I want to make it quite plain that I am not saying the recorder was bound to convict on this evidence although it certainly would not have been surprising had he done so. There was, however, in my opinion, clearly evidence for him to consider and he misdirected himself in law in holding that there was no evidence for him to consider. On that ground I would allow this appeal.

Appeal allowed.

Solicitors: *The Solicitor, Metropolitan Police; Mitchells.*

C. J. E.

[QUEEN'S BENCH DIVISION.]

1959
April 24.

Paull J.

* ROBERTS *v.* NAYLOR BROTHERS LTD.

Damages—Personal injuries—Special damage—Award of lump sum disablement gratuity—Proportion which has "accrued" in respect of injury benefit—Amount to be deducted from loss of earnings—National Insurance (Industrial Injuries) Act, 1946 (9 *&* 10 *Geo.* 6, *c.* 62), *s.* 12—*Law Reform (Personal Injuries) Act,* 1948 (11 *&* 12 *Geo.* 6, *c.* 41), *s.* 2 (1).

The plaintiff, a steel erector, was injured owing to the negligence of the defendants. Loss of earnings amounted to £106; his disablement was assessed under section 12 of the National Insurance (Industrial Injuries) Act, 1946,[1] at 5 per cent. and he received accordingly a lump sum disablement gratuity of £67 10s.:—

Held, that the gratuity had "accrued" to the plaintiff in respect of his industrial injury within section 2 (1) of the Law Reform (Personal Injuries) Act, 1948,[2] and half that sum must be deducted from the loss of earnings in assessing the damages awarded.

ACTION.

On April 10, 1957, the plaintiff, Stanley Roberts, who was employed by the defendants as a steel erector, suffered injuries by reason of the negligence of one of the servants of the defendants, when engaged in the installation of a coal handling plant at Fulham Gas Works, London. The plaintiff's first finger of his right hand was trapped underneath a beam with the result that he lost part of the top portion of the finger. Negligence was admitted and the sole question was the quantum of damages and, in particular, the amount that should be deducted under section 2

[1] National Insurance (Industrial Injuries) Act, 1946, s. 12: "(1) "Subject to the provisions of this "section, an insured person shall be "entitled to disablement benefit if, as "the result of the relevant injury,— "(*a*) at the end of the injury benefit "period he is suffering from loss of "physical or mental faculty which ". . . (i) is likely to be permanent ". . . (2) For the purposes of this "section, the extent of disablement "shall be assessed, by reference to "the disabilities incurred by the "claimant as a result of the relevant "loss of faculty . . . (4) The period "to be taken into account by an "assessment of the extent of a "claimant's disablement shall be the "period . . . during which the "claimant has suffered and may be "expected to continue to suffer from "the relevant loss of faculty . . . "(6) Where the extent of the dis-"ablement is assessed for the period "taken into account as amounting to "less than 20 per cent., disablement "benefit shall be an industrial dis-"ablement gratuity (in this Act re-"ferred to as a 'disablement "'gratuity')—(*a*) of an amount fixed, "in accordance with the length of the "said period and the degree of dis-"ablement, by a prescribed scale . . ."

[2] Law Reform (Personal Injuries) Act, 1948, s. 2 (1): "In an action "for damages for personal injuries ". . . there shall in assessing those "damages be taken into account, "against any loss of earnings or "profits which has accrued or pro-"bably will accrue to the injured per-"son from the injuries, one half of "the value of any rights which have "accrued or probably will accrue to "him therefrom in respect of indus-"trial injury benefit, industrial dis-"ablement benefit or sickness bene-"fit for the five years beginning with "the time when the cause of action "accrued. . . ."

(1) of the Law Reform (Personal Injuries) Act, 1948, from any special damage by virtue of any rights which had accrued to the plaintiff in respect of industrial injury benefit, disablement benefit or sickness benefit.

Peter Pain for the plaintiff.
Desmond Ackner for the defendants.

The cases cited in argument are referred to in the judgment.

PAULL J. stated the facts, awarded the plaintiff £450 general damages, and continued: There arises the question of special damage. The plaintiff was away for seven-and-a-half weeks, and his total loss of wages during that period was £106 7s. 6d. Under the provisions of the Law Reform (Personal Injuries) Act, 1948, s. 2 (1), I have to deduct from any sum which I award him by way of special damages one-half of the value of any rights which have accrued, or possibly will accrue, to the plaintiff in respect of industrial injury benefit, industrial disablement or sickness benefit for the five years beginning with the time when the cause of action accrued. Those words are directory, and direct me to do that mathematical sum. So I have to consider what is one-half of the value of any right which has accrued, or which will accrue over the five years, to the plaintiff in respect of industrial injury benefit, industrial disablement benefit, or sickness benefit.

It is agreed that in respect of the seven-and-a-half weeks during which the plaintiff was off work he received £29 12s. 6d. by way of injury benefit, that benefit being payable while a man is away from work owing to his injury for, at any rate, the first six months. I must therefore set off against the £106 7s. 6d. the sum of £14 16s. 3d.

After seven-and-a-half weeks he went back to work. Under section 12 of the National Insurance (Industrial Injuries) Act, 1946, he was then entitled to have an assessment of future disability. I need not at this moment refer to the actual words of the section, but the effect of the section is that if, when he goes back to his work, the plaintiff's condition is not stabilised, there is what may be called an interim assessment, and, in this case, there was an assessment of 10 per cent. disability in respect of the following six months. That disability having been assessed for that period, the plaintiff received a lump sum payment of £8 17s. It is agreed that half of this sum also should be set off against his loss of earnings, that is the sum of £4 8s. 6d.

Then comes the dispute. At the end of six months there was a final assessment of 5 per cent. disability. In order to see what that dispute is one must look at the provisions of the National Insurance (Industrial Injuries) Act, 1946, s. 12, somewhat carefully. Under section 12 (1) it is provided that, "Subject to "the provisions of this section, an insured person shall be entitled

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"to disablement benefit if, as the result of the relevant injury," he is likely to have permanent physical loss. The plaintiff clearly came within those words, so that he was entitled to disablement benefit for future physical loss. By subsection (2): ". . . the "extent of disablement shall be assessed, by reference to the "disabilities . . . (*a*) . . . to which the claimant may be expected ". . . to be subject during the period taken into account by the "assessment . . ." By subsection (4) the period to be taken into account by the assessment may either be a definite period or life. The assessment of the sum of £8 17s. was, of course, an assessment in respect of a definite period, namely, for six months. The assessment made at the end of the six months was an assessment of 5 per cent., and that assessment was not for a fixed period, so it was an assessment for life.

Then one has to turn to the subsections of section 12 dealing with how the 5 per cent. shall be calculated and how it shall be paid. The Act divides assessments for this purpose into two categories—one where the assessment is under 20 per cent., and one where it is over 20 per cent. Subsection (6) deals with the case where the assessment is under 20 per cent., and subsection (7) where it is 20 per cent. or more. I think it is a matter of some importance to consider the fact that Parliament has not chosen to make the assessment for under 20 per cent. a proviso to subsection (7). The assessment of 20 per cent. or more is an assessment of a weekly sum which is paid week by week. When one deals with under 20 per cent. it has to be realised that Parliament has chosen not to say in subsection (7): "Provided "that where, however, the assessment is under 20 per cent., "there shall be the right or the duty to assess the amount by a "lump sum to take the place of the weekly sums." That is not how Parliament has approached the problem, and I think one has to look at the plain provisions of subsection (6).

Subsection (6) provides: "Where . . . the disablement is . . . "less than 20 per cent., disablement benefit shall be an industrial "disablement gratuity"—of a fixed amount. There is no question there of assessing a weekly sum and then turning it into a fixed amount. It simply says "shall be . . . an amount fixed in accordance . . ." with the scale prescribed by certain regulations. The subsection goes on to say that the scale shall be the same for all persons; in other words, it does not take into account the age of the person nor yet his physical condition. It is simply a lump sum in accordance with the scale, and everyone receives the same lump sum in accordance with the percentage of disability. That scale produces to the plaintiff the sum of £67 10s.

Three submissions have been made to me as to how the provisions of the Law Reform (Personal Injuries) Act, 1948, should be applied to that sum of £67 10s. Mr. Pain says that this is really a payment in respect of the plaintiff's life, and, as the provisions of the Act of 1948 say that it shall be in respect of the period of "five years beginning . . . when the cause of action accrued,"

the right and proper way is to, first, take away the six months during which he received his fixed sum, and therefore take a proportion of four-and-a-half years to life. And he says that "life" means life expectation on the Ministry of Labour life expectation figures. So that you take four-and-a-half divided by the number of years which the Ministry's life expectation figures would produce in the case of the plaintiff, and he says that half of that proportion is to be deducted. If that is right, then it is agreed that the proper figure for special damage is £81 0s. 11d.

Mr. Ackner says that this is wrong. He says that the defendants, by the words of the section, should have credit for half of the whole sum paid, that is to say, they should have credit for £33 15s., in which event the proper figure for special damage would be reduced to £53 7s. 9d.

Mr. Ackner puts forward a third alternative. He says that if that is wrong, then he invites the court to consider the fact that the Ministry in fact based their life payment figures on a seven years' purchase of the weekly sum which would be paid if it were paid week by week, and he says that the proportion ought to be four-and-a-half over seven. If that were so, the proper figure for special damage in this case would be £67 2s. 3d.

I can deal with that third proposition very shortly. I have no knowledge by any Act of Parliament or by any regulations how the Ministry of Labour chose to arrive at the sum they have arrived at in Schedule 2 to the National Insurance (Industrial Injuries) (Benefit) Regulations, 1948, as amended by the regulation of 1955, No. 48. I do not think I am entitled to delve into what factors the Minister had in front of him when he chose to fix a sum, unless he had to fix that sum by regulation or by Act of Parliament. I therefore can see no ground whatsoever for finding in favour of the third proposition, although, no doubt, it is a curious coincidence that the figures in every case work out exactly right.

As between the first and the second proposition, there has been a difference of judicial opinion. In *Meagher* v. *Parnall (Yate) Ltd.*[1] (of which I have a shorthand note) Stable J., in his judgment, said: "The defendants contend that under section "2 (1) of the Law Reform (Personal Injuries) Act, 1948, where "it is provided that"—and then he reads the words of the section—"this lump sum settlement which he received ought to "be divided into two equal halves, and that I ought to take in "assessing the damages one moiety of that sum. In my view, "the contention of the plaintiff in that respect is manifestly "right. The matters that I have to consider are the rights that "have accrued or probably will accrue. The rights in relation "to which this lump sum payment was made were not rights "simply in relation to the five-year period, they were rights in "relation to the whole period of the possible incapacity. The fact

[1] (1958) Unrep., March 3 (Bristol Assizes)

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"that rights outside the five-year period were settled, disposed "of and discharged by a lump sum payment does not transform "that lump sum payment into a right accrued within the five-year "period. To take the simplest possible example, if I have got a "right accruing ten years hence, and that right is to be discharged "by an immediate payment, that does not transform that right "into a right accruing at the time the payment was made; the "payment is made in relation to a right accruing ten years hence. "That disposes of that point."

On the other hand, Finnemore J., in *Watkin* v. *C. A. Parsons & Co. Ltd.*[2] (of which again I have a shorthand note), said: "Another interesting question was canvassed. That is the "argument about the application of section 2 of the Law Reform "(Personal Injuries) Act, 1948. Without going into all the "arguments, I think if the plaintiff has in fact received the "£180, that although it is described as being for life, it is a "sum of money or a right which has accrued to him within "the five years and, having actually received the money, I think "one ought to regard the whole of it and not work out on a "wholly arbitrary basis and a wholly arbitrary calculation what "£180 means applied to an individual of the plaintiff's age and "then reduce it down to the proportion of what five years "would bear to the total. I do not think that anybody drafting "this Act thought of any such thing as that. I think, therefore, "that I have to have regard to the one-half of the £180, which "is what he has received. I understand that payments by way "of industrial benefits have to be considered." He then gives the figure for his damages.

I prefer the method adopted by Finnemore J. Mr. Pain has pointed out to me that if that method is adopted, it may lead to certain hardships, because the person who has received his lump sum gets a half of the whole of his lump sum taken away; whereas the person who receives weekly payments only gets half of the proportion of the whole sum which he has received taken away from him. I have no doubt that is right. If I felt that there was real difficulty in translating the words which Parliament has chosen to use, I think I might very well say that of the two interpretations, both of them open, I prefer the interpretation which does not lead to that hardship. But, feeling as I do that the words that Parliament used are plain, I do not think that any question of hardship ought to enter into how I give my judgment. Hardship is for Parliament; it is not for the courts. A judge's duty is to interpret, by the ordinary canons of interpretation, the words which Parliament has chosen to use. If that results in hardship, it is for Parliament to put the hardship right. So that argument does not impress me in this particular case.

Mr. Pain points out that the word used is "accrue," and

[2] (1958) Unrep., January 15 (Newcastle Assizes).

he says that that is something quite different from the word "paid." Parliament has said the "rights which have accrued or "... will accrue"; not "the sums which the plaintiff has been "paid, or may be paid." Mr. Pain has referred me to the definition of "accrue" in the Oxford Dictionary. He has also referred me to the fact that in the case, for instance, of rent, although rent may be payable at the beginning of a quarter in respect of that quarter, if anything happens, the rent is deemed to "accrue" day by day, irrespective of whether the rent is paid at the beginning or end of the quarter. That I agree with, but I am not at all sure that that is not as a result of particular words in a particular Act of Parliament.

Here one is faced with this. The plaintiff is not, as Mr. Pain submits, under the section entitled to weekly payments at all. He is not entitled to a weekly payment which is to be translated into a lump sum. Parliament has chosen to divide disabilities into those under 20 per cent. and those over 20 per cent., and has chosen to say that, in the case where the disability is under 20 per cent., then the payment is not in any way a weekly payment, but is a definite lump sum. That is what the man is entitled to, no more and no less. It is quite true that that is in respect of his disability during the whole of his lifetime, but, nevertheless, it is a lump sum. The subsection provides that, where it amounts to less than 20 per cent., he is entitled to an amount fixed in accordance with the degree of disablement and the period, the period being life. The Minister has chosen to fix a lump sum payment to cover that right. The plaintiff is entitled to nothing more and to nothing less. So that which has accrued, or which will accrue, is that lump sum, and nothing more will ever accrue to him during his life.

That being so, turning to the words which Parliament has chosen to use in the Act of 1948, I must, in my judgment, deduct one-half of the value of that right which has accrued. I would add that, so far as I can see, no other right will ever accrue to him so far as industrial injury benefit or industrial disablement benefit is concerned in respect of this action. So I think Mr. Ackner is right on his first point, and that the sum which I have to deduct is one-half of the total sum of £67 10s. That means that, in addition to the £450, he is entitled to £53 7s. 9d.

Judgment for the plaintiff for £503 7s. 9d. and costs.

Solicitors: *W. H. Thompson; Carpenters for G. Keogh & Co., Bolton.*

J. D. P.

[QUEEN'S BENCH DIVISION.]

1959
May 7, 8.

Edmund Davies J.

* PEREZ *v.* C.A.V. LTD.

Damages—Personal injuries—Special damages—Award of lump sum disablement gratuity—Proportion which had "accrued" in respect of injury benefit—Amount to be deducted from loss of earnings—National Insurance (Industrial Injuries) Act, 1946 (9 *&* 10 *Geo.* 6, *c.* 62), *s.* 12—*Law Reform (Personal Injuries) Act,* 1948 (11 *&* 12 *Geo.* 6, *c.* 41), *s.* 2 (1).

The plaintiff, a machine operator, was injured due to the breach by the defendants of their statutory duty under section 14 of the Factories Act, 1937. Six months after the injury the plaintiff's disability was assessed at 9 per cent. and he received a lump sum disablement gratuity of £140, under section 12 (6) of the National Insurance (Industrial Injuries) Act, 1946.[1] On the question of how this gratuity was to be taken into account under section 2 (1) of the Law Reform (Personal Injuries) Act, 1948[2]:—

Held, that the deduction to be made under section 2 (1) was such sum as would bear the same proportion to half the gratuity as that part of the five years from the accident which remained unexpired when the gratuity was paid bore to the plaintiff's expectation of life.

Roberts v. *Naylor Brothers Ltd.*, ante, p. 718 not followed.

ACTION.

On September 26, 1957, the plaintiff, Eusebio Perez, who was employed by the defendants as a machine operator, suffered injuries to the ring finger of his right hand when it was crushed against the guard of the capstan lathe which he was operating in the defendants' factory. Edmund Davies J. held that the defendants were guilty of a breach of their statutory duty under

[1] National Insurance (Industrial Injuries) Act, 1946, s. 12: "(1) "Subject to the provisions of this "section, an insured person shall be "entitled to disablement benefit if, as "the result of the relevant injury,— "(*a*) at the end of the injury benefit "period he is suffering from loss of "physical or mental faculty which ". . . (i) is likely to be permanent ". . . (2) For the purposes of this "section, the extent of disablement "shall be assessed, by reference to "the disabilities incurred by the "claimant as a result of the relevant "loss of faculty . . . (4) The period "to be taken into account by an "assessment of the extent of a "claimant's disablement shall be the "period . . . during which the "claimant has suffered and may be "expected to continue to suffer from "the relevant loss of faculty . . . "(6) Where the extent of the dis-"ablement is assessed for the period "taken into account as amounting to "less than 20 per cent., disablement "benefit shall be an industrial dis-"ablement gratuity (in this Act "referred to as a 'disablement "'gratuity')—(*a*) of an amount fixed, "in accordance with the length of the "said period and the degree of dis-"ablement, by a prescribed scale . . ."

[2] Law Reform (Personal Injuries) Act, 1948, s. 2 (1): "In an action "for damages for personal injuries ". . . there shall in assessing those "damages be taken into account, "against any loss of earnings or "profits which has accrued or pro-"bably will accrue to the injured per-"son from the injuries, one half of "the value of any rights which have "accrued or probably will accrue to "him therefrom in respect of indus-"trial injury benefit, industrial dis-"ablement benefit or sickness bene-"fit for the five years beginning with "the time when the cause of action "accrued. . . ."

section 14 of the Factories Act, 1937, towards the plaintiff in that the chuck of the lathe was not securely fenced. The plaintiff's share in the responsibility for his injuries owing to his own contributory negligence was assessed at 40 per cent. General damages were assessed at £650 and loss of earnings amounted to £51 18s. 9d. The question on which the case is reported was the proportion which should be deducted from the special damage by virtue of section 2 (1) of the Law Reform (Personal Injuries) Act, 1948, in respect of any rights which had accrued to the plaintiff in respect of industrial injury benefit, disablement benefit or sickness benefit. After the accident, the plaintiff received £15 16s. injury benefit and his disablement benefit was provisionally assessed at £12 18s. Six months later a final assessment of 9 per cent. disability was made and a lump sum gratuity, assessed at £140, was granted to the plaintiff. The plaintiff contended that what had to be taken into account was such sum as would bear the same proportion to half the £140 as that part of the five years from the accident, which remained unexpired when the gratuity was paid, bore to the plaintiff's estimated expectation of life, in which case special damage would amount to £23. The defendants contended that one-half of £170 should be deducted, in which case no special damage was recoverable.

Kenneth Potter for the plaintiff.
Ronald Hopkins for the defendants.

The cases cited in argument are referred to in the judgment.

EDMUND DAVIES J. stated the facts, held that the defendants were 60 per cent. responsible for the plaintiff's injuries, assessed the total general damages at £650 and continued: There remains for determination the difficult question whether the plaintiff is further entitled to any special damages. Fundamentally this turns on the due interpretation of section 2 of the Law Reform (Personal Injuries) Act, 1948, and its application to the facts of this case. [His Lordship read section 2 (1) and continued:] In the light of events, it is contended for the plaintiff that he is entitled to have added to his general damages the further sum of £23, while the defendants contend that no special damages are recoverable.

Although the sum involved is not large, doubtless for the plaintiff the point, as well as the money, is of importance. It arises in this way: section 12 of the National Insurance (Industrial Injuries) Act, 1946, which created the various benefits referred to in the Act of 1948, regulates the payment of disablement benefit as defined by section 7. By section 12 (4) (excluding the proviso), "The period to be taken into account "by an assessment of the extent of a claimant's disablement shall "be the period (beginning not earlier than the end of the injury "benefit period, and limited by reference either to the claimant's

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"life or to a definite date) during which the claimant has suffered "and may be expected to continue to suffer from the relevant loss "of faculty." By subsection (5) (excluding the proviso), "An "assessment shall state the degree of disablement in the form of "a percentage and shall also specify the period taken into account "thereby and, where that is limited by reference to a definite "date, whether the assessment is provisional or final." Then, finally, by subsection (6) it is provided: "Where the extent of "the disablement is assessed for the period taken into account "as amounting to less than 20 per cent., disablement benefit "shall be an industrial disablement gratuity (in this Act re-"ferred to as a 'disablement gratuity')—(*a*) of an amount fixed, "in accordance with the length of the said period and the degree "of disablement, by a prescribed scale, but not in any case "exceeding £150; and (*b*) payable, if and in such cases as "regulations so provide, by instalments. The scale prescribed "for the purposes of this subsection shall be the same for all "persons . . ."

By virtue of these provisions, as I understand, the plaintiff received for some time industrial injury benefit. Then came the time when his disablement benefit was assessed under section 12 and, as it was assessed for life at less than 20 per cent., he was paid a disablement gratuity pursuant to subsection (6) in full and final discharge of all benefits.

The controversy is how, under the Act of 1948, this gratuity is to "be taken into account." Let us call it £X. For the defendants it is contended that £$\frac{X}{2}$ must be deducted from the "loss of earnings or profits which has accrued or probably "will accrue to the injured person from the injuries." It is agreed that, if that be the right view, no special damages are recoverable. On the other hand, it is submitted on the plaintiff's behalf that what has to be taken into account is merely such sum as will bear the same proportion to £$\frac{X}{2}$ as that part of the five years from the accident which remained unexpired when the gratuity was paid bears to the plaintiff's estimated expectation of life. It is agreed that, if that be the correct method, the plaintiff would be entitled to recover £23 special damages.

A hypothetical example will serve to illustrate the opposing contentions. Assume that one year from the accident the plaintiff was paid a gratuity of £100 when he was 50 years old. Assume further a life expectation at that time of 20 years. On those facts, the defendants would contend that the Act of 1948 requires the court to take into account one moiety of £100, namely, £50. If the plaintiff is right, the appropriate figure on those facts would be 4/20ths of £50, namely, £10.

This is not the first time that this matter has arisen. In *Meagher* v. *Parnall (Yate) Ltd.*[1] Stable J. adopted the view

[1] (1958) Unrep., March 3 (Bristol Assizes).

now presented on behalf of the plaintiff; while Finnemore J. in *Watkin* v. *C. A. Parsons & Co. Ltd.*[2] and Paull J. as recently as April 24 last in *Roberts* v. *Naylor Brothers Ltd.*[3] accepted the defendants' argument and deducted one-half of the total gratuity paid. In view of this conflict, diffidence in expressing one's own views on such a controversial issue is both inevitable and seemly.

I doubt whether the point ever occurred to the draftsman of the Act of 1948, which requires to be taken into account (it is helpful to recall) "one half of the value of any rights which "have accrued or probably will accrue to him therefrom in respect "of industrial injury benefit, industrial disablement benefit or "sickness benefit for the five years beginning with the time "when the cause of action accrued." I stress that the rights, whether already accrued or likely to accrue, that have to be taken into account are rights in respect of benefits "for the "five years beginning with the time when the cause of action "accrued." That, as it seems to me, is the kernel of the matter and that, with respect to Finnemore J. and Paull J., is what the defendants' contention here appears to overlook.

It seems to me that if one is to deduct one moiety of the whole gratuity paid, one is wholly disregarding the five-year limitation. I respectfully agree with Stable J. when he said: "The rights in relation to which this lump sum payment was "made were not rights simply in relation to the five-year period, "they were rights in relation to the whole period of the possible "incapacity." Finnemore J., on the other hand, said: "I think "if the plaintiff has in fact received the £180, that although "it is described as being for life, it is a sum of money or a "right which has accrued to him within the five years and, "having actually received the money, I think one ought to "regard the whole of it and not work out on a wholly arbitrary "basis and a wholly arbitrary calculation what £180 means "applied to an individual of the plaintiff's age and then reduce "it down to the proportion of what five years would bear to the "total. I do not think that anybody drafting this Act thought "of any such thing as that." For my part, I repeat that I take leave to doubt that those drafting the Act ever had this matter in mind at all.

Paull J. put the matter somewhat differently; he said[4]: "The plaintiff is not . . . under the section"—that is, section 12 of the Act of 1946—"entitled to weekly payments at all. He is "not entitled to a weekly payment which is to be translated into "a lump sum. Parliament has chosen to divide disabilities into "those under 20 per cent. and those over 20 per cent., and has "chosen to say that, in the case where the disability is under "20 per cent., then the payment is not in any way a weekly "payment, but is a definite lump sum. That is what the man

[2] (1958) Unrep., January 15 (Newcastle Assizes).

[3] Ante, p. 718.

[4] Ante, p. 723.

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"is entitled to, and he is entitled to nothing more and nothing "less. It is quite true that that is in respect of his disability "during the whole of his lifetime, but, nevertheless, it is a "lump sum. The subsection provides that, where it amounts to "less than 20 per cent., he is entitled to an amount fixed in "accordance with the degree of disablement and the period, the "period being life. The Minister has chosen to fix a lump sum "payment to cover that right. The plaintiff is entitled to nothing "more; he is entitled to nothing less. So that which has accrued, "or which will accrue, is that lump sum, and nothing more will "ever accrue to him during his life." So to hold is, in my respectful judgment, to give inadequate attention to the point that the lump sum payment is made not merely in respect of rights to benefits which have accrued or will accrue during the five-year period but is, as it were, a compounding of those benefits which would, but for the gratuity provision, continue to be paid throughout life in respect of a disability regarded as subsisting throughout the same period.

I am aware that there are difficulties in the plaintiff's way. It is true that the lump sum is not arrived at by first assessing a weekly sum and then (as it were) capitalising it; and section 12 (6) provides that the scale prescribed shall be the same for all persons, so that both age and physical condition or degree of disability, provided it be below 20 per cent., are alike immaterial. Nevertheless, for the reasons I have endeavoured to state, I prefer the view advanced on the plaintiff's behalf as one which seeks to give effect to the entire wording of section 2 (1) of the Act of 1948 and, in particular, does not appear to overlook the limitation to benefits "for the five years beginning ". . . when the cause of action accrued." The fact that it appears also to lead to a fairer conclusion than that advocated by the defendants does not detract from its merit. If the formula urged by the plaintiff be not adopted, there seems to me at least something to be said for the view that the Act of 1948 has made no provision that is applicable to cases such as the present one, where a disablement gratuity is paid, and that, accordingly, no deduction should be made in respect of any part of such gratuity. That argument has not, however, been advanced on the plaintiff's behalf and its validity does not, therefore, now fall to be considered.

In the result, the sum of £23 must be added to the general damages of £650 and the plaintiff is, in my judgment, entitled to six-tenths of the combined total of £673. According to my calculation that works out at £403 16s.

Judgment for the plaintiff for £403 16s. and costs.

Solicitors: *Evill & Coleman; Carpenters.*

J. D. P.

[PROBATE, ETC., DIVISION.]

* PRACTICE DIRECTION (APPLICATIONS FOR GRANTS).

1959
May 28.

Probate—Practice—Application for grant through solicitor—Application by post at the Principal Registry—Second or subsequent grant.

The President has directed under rule 3 (1) of the Non-Contentious Probate Rules, 1954, that, as from July 1, 1959, a person applying for a second or subsequent grant through a solicitor may apply by post at the Principal Registry in cases where the original will is registered or the original grant was made at the Principal Registry.

The President has further directed that, as from July 1, 1959, application for the resealing of a Scottish confirmation or a Northern Irish or Colonial grant may be made by post at the Principal Registry.

B. LONG,
Senior Registrar.

May 28, 1959.

[N.B. This direction does not provide postal facilities at the Principal Registry for applications for first grants, for which postal facilities are available at all district probate registries.]

[COURT OF APPEAL.]

* WESTGATE *v.* WESTGATE.

1959
May 26.

Hodson, Sellers and Harman L.JJ.

PRACTICE NOTE.

Court of Appeal—Transcript of proceedings below—Divorce—Undefended—Transcript of argument—Whether necessary.

APPEAL.

At the hearing of an appeal by the wife petitioner from the refusal of Judge Dutton Briant, sitting as a special commissioner, to grant her a decree of divorce on the grounds of her husband's cruelty, a transcript was produced of the proceedings below, including counsel's argument.

N. H. Curtis-Raleigh for the wife petitioner.

The respondent did not appear and was not represented.

[Reported by NORMAN PRIMOST, Esq., Barrister-at-Law.]

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WESTGATE v. WESTGATE (PRACTICE NOTE)

HODSON L.J. (at the conclusion of his judgment) said: It is right that a shorthand writer should take notes of counsels' argument and of the judge's observations, particularly in undefended cases, but it is an unnecessary extravagance for them to be transcribed for use in the Court of Appeal. If, however, something said by the judge in argument is relied on as a ground of appeal, different considerations may arise.

SELLERS and HARMAN L.JJ. agreed.

Solicitors: *Graham Hooper & Betteridge.*

[PROBATE, ETC., DIVISION.]

1959
May 27.

Karminski J.

* THATCHER *v.* THATCHER AND GILL (WHEELER INTERVENING).

PRACTICE NOTE.

Husband and Wife—Practice—Pleading—Reply—Amending reply to allege desertion in answer to cross-petition—Cross-petition an amendment to answer—Three years not completed at date of petition nor of original answer.

A respondent who had alleged adultery and cruelty in her answer was given leave to amend her answer by alleging "by way of "cross-petition" that the petitioner had deserted her for a period of at least three years prior to a precise date which she specified. The petitioner, whose petition had been filed less than three years prior to the month in which it was common ground that the parties had separated, had denied the charges in the original answer, and had prayed for divorce on the ground of adultery. At the hearing, by which time well over three years had elapsed since the parties had separated, the counter-charges of adultery, and the charge of cruelty, were abandoned, and the petitioner applied for leave to amend his reply "by way of answer to the respondent's cross-"petition" by alleging desertion for a period of at least three years prior to the presentation of the cross-petition:—

Held, (1) that the court had jurisdiction to allow the amendment to the reply and that, in the circumstances, it should be allowed.

(2) That, on the facts, the petitioner should be granted a decree nisi of divorce on the grounds of the desertion alleged in his amended reply.

DEFENDED PETITION for divorce.

The husband by his petition dated June 27, 1957, prayed for divorce on the ground of adultery in August and September 1954 and from May 1955 to the date of his petition; and alleged that such adultery as had been condoned had been revived by

subsequent adultery and by desertion since March 20, 1955, when he alleged that the parties had separated. The wife by her answer dated March 18, 1958, denied that she had committed adultery, alleged desertion in March 1955 (without specifying a date), and prayed for a divorce on the grounds of adultery since March 1955 and of cruelty, which were denied in the reply which was dated June 27, 1958. At the date, therefore, of the petition a period of three years had not elapsed since the parties separated, and it was also not clear whether a period of at least three years had elapsed prior to the answer.

On May 14, 1959, the wife was given leave to amend her answer by alleging (if adultery were found, which she denied) condonation by an act of marital intercourse in February 1956 (she admitted a miscarriage in June 1956), by denying that she herself had by that act of marital intercourse condoned the husband's adultery and cruelty (but alleging if she had that the adultery and cruelty had been revived by continuing adultery and desertion), and by adding "by way of cross-petition" [1] an allegation of constructive desertion in March 1955 prior to March 18, 1955 (the date in the month of her answer); and she prayed for divorce on that ground also.

The husband by his reply denied the allegations in the answer, and in his amended reply dated May 22, 1959, to the amended answer denied the further allegations in the answer contained in the cross-petition which had been added to it.

Neither party prayed for the exercise in their favour of the court's discretion.

At the hearing the allegations of adultery, and the allegation of cruelty, were abandoned, and the wife also abandoned the allegation of desertion.

Counsel for the husband applied for leave further to amend his reply by way of answer to the cross-petition contained in the amended answer, and to pray for divorce in his amended reply on the ground of desertion since March 19 [sic], 1955.

Brian Neill for the husband and intervener referred to *Spawforth* v. *Spawforth* [2] (in which leave to allege desertion in a supplemental petition was refused) and submitted that since on the authority of *Robertson* v. *Robertson* [3] a cross-petition alleging desertion for three years might be added to the same document as that containing an answer filed less than three years before the alleged desertion, an answer to such a charge, in which relief was sought on the ground of desertion, might be included in the reply "by way of answer to the cross-petition." He asked for leave to amend his reply accordingly.

[1] As in *Robertson* v. *Robertson* [1954] 1 W.L.R. 1537; [1954] 2 All E.R. 413n., and *Swiszczowski* v. *Swiszczowski and Jewasinski* [1959] 1 W.L.R. 187; [1959] 1 All E.R. 495.

[2] [1946] P. 131; 62 T.L.R. 262; [1946] 1 All E.R. 379.

[3] [1954] 1 W.L.R. 1537.

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[KARMINSKI J. That is a novelty, is it not, in a reply? It seems an excellent way out; otherwise it means striking out the existing petition and the presentation of a new petition, with all the costs that that course would incur, which is very much to be deprecated. Once there is a cross-petition, the petitioner in the original petition must be in no worse position than the respondent; so that the proposed reply is really an answer to the counterclaim, with the right to cross-pray.]

De Piro for the wife did not oppose the application, and submitted that the proposition was right in principle; for if the wife had filed a separate cross-petition, with a consolidation of the suits, it would have been open to the husband, in answer to her cross-petition, to seek relief in that answer on the ground of desertion.

Christopher French for the co-respondent associated himself with these submissions as amicus curiae.

KARMINSKI J. I give leave to the husband to amend his reply as prayed.[4] He may swear to the truth of the amendment in the witness-box. Service to be dispensed with by consent.

[His Lordship dismissed the co-respondent and intervener from the suit and granted a decree nisi on the prayer of the cross-petition in the amendment to the reply.]

Solicitors: *Champion & Co. for Knight and Maudsley, Maidenhead; Willmett & Co.*

J. B. G.

[4] The material parts of the answer as amended were as follows: "And "by way of cross-petition the respon- "dent alleges that the petitioner "deserted her in March, 1955, prior "to March 18, 1955 . . ."

The material parts of the reply as re-amended were as follows: "By "way of answer to the cross-petition "the petitioner alleges that the re- "spondent has deserted the petitioner "for a period of at least three years "immediately preceding the presen- "tation of the cross-petition . . ." (The nature of the alleged desertion since March 19, 1955, was then set out.)

[CHANCERY DIVISION.]

1959 *April* 28, 29, 30; *May* 1, 26, 27; *June* 1.

Roxburgh J.

* *In re* WATSON'S SETTLEMENT TRUSTS. DAWSON AND ANOTHER *v.* REID AND OTHERS.

[1957 W. No. 2584.]

Perpetuity Rule—Power of appointment—Special power—Power of revocation and new appointment—Power to trustees to revoke trusts

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[Reported by MARGARET THOMAS, Barrister-at-Law.]

and to direct property to be held on other trusts—Whether exercisable by trustees for time being—Whether power valid.

Charity—Health—Relief of suffering—Research work into "the cause "of cancer" and "a cure for cancer"—Payments to discoverers—Whether charitable.

By a settlement dated December 4, 1931, the settlor directed his trustees, inter alia, to hold certain shares in a company upon trust after his death for the benefit of his wife, his four children, his grandchildren and certain named persons, as they might in their discretion by deed, without infringing the rule against perpetuities, at any time before the death of the settlor appoint. In default of and subject to such appointment the shares were to be held on trust for division among certain named charities. Under the trusts concerning one of these charities the trustees were to pay the income from the shares to the treasurer of the British Empire Cancer Campaign to be applied for the general purposes of research work in cancer until the campaign should notify the trustees that "the cause of cancer" had been discovered and arbiters were satisfied that this was so, when the trustees were to sell all or some of the shares as they thought fit and pay the proceeds to the discoverers; the income of the balance of the shares, if any, was to continue to be paid to the campaign until it notified the trustees that "a cure for cancer" had been discovered and arbiters were satisfied that this was so, when the trustees were to sell such of the shares as they thought fit and pay the proceeds to the discoverers. Subject to this the campaign shares were to be held on trust for Dr. Barnardo's Homes.

Clause 7 of the settlement empowered the trustees at their discretion by deed revocable or irrevocable to revoke any of the trusts in respect of shares not beneficially vested in possession, and to direct that the shares should be held upon such other trusts for the benefit of such persons (other than the settlor and his wife) or charitable purposes as they thought fit. The settlor was alive at the date of this summons. Two of the original trustees died in 1941 and 1945 respectively. The original trustees and the trustees for the time being had at different times, pursuant to clause 7, executed deeds of revocation and new appointment. On a summons by the present trustees to determine whether the power of revocation and new appointment was exercisable only by the original trustees or by the trustees from time to time, and if the latter, whether the power was void for remoteness:—

Held, (1) that "shares" in the settlement generally referred to shares in the company and not to the shares of the beneficiaries in the trust fund, so that the power of revocation and new appointment could not be severed as between one share and another in the corpus of the trust fund.

(2) That the power was not confined to the original trustees but extended to all duly appointed trustees throughout the duration of the settlement.

(3) That the trusts of the campaign shares were wholly charitable and sufficiently certain, and the prizes were to be regarded not as a reward for past efforts but as an incentive to the relief of human suffering.

(4) That since the power was indivisible it was not permissible to wait and see how it was in fact exercised, but that it was void ab initio because it was capable of being exercised beyond the period allowed by the rule against perpetuities.

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WATSON'S SETTLEMENT TRUSTS, *In re.*

Dictum of Lord Parker in *In re De Sommery* [1912] 2 Ch. 622, 630 applied.

ADJOURNED SUMMONS.

By a settlement dated December 4, 1931, the settlor, James Angus Watson, directed his trustees to hold 112,000 £1 shares in the Whitton Trust, a company registered with unlimited liability under the Companies Act, 1929, in the following manner: by clause 1, as to the first block, which consisted of 36,000 shares, upon trust to pay the dividends and income therefrom to his wife, Ethel Watson, during her life and after her death upon trust for division into four equal parts to be held upon the trusts thereinafter declared for each of his four children, Doreen, Hazel, Graham and Bernard, and as to the second and third blocks, of 10,000 shares each, in the events which happened, upon similar trusts for the four children; by clause 2, as to the fourth block consisting of 4,000 shares, Doreen's portion, was to be held "Upon trust to pay the dividends and income "to arise therefrom to the said Doreen . . . during her life and "from and after her death in trust for such one or more "exclusively of the others or other of her children at such age "or time or respective ages or times if more than one (not being "later than twenty-one years after her death) and if more than "one in such shares and with trusts for their respective benefit "and such provision for their respective advancement main-"tenance and education at the discretion of the trustees or of "any other person or persons as the said Doreen . . . may by "deed revocable or irrevocable or by will or codicil appoint and "subject to or in default of any such appointment in trust for "all or any the children or child of the said Doreen . . . who "attain the age of twenty-one years or being female marry under "that age and if more than one in equal shares absolutely."

The fifth block (Hazel's portion of 4,000 shares), the sixth block (Graham's portion of 8,000 shares), and Bernard's portion (his interest in the first block of 36,000 shares), were by clauses 3, 4 and 5 respectively to be held on trusts similar to those of Doreen's portion. There was an accruer clause in the event of the failure of the trusts of any portion. The remaining 40,000 shares were disposed of by clause 6 in the following manner: after the death of the settlor 10,000 shares were, in the events which happened, to accrue to the children's portions and the balance of 30,000 shares were settled upon trust for the benefit of all or any of the following persons, Ethel Watson, Doreen, her children, Hazel, her children, Angus, his children, Bernard, his children, one Nellie Reid, one Eleanor Wilkinson and two named persons since deceased, as the trustees might in their absolute discretion by deed, without infringing the rule against perpetuities, at any time before the death of the settlor appoint. In default of and subject to any such appointment the shares were to be held upon trust as to one-fifth for the National Commercial

Travellers Association, one-fifth for the Salvation Army, one-fifth for the London Missionary Society, one-tenth each for the Northern Counties Gentlewomen's Society and the Indigent Gentlewomen's Fund. The remaining fifth, "the campaign shares," was to be held upon trust to pay the income therefrom to the treasurer of the British Empire Cancer Campaign, the income to be applied for the general purposes of research work in cancer "until such time as the campaign shall notify the trustees in "writing that the cause of cancer has been discovered (though "the cure thereof may not be part of the discovery) to the "complete satisfaction of the Scientific Advisory Committee or "other body nominated by the campaign and upon trust that on "receipt of such notice the trustees shall appoint arbiters who "shall decide whether the cause of cancer has been discovered "and if so who is or are the discoverer or discoverers and so "that the decisions of the said arbiters shall be final and binding "on all persons for all purposes and upon trust if the said "arbiters shall decide that the cause of cancer has been dis-"covered that the trustees shall in their absolute and uncon-"trolled discretion sell the campaign shares or any part thereof "and shall pay to such discoverer or discoverers (and if more "than one in such proportions as they shall think fit) such part "of the proceeds of sale thereof as the trustees may in their "uncontrolled and unfettered discretion think fit and upon trust "as to the balance of the campaign shares which shall not be "so sold that the same shall be retained by the trustees and "the income arising therefrom shall be paid to the treasurer for "the time being of the campaign and shall be applied by him "for the general purposes of research work in cancer until such "time as the campaign shall notify the trustees in writing that "a cure for cancer has been discovered to the complete satis-"faction of the Scientific Advisory Committee or other body "nominated by the campaign and upon trust that on receipt "of such notice the trustees shall appoint arbiters who shall "decide whether a cure for cancer has been discovered and if "so who is or are the discoverer or discoverers and so that the "decision of the arbiters shall be final and binding on all persons "and for all purposes and upon trust if the arbiters shall decide "that a cure has been found that the trustees shall sell the "balance of the campaign shares remaining unsold or such part "thereof as the trustees shall think fit and shall pay the proceeds "of sale thereof to such discoverer or discoverers in such shares "and proportions as the trustees shall in their absolute and "uncontrolled and unfettered discretion think fit." Subject to this the trustees were to hold the campaign shares in trust for Dr. Barnardo's Homes.

By clause 7: "Without prejudice to any payment which shall "already have been made in pursuance of the trusts hereof or "under any power for the time being exercisable in respect of "any of the shares hereby settled and subject as hereinafter

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"provided the trustees may from time to time by deed revocable "or irrevocable and expressed to be supplemental to these "presents at their absolute and uncontrolled discretion without "being in any way liable for the exercise of such discretion "revoke all or any of the trusts powers and provisions herein-"before declared and contained concerning all or any of the "shares hereby settled and may direct that the shares to which "such revocation extends shall thenceforth be held upon such "other trusts and subject to such other powers and provisions for "the benefit of such person or persons (other than the settlor or "the said Ethel Watson) or for such charitable purposes as they "may think proper Provided further that the trustees shall "not be at liberty to exercise the power of revocation hereby "conferred in respect of any of the shares hereby settled the "beneficial interest in which shall for the time being have already "become absolutely vested in possession in any person or "charity."

By a supplemental deed dated August 31, 1933, the settlor declared that a further 16,000 shares registered in the names of his trustees should be held by them with the same powers upon the same trusts and for the same beneficiaries as under the earlier settlement. Two of the original trustees died in 1941 and 1945 respectively and were replaced by new trustees. In purported exercise of the power contained in clause 7 of the 1931 settlement, and the corresponding power in the 1933 settlement, the original trustees and the trustees for the time being had at different times executed deeds of revocation and new appointment. Doubt having arisen as to the validity and construction of the power, the plaintiffs, who with the settlor's son Bernard, were the present trustees of the two settlements, took out this summons to determine, inter alia, (1) (i) whether the power of revocation and new appointment was exercisable only by the original trustees, or (ii) by the trustees from time to time, and (2) if the latter, whether the power was void for remoteness and if so to what extent, and in particular so far as it related to the trust for the British Empire Cancer Campaign and Dr. Barnardo's Homes. The settlor and his wife were living at the date of the summons.

The first two defendants were Nellie Reid and Eleanor Wilkinson, the third to sixth defendants were the children of the settlor, all of whom had attained twenty-one, the seventh defendant was a grandchild of the settlor, the eighth, eleventh, twelfth, thirteenth and fourteenth defendants were charities claiming to be interested under the deeds of revocation and new appointment, and the ninth and tenth defendants were the British Empire Cancer Campaign and Dr. Barnardo's Homes National Incorporated Association.

E. J. A. Freeman for the trustees.

E. I. Goulding for the first, second and seventh defendants.

V. G. H. Hallett for the third to sixth defendants.

D. A. Thomas for the eighth defendant.

J. A. Brightman for the ninth and tenth defendants.

N. C. H. Browne-Wilkinson for the eleventh and twelfth defendants.

L. H. L. Cohen for the thirteenth and fourteenth defendants.

The following cases, not referred to in the judgment, were cited in argument: *In re Hargreaves* [1]; *In re Churston's Settled Estates* [2]; *In re Hughes* [3]; *In re Canning* [4]; *In re Russell* [5]; *In re Game* [6]; *In re Wills' Will Trusts* [7]; *In re Gott* [8]; *In re White* [9]; *In re Wilkinson* [10]; *In re Abbott.* [11]

Cur. adv. vult.

June 1. ROXBURGH J. read the following judgment: The question for decision today is whether a power of revocation and new appointment inserted in a settlement has always been, or may become, void as infringing the rule against perpetuities. [His Lordship stated the facts and continued:] I have, as a matter of construction, reached the conclusion that generally in this settlement, though not invariably, and in particular in the general revocation clause, the word "shares" refers to the shares in the capital of the unlimited company and not to shares of beneficiaries in the trust fund. This is important, because in my judgment it excludes the possibility which might otherwise exist of severing the power as between one share in the corpus of the trust fund and another, and in particular as between "the campaign shares" (in respect of which the power of revocation is particularly vulnerable) and the other shares in the trust fund. I also hold that the power of revocation is not confined to the original three named trustees, but extends to all duly appointed trustees throughout the duration of the settlement.

I must now construe the trusts of "the campaign shares." These I hold to be wholly charitable and sufficiently certain. We are not travelling in the artificial sea of conditions subsequent, and I do not envisage that arbiters will be unable to decide at some future time whether the cause of cancer has been discovered and whether a cure (by which I understand "a generally effective cure") has been found. Moreover, I regard the prizes not as a reward for past efforts, but as an incentive to qualified persons to direct their brains and energies to the relief of human suffering.

If these four conclusions are right, that must be the end of the power, because if the power is indivisible it may continue to

[1] (1889) 43 Ch.D. 401.
[2] [1954] Ch. 334; [1954] 2 W.L.R. 386; [1954] 1 All E.R. 725.
[3] [1921] 2 Ch. 208.
[4] [1936] Ch. 309.
[5] [1895] 2 Ch. 698.
[6] [1907] 1 Ch. 276.
[7] [1959] Ch. 1; [1958] 3 W.L.R. 101; [1958] 2 All E.R. 472.
[8] [1944] Ch. 193; 60 T.L.R. 214; [1944] 1 All E.R. 293.
[9] [1893] 2 Ch. 41.
[10] [1926] Ch. 842.
[11] [1893] 1 Ch. 54.

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be exercised long after the period allowed by the rule against perpetuities. Indeed, as the gift in favour of Dr. Barnardo's Homes is exempt from the rule, these shares may never become absolutely vested in any charity, or alternatively they may become so vested in the remotest future. But, owing to the difficulties of the case and its serious consequence (for indeed there have been purported exercises of the power), I should not do justice to counsel's able arguments if I stopped at this point.

It has been argued by the friends of the power that I ought to sever it, avoiding it as regards the campaign shares (or, alternatively, construing the trusts of those shares differently), but adopting as regards the remaining shares an attitude of "wait and see"; and the foundation of this argument is laid upon *In re Bowles*[1] and *In re Davies and Kent's Contract.*[2] Thus they seek to counter the arguments of their foe; for it was argued by Mr. Goulding that as regards the four funds named after the children of the settlor, the named child might under clauses 2, 3, 4 and 5, or the trustees might under clause 7, and as regards the balance of 30,000 shares the trustees might under clause 6 or 7, interpose a life interest in favour of a grandchild of the settlor born after the date of the settlement. Such an appointment would be valid, and would not prejudice the ultimate remainders, which vested in interest in due time, but the fund might not fall into possession within the period allowed by the rule. Accordingly, so the argument ran, the power of revocation might be exercisable beyond that period.

Counsel answered this argument by saying that none of these dire possibilities has happened, and none may ever happen, so that the power of revocation has at any rate not yet disclosed its invalidity (except perhaps as regards the campaign shares in relation to which it should be severed).

This is at first sight a startling contention, and it runs entirely counter to the well-known passage in Lord Parker's judgment in *In re De Sommery*,[3] which is later in date than either of the two foregoing cases: "A special power which, according to the "true construction of the instrument creating it, is capable of "being exercised beyond lives in being and twenty-one years "afterwards is, by reason of the rule against perpetuities, "absolutely void; but if it can only be exercised within the "period allowed by the rule, it is a good power, even although "some particular exercise of it might be void because of the rule. "If a power be given to a person alive at the date of the instru-"ment creating it, it must, of course, if exercised at all, be "executed during his life, and is therefore valid. Again, if a "power can be exercised only in favour of a person living at the "date of the instrument creating it, it must, if exercised at all,

[1] [1905] 1 Ch. 371.
[2] [1910] 2 Ch. 35.
[3] [1912] 2 Ch. 622, 630.

"be exercised during the life of such person, and is therefore "unobjectionable. Further, the instrument itself may expressly "limit a period, not exceeding the legal limits, for the exercise "of the power. Lastly, where the settlor has used language "from which the court may fairly infer that he contemplated "the creation, not of a single power, but of two distinct powers, "one of which only is open to objection because of the rule "against perpetuities, the court will avoid the latter only and "will give effect to the power which is not open to this objec-"tion. Thus, although a power vested in the trustees for the "time being of a settlement has, so far as I can discover, been "uniformly looked on as a single and indivisible power, it may "be otherwise if the power be limited to A and B or other the "trustees of the settlement for the time being. In this case the "court may treat the settlor as having created one power vested "in A and B while trustees, and a distinct power vested in their "successors, in which case the power vested in A and B would "be open to no objection on the ground of remoteness: "*Attenborough* v. *Attenborough*.[4]"

I cannot disregard that exposition of the law, approved as it was by the Privy Council in *Kennedy* v. *Kennedy*,[5] which has become almost canonical, but I should like to attempt a reconciliation between the three cases, which does not seem to me to be difficult. It is in fact foreshadowed by Lord Parker in the opening sentence of the last quotation. The distinction is between a power which is in itself void and a power which is itself good although some particular exercise of it might be void because of the rule.

In the latter type of case it is permissible to wait and see how the power is in fact exercised, and both *In re Bowles*[6] and *In re Davies and Kent's Contract*[7] belong to this class. But such a course is without precedent and would be taken in plain defiance of Lord Parker and quite contrary to traditional doctrine, where the power itself is at stake. I would adopt, as the traditional doctrine, the following passage lately offered for acceptance by two living authors, Megarry and Wade in The Law of Real Property (1957), at pages 214 and 215: "There is "no 'wait and see.' . . . If at the relevant moment there is "the slightest possibility that the perpetuity period may be "exceeded, the limitation is void ab initio even if it is most "improbable that this in fact will happen and even if, as events "turn out, it does not."

It follows, therefore, that even if severance were possible, the severed power would be void as regards each separable portion of the fund. I hold that the power was itself void ab initio because it was capable of being exercised beyond the period

[4] (1885) 1 K. & J. 296.
[5] [1914] A.C. 215.
[6] [1905] 1 Ch. 371.
[7] [1910] 2 Ch. 35.

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allowed by the rule against perpetuities, and accordingly all the purported exercises of the power were void.

Orders accordingly.
Usual order as to costs.

Solicitors: *Lawrence Jones & Co.; Ranger, Burton & Frost; Amery-Parkes & Co.; Kingsford, Dorman & Co.; Crossman, Block & Keith.*

[SWANSEA ASSIZES.]

1958 *July* 8.

Glyn-Jones J.

* HOPKINS *v.* REES AND KIRBY LTD.

Costs—County court jurisdiction, High Court action within—Less than £400 recovered—Payment into court of £250 accepted—Whether costs on County Court scale—Test to be applied—County Courts Act, 1934 (24 *&* 25 *Geo.* 5, *c.* 53), *s.* 47 (1), *as substituted by County Courts Act,* 1955 (4 *&* 5 *Eliz.* 2, *c.* 8), *s.* 1 (2).

County Court—High Court proceedings—Payment into court of £250 accepted.

The plaintiff, a steel erector, claimed damages for personal injuries caused by the defendants' negligence when he fell from a building, injuring his ankle. Having brought his action in the High Court he subsequently accepted the £250 paid in by the defendants. It was contended on their behalf that the judge was entitled to have regard to all the circumstances of the case in deciding whether there were reasonable grounds for bringing High Court proceedings within the meaning of section 47 (1) (as substituted) of the County Courts Act, 1934 [1]:—

[Reported by LAWRENCE GRIFFITHS, Esq., Barrister-at-Law.]

[1] County Courts Act, 1934, s. 47 (1) (as substituted): "Where an "action founded on contract or tort "is commenced in the High Court "which could have been commenced "in the county court and the action "is not referred for trial to an official "referee, then subject to subsections "(3) and (4) of this section the "plaintiff—(*a*) if he recovers a sum "less than £300, shall not be entitled "to any more costs of the action than "those to which he would have been "entitled if the action had been "brought in the county court; and "(*b*) if he recovers a sum less than "£75, shall not be entitled to any "costs of the action; so, however, "that this section shall not affect "any questions as to costs if it "appears to the High Court or a "judge thereof . . . that there was "reasonable ground for supposing the "amount recoverable in respect of the "plaintiff's claim to be in excess of "the amount recoverable in an action "commenced in the county court.

"For the purposes of paragraphs "(*a*) and (*b*) of this subsection, a "plaintiff shall be treated as recover-"ing the full amount recoverable in "respect of his claim without regard "to any deduction made in respect "of contributory negligence on his "part or otherwise in respect of "matters not falling to be taken into "account in determining whether the "action could have been commenced "in the county court."

County Courts Act, 1955, s. 1 (1): "The amounts by reference to which "the jurisdiction of a county court in "actions of contract or tort, or for "money reversable by statute, is "limited by sections 40 and 41 of "the principal Act shall be £400. . ."

Held, that the test was whether the plaintiff as a reasonable man would at the time of issuing the writ have concluded that no judge would award more than £400, and that since, in the circumstances, such a conclusion would not have been warranted, the plaintiff was entitled to High Court costs.

ACTION.

On November 20, 1955, the plaintiff, a steel erector, was injured when he fell from the defendants' factory, injuring his ankle. The action having been ordered to be tried in the High Court, the defendants paid into court £250, which the plaintiff accepted. He now applied for the costs to be taxed on the High Court scale.

P. J. M. Thomas for the plaintiff.
Alun T. Davies for the defendants.

GLYN-JONES J. This claim is brought by the plaintiff against his employers in respect of an industrial injury which happened on November 20, 1955. The plaintiff issued his writ in the High Court on May 6, 1957, and there were pleadings. In the defence the defendant company charges the plaintiff with having caused the accident, or contributed to causing it, by his own negligence.

In March 1958 the defendant company paid into court the sum of £250 and, within the time prescribed by the rules, the plaintiff gave notice that he accepted that sum in satisfaction of his claim. I have no idea whether he accepted it because he thought that sum would adequately compensate him for the injury which he had suffered, or because he thought that there was some chance of a plea of contributory negligence against him succeeding. He gave notice that he accepted it.

The defendant company then point out that costs would have to be taxed on the county court scale pursuant to the provisions of section 47 of the County Courts Act, 1934, as substituted by the County Courts Act, 1955.

Section 47 (1) provides that where an action founded on tort is commenced in the High Court which could have been commenced in the county court, the plaintiff, if he recovers a sum less than £300 shall not be entitled to any more costs of the action than those to which he would have been entitled if the action had been brought in the county court. The section goes on to provide: "So, however, that this section shall not affect "any question as to costs if it appears to the High Court or a "judge thereof that there was reasonable ground for supposing "the amount recoverable in respect of the plaintiff's claim to "be in excess of the amount recoverable in an action commenced "in the county court." I take that to mean reasonable grounds for supposing that the amount awarded as damages to the plaintiff, in the event of his succeeding, might exceed the sum of £400. The subsection continues: "For the purposes of para-"graphs (*a*) and (*b*) of this subsection a plaintiff shall be treated

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"as recovering the full amount recoverable in respect of his "claim without regard to any deduction made in respect of con- "tributory negligence on his part or otherwise in respect of "matters not falling to be taken into account in determining "whether the action could have been commenced in the county "court."

I read those provisions as requiring me to consider this case in this way. Looking at the materials available to the plaintiff and his solicitors at the time when the writ was issued, were there grounds upon which the plaintiff might reasonably contemplate that it was possible that the damages recovered would exceed £400? Mr. Alun Davies submits that the answer to that question should include all the matters that were in dispute in the action, including medical evidence and the circumstances in which the accident happened. I think that is wrong. I think that the only question for me is: putting myself, as far as I can, in the position of the plaintiff at the time when he issued the writ, am I satisfied it was then obvious that this was a county court action or was it an action which, when tried by one judge rather than another, might have resulted in an award of £400? I find in the medical report on the plaintiff submitted to his solicitors for the purpose of this action, a statement that the ankle has a tendency still to go over, that it is now a chronic sprain which will cause some permanent disability, and that if this ankle continues to be liable to go over he might be a danger to his workmates and run the risk of injury to himself if he continued working at heights as a steel erector. Looking at that, and no more, I am, I think, unable to say that it should have been quite clear to the plaintiff as a reasonable man that no judge would award more than £400 for that injury. For that reason, I think that High Court costs are recoverable, and I make the order that the plaintiff is entitled to have his costs taxed on the High Court scale. Of course, I express no opinion whether I myself should have given £400; neither do I express any opinion as to what abatement would have been made from the total sum awarded by reason of any contributory negligence on the part of the plaintiff. The latter of those matters I am prohibited from considering by statute and the former, I think, is irrelevant.

Solicitors: *W. H. Thompson*; *Gee & Edwards, Swansea.*

[CHANCERY DIVISION.]

* PRACTICE DIRECTION (TITLE OF PROCEEDINGS).

1959
June 18.

Practice and Procedure—Chancery Division—Title of proceedings—Principles to be adopted.

To reduce time and space wasting verbiage in titles to proceedings in the Chancery Division the judges of the Division have approved the following methods and principles:

1. Where the title refers to a document such as a settlement, lease, contract, etc., it will be sufficient to state the nature of the document, its date and parties. Initials only of the Christian or first names of each named party to the document should be given in conjunction with their surnames. It will normally be sufficient to refer to the parties as "between (A. B.) "and Others." Should it be necessary to distinguish two documents of the same date the necessary distinction should be concise in form.

2. Where a proceeding is taken in the matter of several instruments and it is convenient to do so, the instruments may be listed under suitable introductory words, e.g.:

"IN THE MATTER OF the following instruments."

"Date Instruments Parties."

3. Designation of a house or land or other premises should follow the lines of a postal address rather than those of a conveyancing description. Where such a method is not possible the title should be limited to words sufficient to identify the property consistently with the nature of the proceedings. Words such as "in the Parish of . . . " or "in the County of . . . " should not appear in the title.

4. The capacity in which persons sue or are sued, e.g., as executors of a deceased person or as representing themselves and all other persons having a common interest, should be omitted from the title, but the status of female parties to the action must always be given. A party who is an infant must be so described. Where an infant is a plaintiff the title should contain no reference to his next friend. Where an infant party attains his majority in the course of the proceedings he shall thereafter be described in the title as "(Late an infant)." The additional words "but now "of full age" should not be used.

Representative capacities should be mentioned in the body of the writ, originating summons, or other like document.

5. Where a person has by order been added as a party, insert after his name "(added ../../5..)." When a defendant has become a plaintiff or vice versa, insert after his name his former capacity and date of the order effecting the change, e.g., "William "Brown (former defendant ../../5..)."

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PRACTICE DIRECTION (TITLE OF PROCEEDINGS).

Where proceedings are stayed against any particular party, insert after his name "(proceedings stayed ../../5..)."

6. When an action has been reconstituted on more than one occasion, the title to summonses, notices, pleadings and affidavits should set out no more than the original title and the one constituted by the last order to carry on. In setting out the names of the original parties, only those of the first-named plaintiff and defendant should be given. Any additional plaintiffs and defendants can be covered by the words "and others." (See R.S.C., Ord. 38, r. 2.) Unless otherwise directed, the full title will continue to be set out in any order which is drawn up.

7. The above instances are not intended to be exhaustive, but the principles indicated should be followed as occasion requires.

MAURICE WILLMOTT,
Chief Master,
Chancery Division.

June 18, 1959.

[CHANCERY DIVISION.]

1959
May 27.

Vaisey J.

* *In re* DOUGLAS' WILL TRUSTS. LLOYDS BANK LTD. *v.* NELSON AND OTHERS.

[1958 D. 1281.]

Will—Construction—Survivorship, words of—Gift of income to wife for life—Gift of estate after death of wife to "my sisters . . . or the "survivors or survivor of them"—Wife predeceased by testator's sisters—Devolution of estate.

Trust and Trustee—Investments authorised—Construction—Power to trustees to invest "on such securities as they may think fit"—"Securities"—Meaning.

By his will a testator provided: "I direct my trustees to pay "the income from my estate to my said wife [naming her] for her "use during her life provided she so long remain my widow and "from and after her decease or second marriage whichever shall "first happen then I give my estate and effects to my sisters "[naming them] or the survivors or survivor of them I authorise "and empower my trustees to invest the trust funds on such "securities as they may think fit without being responsible for any "loss or for the failure of any banker broker or other person in "whose hands the trust funds may be. . . ."

The sisters, three in number, all survived the testator but predeceased the wife:—

Held, (1) that the words "survivors or survivor of them" referred to survivors, not of the testator, but of the wife; that, as none of the three sisters had survived the wife, and her life interest during widowhood still subsisted, there could be no such survivorship and that, therefore, after her death the estate devolved as on intestacy.

Cripps v. *Wolcott* (1819) 4 Madd. 11 applied.

Browne v. *Lord Kenyon* (1818) 3 Madd. distinguished.

(2) That, since there was an intestacy, the relevant provisions of the Administration of Estates Act, 1925, became operative, and the wife was entitled to £1,000 and to the testator's personal chattels.

(3) That "securities" meant "investments" and was not confined to secured investments but, while not being so extensive as to mean any property at all (such as jewellery and "wild cat" investments), included investments within the range authorised by law and any stocks, shares or bonds by way of investment.

ADJOURNED SUMMONS.

By his will dated August 29, 1933, a testator, James Wightman Douglas, provided: " . . . I appoint my sisters Jane "Catherine Douglas and Sarah Scott Douglas executrices and "trustees of this my will and also trustees for the purposes of "the Settled Land Act, 1925, I direct my trustees to allow my "wife Gertrude Douglas to have the use and enjoyment of my "household furniture and household effects plate linen china "bedding books and jewellery for her use during her life if she "so long remain my widow I give and devise my real estate "together with the residue of my personal estate and effects to "my trustees upon trust in the first instance to pay my just "debts funeral and testamentary expenses and subject thereto "I direct my trustees to pay the income from my estate to my "said wife Gertrude Douglas for her use during her life provided "she so long remain my widow and from and after her decease "or second marriage whichever shall first happen then I give my "estate and effects to my sisters Jane Catherine Douglas "Elizabeth Grace Douglas and Sarah Scott Douglas or the "survivors or survivor of them I authorise and empower my "trustees to invest the trust funds on such securities as they "may think fit without being responsible for any loss or for "the failure of any banker broker or other person in whose hands "the trust funds may be. . . ."

The testator died in 1937; Elizabeth Grace Douglas and Jane Catherine Douglas died in 1940 and Sarah Scott Douglas died in 1957. Doubts arose as to the true construction of the power of investment contained in the will and also on the question whether, owing to the deaths of the testator's sisters during his widow's lifetime, the residuary gift in his will operated, as from the widow's death or remarriage, in favour of the personal representatives of Sarah Scott Douglas or of those of all three sisters in equal one-third shares or failed to operate, so that the property subject to the trusts devolved as on a partial intestacy of the testator. Accordingly, on September 26, 1958, Lloyds Bank Ltd., the sole trustee of the will under a deed of appointment dated January 6, 1940, took out this summons. The defendants to the summons were: the three executors of Sarah Scott Douglas, the third defendant being also a trustee of the will of Jane Catherine Douglas and the sole residuary legatee under the will of Elizabeth Grace Douglas; the two other trustees of the will of Jane Catherine Douglas; the testator's widow; and a

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defendant representing next-of-kin. By the summons the bank asked: (1) Whether, on the true construction of the will and in the events which had happened, the trusts of the residuary estate declared to operate from and after the widow's death or second marriage (*a*) operated in favour of the personal representatives of Sarah Scott Douglas (being the personal representatives of the survivor of Jane Catherine, Elizabeth Grace and Sarah Scott Douglas); or (*b*) operated in favour of the personal representatives of all three sisters in equal one-third shares; or (*c*) failed to take effect so that, from and after the widow's death or second marriage, the residuary estate was undisposed of by the will and devolved as on a partial intestacy: (2) Should the answer to question (1) be in terms of para. (*c*), whether (*a*) the bank as trustee was at liberty during the widow's lifetime to raise out of the capital of the residuary estate and pay to her the sum of £1,000 and interest thereon as in the Administration of Estates Act, 1925, mentioned; or (*b*) that sum and interest thereon ought not to be raised and paid until her death; and (*c*) whether the bank as trustee was at liberty to deliver to the widow absolutely and during her lifetime the testator's personal chattels as defined in that Act: (3) (*a*) Whether on the true construction of the will the power thereby conferred on the trustees thereof to invest the trust funds in such securities as they might think fit (i) comprised only investment in or on debts or claims the repayment whereof was secured on some fund or property or (ii) included also the purchase out of the trust funds of any stocks, shares or bonds by way of investment; (*b*) whether on the true construction of the will that power (i) comprised only such securities (comprised in the expression "securities") as might from time to time be by law authorised for the investment of trust funds or (ii) comprised any securities (comprised in the expression "securities") that the trustees thought fit whether or not by law authorised for the investment of trust funds: (4) An inquiry as to who on the testator's death became beneficially entitled to any property of his as to which he died intestate. Para. (*b*) of this question asked also that the third defendant be appointed to represent the estate of Elizabeth Grace Douglas.

P. S. A. Rossdale for the bank.

B. S. Tatham for two executors of Sarah Scott Douglas.

Oliver Lodge for her third executor, the two other trustees of Jane Catherine Douglas, and next-of-kin.

O. M. W. Swingland for the widow.

The cases cited in argument are referred to in the judgment.

Vaisey J. This is not an easy case. Although the words of the will look simple, not suggesting any sort of doubt or question, when investigated they are by no means simple or easy to construe.

The point is one of the briefest. The testator made his will on August 29, 1933. He died on January 26, 1937, leaving estate that was originally sworn at £18,000. He left surviving him his widow and three sisters whom he named in the will, Jane, Elizabeth and Sarah. The difficulty has arisen owing to the fact that the three sisters, Jane, Elizabeth and Sarah, all predeceased the widow, which it seems the testator did not expect them to do. The surviving sister, Sarah, died on May 4, 1957; the widow is still alive, but all the three sisters are dead.

The words of the will are these. The testator first gives his wife in quite plain, simple and unquestionable terms the life estate in the residue of his property. Then he goes on: "and "from and after her decease or second marriage whichever shall "first happen then I give my estate and effects to my sisters "Jane, Elizabeth and Sarah or the survivors or survivor of "them." Looking at this will without a knowledge of the authorities which govern this kind of point, it might have been said that the words "the survivors or survivor of them" were referring to the death of the testator: in other words, that it is a gift to the three sisters or either of them who survived the testator subject to the widow's life estate. But there is a well-settled rule, known as the rule in *Cripps* v. *Wolcott*,[1] which is thus stated in Hawkins on Wills, 3rd ed. (1925), p. 310: "In bequests of personal estate, words of survivorship are prima "facie to be referred to the period of payment or distribution, "and not to the death of the testator." Then it goes on: "So "if the bequest be to A for life, and after his decease to B, C, "and D, *or the survivors*, those living at the death of A will "take the whole fund." The authorities, which are well settled, oblige me to read the words "survivors or survivor of them" as referring to the survivorship, not of the testator, but of the tenant for life, his widow.

There is another rule, known as the rule in *Browne* v. *Lord Kenyon*,[2] which is referred to in Hawkins on Wills, at p. 316, in these words: "A bequest to several, or to a class, '*or*' to "such of them as shall be living at a given period, is construed "as a vested gift to all, subject to be divested in favour of those "living at that period, if there be such; and if none are then "living, all are held to take." The operation of that rule in *Browne* v. *Lord Kenyon*[2] depends on there having been a vested gift in the first instance, and I am bound to say that I cannot find any such gift in this case, this being a gift in joint tenancy to the three sisters, followed by the words which I have already read "or the survivors or survivor of them."

It is suggested that I should read this as a gift to the sisters with a substitutionary gift to the "survivors or survivor of "them" living at the death of the widow, thus limiting the antecedent vested gift made previously so that the sisters would

[1] (1819) 4 Madd. 11.

[2] (1818) 3 Madd. 410.

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Vaisey J.

take under the original gift with the result that, as they take as joint tenants, Sarah, as survivor of the three, is entitled to the whole fund. I do not think that I can read it in that way. This is a gift in one unbroken sentence with no sort of punctuation or anything of that kind. The gift is to the three sisters "or the survivors or survivor of them," which must mean, as I have already said, having regard to the leading case of *Cripps* v. *Wolcott*,[3] a gift to the three sisters, but as none of them has survived the tenant for life, the widow, who is still alive, her life interest during widowhood still remains.

As I have said, there could not be and cannot be any "survivors or survivor" in the sense which I am bound to attribute to those words as stated in *Cripps* v. *Wolcott*.[3] Therefore, I think that there is no person to take under this will, with the result that in my judgment there is an intestacy. In those circumstances, subject to the interest during widowhood of the testator's widow, the testator's estate is undisposed of and goes as on an intestacy.

Argument was then addressed to the court on question 2, and the following cases, not referred to in the judgment, were cited: *In re McKee*[4]; *In re Harari's Settlement Trusts*.[5]

Vaisey J. This second point is a very strange one, and I do not think that there is much I need say about it, because, in the events which have happened, and having regard to the construction which I have placed on the will, the testator must be assumed to have died intestate, subject to the interest during widowhood that he has given to his dependant, Mrs. Douglas.

There being an intestacy, the relevant provisions of the Administration of Estates Act, 1925, come into operation. There being already a trust for sale under the will, or a full widowhood interest, given to her, she need not trouble about the part of the Administration of Estates Act, 1925, which gives her a limited interest. As regards that part of the Administration of Estates Act, 1925, which gives her an absolute interest in undisposed of property, I think that the widow, if she wants it, can claim to have paid over to her this portion which I am referring to of £1,000 with interest at 5 per cent. from the death. I do not see how that can be surmounted. As to the testator's personal chattels, I think that she is entitled to have them handed over to her, and delivered with the £1,000 with interest, notwithstanding that she might appear, on a narrow view of the case, to be disqualified by the fact that she is still alive.

Argument was then addressed to the court on question 3.

[3] 4 Maddocks 11.

[4] [1931] 2 Ch. 145; 47 T.L.R. E.R. 430.

[5] [1949] W.N. 79; [1949] 1 All 424.

VAISEY J. I think that "securities" means investments and "investments" means, as the law now stands, investments authorised by law; that is to say, mortgages, stocks and shares, bonds, or investments authorised under the Act.

Once you say that "investments" means any property at all, I do not see how you are going to exclude jewellery and wild cat investments such as gold mines in Alaska. "Securities" is not confined to secured investments, but I think that it means investments and investments within the authorised range. I am prepared to make a declaration that "securities" includes any stocks or shares or bonds by way of investment. There is authority for saying that. That would cover probably all forms of investments in securities.

I think that there had better be an inquiry in the form asked by question 4.

The plaintiff bank will get its costs and expenses in the usual way and the other parties will get their costs as between solicitor and client. They will be paid out of the corpus or bulk of the estate. The costs of the inquiry which I have directed will be reserved.

Declarations and orders accordingly.

Solicitors: *Crossman, Block & Co. for Adam Douglas & Son, Alnwick; Bolton, Jobson & Martyn.*

K. R. A. H.

[CHANCERY DIVISION.]

* MARKS *v.* LILLEY.

[1959 M. 343.]

1959
June 2.
Vaisey J.

Vendor and Purchaser—Specific performance—Costs—Time not of essence of contract—Completion out of time—Issue of writ by purchaser just before completion—Costs subsequent to issue of writ—Equitable right to specific performance—Whether purchaser entitled to costs.

Costs—Specific performance—Completion of contract after issue of writ by purchaser—Whether purchaser entitled to costs.

In a contract, dated November 28, 1958, and expressed to be governed by the National Conditions of Sale, for the sale of a house, the date for completion was left blank but was fixed by condition 4 of those conditions at January 7, 1959. The vendor could not then complete and on January 8, 1959, was given written notice to do so within 28 days, and still could not. No steps were taken on the purchaser's behalf to make time of the essence of the contract. On February 6, the vendor's solicitors, in face of the likelihood of immediate proceedings, told the purchaser's solicitor that the vendor could not complete because his own new house was not ready for him, but that it probably would be by February 20. Not confident of that, the purchaser's solicitor on February 9 issued a

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writ for specific performance. On February 16 vacant possession of the property was given.

On a summons by the purchaser for an order that the costs of the action be taxed and be paid to him by the vendor:—

Held, that, strictly speaking, the issue of the summons for costs was premature, as the purchaser ought not to be given the costs without the merits of the action being considered; but that, since it was clear that there was no defence to the action, and, as the equitable right to specific performance had already accrued (although the date for completion had yet to be made certain by the service of notice making time of the essence of the contract), so that there already existed, when the writ was issued, a right which the purchaser could have enforced by action, the issue of the writ was justified, and, accordingly, the purchaser's costs should be taxed and paid by the vendor.

Summons.

On February 9, 1959, the plaintiff, Brian Marks, issued a writ against the defendant, John David Lilley, claiming specific performance of a contract for the sale of a house.

The contract, dated November 28, 1958, was on a printed form on which the date for completion was left blank, but the contract contained also the statement that the property was sold subject to the National Conditions of Sale. Condition 4 provided: "The completion date shall be the day mentioned for "the purpose in the special conditions or, if none, the first "working day after the expiration of five weeks from the delivery "of the abstract of title." On December 2, 1958, the abstract of title was delivered, the contract being, accordingly, due to be completed on January 7, 1959. The plaintiff required the house for his own occupation only in January, 1959, but the defendant proved unable to complete by the due date, and no step was taken on the plaintiff's behalf to make time of the essence of the contract. In the course of correspondence the plaintiff's solicitor, by notice in writing dated January 8, required completion within 28 days, and later told the defendant's solicitors that unless completion took place by noon on February 6, 1959, proceedings which he had already threatened would be instituted. On February 6, 1959, in the afternoon, the defendant's solicitors informed the plaintiff's solicitor by telephone that completion could not take place because the defendant's new house was not yet completed, but they thought that it would be completed by February 20, 1959. Neither the plaintiff nor his solicitor had previously been told that completion of the contract depended upon the completing of the building of that house. Before the exchange of contracts the defendant's solicitors had told the plaintiff's solicitor that the defendant wished to complete at the latest before Christmas, 1958, and, on the exchange of contracts, they had told him that completion would take place on or about January 1, 1959; on January 2 they had told him that the defendant intended to vacate the property on or about January 12. On February 9, 1959, the plaintiff's solicitor, not being satisfied that the defendant would complete the contract on

February 20, issued the writ in the action, claiming specific performance thereof. On the same day he received from the defendant's solicitors a letter stating that vacant possession of the property would be given on February 20 and a completion statement sent in a day or two. On February 9 there were posted from the plaintiff's solicitor's office, and on February 10 received by the defendant's solicitors, the writ and a copy; and on February 12 the writ was returned endorsed with an acknowledgment of service and an undertaking to appear, and at the same time there was sent a completion statement made up to February 18. The plaintiff's solicitor telephoned to the defendant's solicitors asking if they would agree to pay the costs to date and stating that if they did he would not issue a summons. The plaintiff wanted £25 costs, and the defendant would not pay more than £5. Over the telephone the defendant's solicitors stated that they would not agree to pay any costs and would leave the matter to the master. On February 16, vacant possession of the property was given.

On February 25 the present summons was taken out asking for an order that the costs of the action be taxed and paid to the plaintiff. In order to issue the summons for costs without a duplicate appearance, the plaintiff's solicitor had to draw, engross, swear, stamp and file an affidavit of service. When trying to issue the summons on February 24 he was told that the defendant had in fact entered an appearance on February 23: the defendant, however, did not send him the duplicate appearance until February 25. In view of the importance of the matter to the plaintiff, who married on January 18 and had no other matrimonial home, the plaintiff's solicitor had instructed counsel to settle the writ in the action. The plaintiff claimed that, in view of the foregoing matters, he was entitled to the costs of the proceedings to date.

Greville Janner for the plaintiff.
E. G. Nugee for the defendant.

No cases were cited in argument.

VAISEY J. I think that it would be merciful to these parties if I gave judgment straightway, because, although there are some not very easy questions in this case and if I had to reserve my judgment and go into all the points, I would be keeping the parties waiting, it might be, for some time, the matter really lies within a very narrow compass indeed.

This is an action in which the plaintiff, Brian Marks, claims against the defendant, John David Lilley, specific performance of an agreement dated November 28, 1958, whereby the defendant agreed to sell to the plaintiff a house known as 86, Winchester Avenue, at Wembley, in the County of Middlesex. A great deal has been said about this contract; but, without going into too

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great detail, the matter seems to me to be clear. The contract is on a printed page, and it is true that one of the clauses in the contract is that the purchase should be completed "on or before the (blank) day of (blank) next"; that is to say, that particular printed clause is left in blank, so that, in one sense, the contract names no date for completion, but the contract also says that the property is sold subject to the National Conditions of Sale, 16th edition, with certain exceptions, which are immaterial, and when I look at those national conditions, I find that the date for the completion of the purchase is provided for in perfectly clear language. No. 4 of the National Conditions provides: "The completion date shall be the day "mentioned for the purpose in the special conditions or, if "none"—and that, of course, is this case—"the first working "day after the expiration of five weeks from the delivery of "the abstract of title." It is no good telling me that the real arrangement was that the contract should not be completed on that date, but on some date which was referable to the completion of a building for the defendant's occupation, or something of that kind. Here is the contract in perfectly plain terms, and it does provide a date for completion. Unfortunately, owing to difficulties into which I need not go, the defendant was unwilling and unable to complete the contract on the date indicated, and no step was taken to make time of the essence of the contract. The date which was indicated for the completion of the purchase under the national conditions—that is to say, the first working day after the expiration of a certain period—was January 7, 1959. The purchase was not completed on that day, and a considerable amount of correspondence took place between the solicitors for the parties. The plaintiff was pressing for an early completion, and the defendant was saying that he was quite willing to complete as soon as he could but that he was not at present able to do so. One month after that date—that is to say, after January 7, 1959—the plaintiff issued the writ in this action, on February 9, 1959. I think in a sense he acted rather precipitately. I am not quite sure why he should have rushed it out in that way but the question is: was he entitled to issue this writ? There had been no default in the strict sense. There had been no firm date for completion, of the essence of the contract, and I do not think that there was really any doubt that, subject to clearing away the difficulties which were besetting the defendant, the contract would have been completed within a reasonable time. In fact, what happened was this. Seven days after the issue of the writ, possession of the property was given to the plaintiff, on February 16, 1959, and the contract was in fact completed on February 18, 1959. Apparently the completion statement did not deal with the costs of the action in any way, but contemporaneously or immediately afterwards the plaintiff asked for the costs. When asked what they would come to, he said £25 or 25 guineas, which seems to have been

rather a shock to the defendant, and indeed I am not surprised. I think that it was probably too much; but on February 25 the summons was issued by the plaintiff, asking for an order that the costs of the action should be taxed and paid to the plaintiff. Strictly speaking, I think that was premature; he ought not really to get the costs without going into the merits of the case and so on, and there might have been matters of controversy which would have afforded a defence to this action. It is quite obvious that in point of fact there was no defence to the action; but the defendant takes the view that the issue of the writ was premature and that he ought not to be asked to pay the costs of a perfectly unnecessary action.

I agree that the point is somewhat technical, but I am going to quote from a paragraph of the late Mr. T. Cyprian Williams' book on the Contract of Sale of Land (1930), at p. 132, which I think is a well-founded expression of the law: "The "cause of action,"—this is action for specific performance— "therefore, is not a breach of the contract, such as alone gives "rise to an action at law for damages, but is the duty considered "in equity to be incumbent on the defendant of actually doing "what he promised by the contract to perform. It follows that "a breach of the contract by one party thereto is not necessarily "a condition precedent to the other party's obtaining an order "for its specific performance; though a breach of the contract "is usually requisite to induce the court to interfere." Nowadays, of course, this contract could have been registered as an estate contract, which would have afforded protection to the purchaser; but in former days, before there were such things as registered estate contracts, I believe the origin of the idea that you could issue a writ for specific performance before actual breach was to enable the purchaser, if he thought right, to register his action as a lis pendens. In the present case, the writ was issued on February 9, and completion in fact took place on February 18, and the only question is whether the costs of the action were costs which the plaintiff should have fairly demanded from the defendant. They would not have come to much. I doubt whether the plaintiff is justified in suggesting £25 for the costs incurred during that very short period: possibly certain unnecessary expenditure was made but, in my judgment, when the summons was issued on February 25, the plaintiff was entitled to an order for the payment of the costs of the action, notwithstanding the fact that the action had yet to be tried, because it is admitted there is nothing left in the action. Completion had taken place and, although technical points might be taken, nobody suggests there was any real defence to the action. The sole question is: was the plaintiff justified in issuing the writ which he did issue on February 9, 1959? I think that he was. I quite agree that it seems a futile proceeding in a way; but, as the equitable right had already accrued, notwithstanding the fact that the date for completion had yet to be

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made certain by the service of the ordinary notice making time of the essence, I think that at the date that the writ was issued there was already in existence a right which the plaintiff was in a position, if he had so desired, to enforce by action.

What that amounts to, really, is this: I think that the proper course to have been followed by the defendant would have been for him to say: "Yes, I will pay the costs of the "action to be taxed," instead of which the parties insulted one another (if I may so describe it) by the plaintiff asking for £25 and the defendant offering £5, whereas the proper remedy was for the defendant to say: "Of course, you are entitled to the "costs of the action to be taxed; it is only a few days, and I will "submit to that." Although it is one of the procedural troubles in the present case (because nobody is asking, by any visible documents, for a stay of proceedings, in the action), the effect of my making an order for the payment of the plaintiff's costs is to dispose of the only outstanding point, and I am disposed to stay all further proceedings, subject only to an order that the plaintiff's costs as between party and party shall be taxed and be paid by the defendant, and there will be an end of the action. It is very unfortunate that this matter should have had to be fought out in this very hostile way when all kinds of suggestions were made such as that the contract is one which ought to be rectified and that I must assume from certain passages in the correspondence, and so forth, that the contract is not what it appears to be, a properly constituted written binding agreement for sale and purchase of this house. It is no good saying: "It is quite obvious that the contract ought "to be rectified because it appears from the correspondence that "it was really not in accordance with the conditions of sale." That may have been a ground for rectification but I cannot assume that the contract does not exist as a document operating according to its tenor, and I think, in spite of what has been said by Mr. Nugee, that I must take this contract as a written contract, binding, effective, and to be carried into effect in accordance with its terms. When it states that its date for completion is the first working day after the expiration of certain weeks, I think that that was the date on which the contract was to be completed; further, I think that, immediately after the early part of January the defendant offered February 20 as the date on which he would complete. That was not accepted or agreed to, and the issue of the writ may very likely have had an accelerating effect in hurrying the defendant up, so that in fact he completed not on February 20 but on February 18. Therefore I think that to that extent the issue of the writ has produced some fruit. What point there was in incurring all this unnecessary expense, engrossing this, stamping this and preparing that, is a matter not for me but for the taxing master.

The order which I must make on this summons is that all further proceedings in this action be stayed, subject to an order

for the taxation as between party and party of the plaintiff's costs of the action and an order for the payment of the costs so taxed by the defendant; and there, I hope, will be an end of the matter. It is very unfortunate. There has been a certain amount of unreasonableness on each side, but I do not think that I ought to deprive the plaintiff of his normal right to costs, for which there is indeed ample authority, notwithstanding the fact that the difficulties have not been occasioned by any fraud. It rests solely on this: Here is a contract. It has not been completed. The plaintiff is entitled to ask that it should be carried into effect and specifically performed. That is what the plaintiff has done, and I think he was justified in doing it. If only the defendant, when he was asked for costs, had said "All right; tax the costs and I will pay them," instead of saying he would not pay any costs and offering £5 in a rather tentative manner, everybody, including myself, would have been saved a lot of trouble. I have, however, heard a very interesting argument from counsel, for which I am much obliged.

Order accordingly.

Solicitors: *John Pinto; Francis & Francis, Sudbury.*

K. R. A. H.

[CHANCERY DIVISION.]

* *In re* ROYAL NAVAL AND ROYAL MARINE CHILDREN'S HOMES, PORTSMOUTH. LLOYDS BANK LTD. AND OTHERS *v.* ATTORNEY-GENERAL.

1959
June 4.
Roxburgh J.

PRACTICE NOTE.

Charity—Investments—Variation—Scheme—Single body of trustees of several charities—Separate trust funds—Application by trustees to combine funds into one fund—Application to enlarge scope of permissible investments—Jurisdiction of court to sanction such applications by way of scheme—Special jurisdiction confined to charities—Interim order to take effect "unless and until the "law regulating the investment of trust moneys generally is "amended by Parliament"—Review of investments by professional adviser.

Trust and Trustee—Variation of trusts—Powers of investment—Pending legislation—Interim order—Charity.

ADJOURNED SUMMONS.

The custodian trustee and the managing trustees of the general fund of the Royal Naval and Royal Marine Children's Homes, Portsmouth, "the Institute," applied to the court under

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[Reported by MARGARET THOMAS, Barrister-at-Law.]

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the Charitable Trusts Acts, 1853 to 1925, for permission (*a*) to consolidate the general fund and a fund of which the Institute was the trustee into one pool in which the several trusts were to be deemed to be interested in appropriate aliquot shares, and (*b*) to enlarge the scope of permissible investments for such combined fund.

J. A. Gibson for the applicants.
Denys Buckley for the Attorney-General.

Roxburgh J. This application as amended is not an application under section 57 of the Trustee Act, 1925, but is an application for a variation of the powers of investment of charitable trustees by way of scheme. There is no particular reason why such an application should normally be adjourned into open court but, as it has been adjourned, it gives me an opportunity of saying something about a point of principle which has only very recently arisen and in respect of which I am happy to say that my view and that of the Attorney-General, as represented by Mr. Buckley, are in harmony.

The point is this: I have long regarded as completely unsatisfactory the position under which judges were expected to exercise their discretion in relation to a matter which is primarily financial and economic and in regard to which they have had, as judges, no special training. I wear no white sheet when I admit that it is a matter on which obviously there were bound to develop differences of opinion amongst judges, because the questions cannot be solved in accordance with any legal principles. Therefore, it was with something little short of ecstasy that I read recently an official announcement [1] that an Act for amending the general range of authorised investments was now in contemplation. That raises the question, what ought I to do with an application like this, which is an application to extend the range of investments for one charity and an associated small charity.

It seems to me that Parliament has always accepted the obligation of specifying the general range of trustee investments. Section 1 of the Trustee Act, 1925, gives the most recent general range although there have been some additions and alterations from time to time in connection with special securities. It is, I should have thought, essentially a matter with which Parliament, which can take into account all considerations, financial and economic as well as equitable and legal, was specially qualified to deal. Therefore, I have reached the conclusion, which Mr. Buckley does not oppose, that any further orders made in relation to these matters should be interim orders; that is to say, orders to take effect unless and until the law regulating the investment of trust moneys generally is amended by Parliament.

[1] H.L. Debates, vol. 216, col. 410 (May 13, 1959). The Times, May 14, 1959.

There would have been an alternative method, namely, to make an interim order for a defined space of time—say a year—but that might be over-optimistic and it would mean the further expense of an application to extend the time. In order to cover all risks, it might have been specified to be for four years, but one hopes that the new schedule may have come into legislative force long before the expiration of four years. I do not think that this new formula is really ambiguous: it operates automatically and does not involve any further expense at all.

I should have thought that it could not be desirable for me to anticipate the will of Parliament by an order of more extended duration than that. It is true that investment clauses are often in special form and they always have to be looked at to see exactly what they say; but it seems much better, broadly speaking, that there should be a general range of permitted investments for charitable funds than that each charity should have its own particular private range. Speaking for myself, if I knew exactly what range Parliament were inclined to enact, I should enact it in advance by way of order but, as I do not possess that information, it is not open to me to take that course.

I realise that in saying this, it may seem that I am impinging something upon what I specially claim to be my own, namely, the right to exercise my discretion; but there comes a point at which the exercise of judicial discretion by several different judges on a matter which arises almost daily may become very embarrassing to the legal profession, and I think that in the exercise of my discretion I am entiled to take that into account.

It is for that reason that I have adopted the present scheme. It is substantially (though not identically) the same as that adopted by Vaisey J. in *In re Royal Society's Charitable Trusts* [2] and that is no accident, because I was anxious as far as possible, to bring about some sort of uniformity of practice in matters upon which it is very difficult to know exactly how to exercise the discretion entrusted. I am bound to admit that that list goes further in some respects than a list which I should have evolved if his judgment had not come into existence before mine. But these are very narrow points and I am trying as it were, to mould my discretion in the direction of uniformity. That is the policy which I hope to adopt until Parliament makes its will known.

The following scheme was adopted:

SCHEME

I. The following investments and moneys viz. (*a*) the investments and moneys representing the capital of the general fund (hereinafter called "the general fund") of the Royal Naval and Royal Marine Children's Homes, Portsmouth (hereinafter called

[2] [1956] Ch. 87; [1955] 3 W.L.R. 342; [1955] 3 All E.R. 14.

1959

Lloyds Bank Ltd. v. Attorney-General.

Roxburgh J.

"the Institute") and (*b*) the investments and moneys representing the capital of the Royal Commissioners Patriotic Fund (hereinafter called "the special fund") of which the Institute is the trustee shall be consolidated into one combined pool. All the said investments and moneys as the same may be constituted or represented are hereinafter referred to as "the pool."

II. The general fund and the special fund shall be regarded and treated for all purposes as interested from time to time in in an appropriate undivided aliquot portion of the pool.

III. For the purposes of settling adjusting and regulating the respective amounts for the time being of the aliquot portions of the general fund and the special fund all valuations and calculations shall be made and from time to time as circumstances may require be revised by the Institute.

IV. Unless and until the law regulating the investment of trust moneys generally shall be amended by Parliament (but without prejudice to any investment made pursuant to this order prior to the aforesaid Act of Parliament coming into effect)—

A. The pool shall be divided into two parts of which one part (hereinafter called "the free fund") shall at the date of division have twice the value of the other part (hereinafter called "the restricted fund")

B. Moneys forming part of the restricted fund and requiring investment may be invested only in or upon the range of investments authorised by section 1 of the Trustee Act, 1925, for the investment of trust moneys (hereinafter called "the authorised range")

C. Subject to the provisions hereinafter contained moneys forming part of the free fund and requiring investment may in addition to the authorised range be invested in or upon any of the following investments and such investments may be varied for others of a like nature:—

(i) the purchase of freehold land or leasehold land held for a term of which at least 200 years are unexpired at the date of purchase situated in the United Kingdom of Great Britain and Northern Ireland and as to both freehold and leasehold land whether or not subject to easements or restrictive covenants *Provided* that the value of any land so purchased and for the time being forming part of the free fund shall not in the aggregate exceed £20,000 such value to be calculated and ascertained (in the case of each such purchase) at the time of such purchase

(ii) securities of or guaranteed by the Government of the United States of America or any State thereof

(iii) the stocks bonds debentures or securities of any municipality county or district council public body local authority public utility company or railway situated or operating within the United Kingdom the Dominion of Canada the Commonwealth of Australia or the Dominion of New Zealand

(iv) the debentures or debenture stock (including convertible debenture stock) or guaranteed preference ordinary or deferred stock or shares or other marketable security of any company incorporated in the United Kingdom under any general or special Act of Parliament or by Royal Charter or incorporated under the laws of the Dominion of Canada the Commonwealth of Australia the Dominion of New Zealand or the United States of America or any state of any of the foregoing

Provided that no moneys shall be invested

(*a*) upon any investment mentioned in paragraph (ii) paragraph (iii) or paragraph (iv) of this clause which is not dealt in or quoted officially on one of the recognised stock exchanges in London New York Toronto Montreal Melbourne or Wellington

(*b*) in any stock or shares of any company or corporation (other than a company incorporated in the United Kingdom carrying on banking or insurance business in the United Kingdom) which by reason of not being fully paid up or otherwise carry a liability to contribute by way of calls in the event of a winding up or otherwise but this proviso shall not prevent the acquisition of newly issued shares or stock which would otherwise be permitted hereby and of which the capital is by virtue of the terms of the issue thereof to be paid by instalments of which the last is to be payable not later than one year from the date of issue

(*c*) in the ordinary or deferred stock or shares of any company or corporation unless at the time of investment such company shall have a paid up capital of at least £750,000 or its equivalent at the current rate of exchange

(v) a professional adviser of not less than 15 years' standing in his profession as a stockbroker merchant banker or as a member of a finance house shall be employed to keep the trust investments under review and to recommend any changes which such adviser may from time to time consider to be desirable.

Costs taxed on the basis including therein, in the case of the applicants the costs of preparing and submitting, and in the case of the respondent the cost of considering, the originating summons herein and the affidavits with the exhibits thereto in support thereof in draft.

Order accordingly.

Solicitors: *Mills & Morley for Bramsdon & Childs, Portsmouth; Treasury Solicitor.*

[PROBATE, ETC., DIVISION.]

1959
May 13.

* GUERRINE (orse. ROBERTS) *v.* GUERRINE.

PRACTICE NOTE.

Sequestration—Bank account—Moneys standing to debtor's credit—Divorce—Costs—Enforcement of order for costs—R.S.C., Ord. 43, *r.* 6.

MOTION.

On September 24, 1958, a sum of £100 was paid into court as security for costs ordered to be paid by a husband whose wife had obtained a decree nisi of nullity of marriage. On February 25, 1959, the decree having been made absolute, the costs were taxed at the sum of £480 9s. 3d. and the balance outstanding was ordered to be paid by the husband within seven days of the order being served upon his solicitors. No payments having been made, a writ of sequestration was issued out of the Divorce Registry on April 30, 1959, that four named commissioners sequester all the estate both real and personal of the husband. Barclays Bank Ltd., having been notified of the writ, declined to pay funds standing to the husband's credit at the bank to the sequestrators without further order of the court.

The wife issued a notice of motion seeking an order that the bank should verify and admit the balance standing to the credit of the husband at the bank and should pay the sum into court to the credit of the sequestration account. The notice of motion was served on the husband's solicitors and on the bank.

John Mortimer for the wife. Moneys standing to a debtor's credit at a bank are liable to sequestration and a bank account is a chose in action of which no part can be paid away by the bank without an order of the court (see R.S.C., Ord. 43, r. 6, and *Miller* v. *Huddlestone*,[1] in which, following *Wilson* v. *Metcalfe*,[2] the court held that it had jurisdiction to make an order).

R. B. Willis for the bank. The bank admits that the credit balance standing to the account of the husband is £2,162 18s. 11d. It neither assents to the motion nor opposes it, but if an order be made it should be in the form of the order in *Miller* v. *Huddlestone*.[3]

The husband did not appear and was not represented.

MARSHALL J. There will be an order that Barclays Bank Ltd., having admitted the sum standing to the credit of the husband in their books, shall pay that sum into court to the credit of the sequestration account. The order will provide for the costs of the

[1] (1882) 22 Ch.D. 233.
[2] (1839) 1 Beav. 263.
[3] 22 Ch.D. 233.

sequestrators of and incidental to the sequestration to be taxed by the taxing master and direct that he shall fix their remuneration and tax the costs of the bank and that the amount so taxed and found due shall be paid out of the fund paid into court. I am quite satisfied that Barclays Bank Ltd. has acted properly in every way.

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GUERRINE v. GUERRINE.

Marshall J.

Order accordingly.

Solicitors: *T. D. Jones & Co.; Durrant, Cooper & Hambling.*

E. J.

[COURT OF APPEAL.]

* IMPERIAL TOBACCO COMPANY (OF GREAT BRITAIN AND IRELAND) LTD. *v.* PIERSON (VALUATION OFFICER).

C. A.

1959 *July* 16, 28.

Lord Evershed M.R., Romer and Sellers L.JJ.

Rates and Rating—Assessment—Rateable value—Advertising right—Ratepayer granted licence to erect advertising sign—Subsequent erection of sign—"Structure"—Basis of assessment—Rating and Valuation Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 90), *s.* 22 (1) (*b*)—*Local Government Act,* 1948 (11 *&* 12 *Geo.* 6, *c.* 26), *s.* 56.

By an agreement of June 21, 1955, a company was granted the exclusive right of fixing and exhibiting upon certain premises a "flashing neon advertising sign" and to make all necessary connections for its working. The agreement provided that the sign and apparatus were to remain the property of the company. Pursuant to the agreement the company erected the sign and it was in existence on April 12, 1956, the date when the company was assessed in respect of the "right" which they had obtained under the agreement. It was conceded that the right was a "separate hereditament" for the purposes of section 56 of the Local Government Act, 1948.[1] The rateable value was assessed at £165. The company contended that the assessment should be in the sum of £150. The question was whether the rateable value should be determined under section 56 of the Act of 1948 and section 22 (1) (*b*) of the Rating and Valuation Act, 1925, on the basis of the right granted to the

[1] Local Government Act, 1948, s. 56: "Where the right to use "any land (including any hoarding, frame, post, wall or structure "erected or to be erected on the land, "and including also any wall or other "part of a building) for the purpose "of exhibiting advertisements is let "out or reserved to any person other "than the occupier of the land, or, "when the land is not occupied for "any other purpose, to any person "other than the owner of the land, "that right shall be deemed for "rating purposes to be a separate "hereditament in the occupation of "the person for the time being entitled to the right, and shall be "included in the valuation list as a "separate hereditament accordingly, "and, notwithstanding anything in "section 3 or section 4 of the Advertising Stations (Rating) Act, "1889, in estimating the value of the "land for rating purposes no account "shall be taken of any value or, as "the case may be, of any increased "value arising from the use of the "land for the purpose of exhibiting "advertisements in accordance with "that right."

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company by the agreement without taking into account the value of the work subsequently done. It was conceded that the advertising sign constituted a "structure":—

Held, that the company was properly rateable in respect of the "right" or "rights" which it obtained by the agreement of 1955 and that the right which on April 12, 1956, was to be deemed for rating purposes to be a separate hereditament was the right to use for the purposes of exhibiting advertisements the structure which the company had erected and, accordingly, that the company was liable to be rated at the higher figure of £165.

Per Sellers L.J. In assessing the right to use any land and structure on it, it does not matter whether any hoarding or structure is erected and paid for by the occupier of the land or the person deemed under section 56 to be in occupation of a separate hereditament. The purpose of the section is to place the liability to rates in respect of the exhibition of advertisements on land directly on the person enjoying the right to advertise instead of upon the occupier of the land.

Appeal by case stated from the Lands Tribunal.

By an agreement dated June 21, 1955, between the Bradford Corporation and the respondents, the Imperial Tobacco Company (of Great Britain and Ireland) Ltd., by their authorised agents, it was provided that the corporation agreed "to grant to the "company the exclusive rights of fixing and exhibiting upon the "premises of the corporation at the junction of Forster Square "Canal Road and Bolton Road in the City of Bradford (herein-"after called 'the said premises') a flashing neon advertising sign "reading 'Player's Please' to be erected in the position shown "in the rectophot attached hereto and to be operated by an auto-"matic time switch Together with all necessary rights (a) to "connect such sign to the switchboard and meters and to the "main electric cable in the street (b) to erect and maintain a "permanent scaffold and iron ladder."

Clause 2 provided for the corporation giving to the Imperial Tobacco Company liberty to enter on the premises to make the necessary fixtures, etc., and do other things necessary for making the sign effective, with liberty to enter for repairing and maintaining the apparatus.

Clause 4: "The corporation will immediately inform the "[Imperial Tobacco] company in the event of the sign requiring "attention or needing repair and the company will keep and "maintain the same securely fixed and in good and substantial "repair to the satisfaction of the corporation."

By clause 5 the corporation was to pay rates and taxes payable in respect of the premises, and the company was to pay any rates which might be imposed solely upon the sign.

Clause 9 provided that the agreement should be for three years certain and that it should then continue until duly determined by notice.

Clause 11: "Upon the determination of this agreement the "said sign and the apparatus used in connection therewith shall "remain the property of the company who shall remove the same

" within fourteen days and make good any damage done to the " said premises in consequence of such removal."

Pursuant to that agreement the Imperial Tobacco Company erected the sign and it was in existence on April 12, 1956, the date when they proposed that the assessment of £165 made on them under section 56 of the Local Government Act, 1948, be reduced to £150. The local valuation court confirmed the assessment of £165. The Imperial Tobacco Company appealed to the Lands Tribunal.

It was conceded that the Imperial Tobacco Company was properly rateable in respect of the " right " or " rights " which they obtained by the agreement, and which, for the purposes of section 56 of the Local Government Act, 1948, were to be treated as a " separate hereditament."

The decision of the tribunal contained the following passage: " There is no dispute that the hereditament is properly described " and entered in the valuation list, nor that its rateable value is " to be ascertained under section 22 (1) (*b*) of the Rating and " Valuation Act, 1925.

" The question in dispute is whether the value to be ascer- " tained is that of a right to exhibit advertisements on a structure " to be erected on the land at the expense of the grantee, the " right in fact conferred on the appellants by an agreement dated " June 21, 1955, or that of a right to exhibit advertisements on " a structure erected on the land, which was the position at the " date of the proposal, April 12, 1956.

" It is agreed between the parties that in the former case the " rateable value should be £150, in the latter case £165."

The tribunal reduced the assessment to £150. The ground of its decision was stated thus: " While it is, of course, true that " the value must be ascertained as at the date of the proposals, " it is the value of the grant and not of some other grant. The " grant has its values irrespective of whether it is in fact exer- " cised, and it is the grant which is the rateable hereditament, " not the exercise of the grant. . . . In the present case the " right granted is to exhibit advertisements on a structure to be " erected, and it is that right which in my judgment has to " be valued and the value of the right cannot in my view be " enhanced by the erection of the structure, to do so seems to " me to be in effect valuing a different right, a right to exhibit " advertisements on a structure erected on the land, from that " which is let."

The rating officer appealed. In the case stated the question for the determination of the court was whether the tribunal had come to a correct decision in law in determining that the rateable value to be ascertained under section 56 of the Local Government Act, 1948, and section 22 (1) (*b*) of the Rating and Valuation Act, 1925, was the right granted by the agreement of June 21, 1955, without taking into account the work done subsequent to that date.

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Maurice Lyell Q.C. and *J. R. Phillips* for the valuation officer.

Harold Williams Q.C. and *Peter Mason* for the Imperial Tobacco Company.

The following decisions were referred to in argument and are not mentioned in the judgments: *The Overseers of Hilton and Walkerfield* v. *The Overseers of Bowers*[2]; *The Queen* v. *The Guardians of the Poor of Battle Union.*[3]

Cur. adv. vult.

July 28. The following judgments were read.

Lord Evershed M.R. read the relevant parts of the agreement of June 21, 1955, and section 56 of the Local Government Act, 1948, stated the facts, and continued: I am not entirely clear whether Mr. Williams is prepared to concede that the question was properly stated in the case stated, but he was prepared to argue on the footing that it was correctly stated. If so, the question is, what is the "right" that here is to be treated as the rateable hereditament? and the answer depends on the interpretation and effect of the agreement.

No doubt the question must be asked and answered as on the date of the proposal, namely, April 12, 1956; but Mr. Williams' case is that the "right" on that date is the same as that which was conferred on June 21, 1955, by the agreement, and is not (for present purposes, at any rate) to be enhanced by the fact of, or in consequence of, anything done by the Imperial Tobacco Company in the course of the existence of the right. So it was and is said by Mr. Williams, and his argument is accepted by the tribunal, that the right is and was limited to the exhibition of advertisements on the structure to be erected, and is not and has not become a right to exhibit on a structure when erected.

It is to be noted that Mr. Williams, in his argument, was prepared to assume (and he expressly so conceded here and before the tribunal) that the word "structure" meant or included the actual physical framework and sign or lettering "Player's Please."

But once the assumption is made, then, although I confess that I have felt greater difficulty than my Brethren, I have in the end felt compelled (albeit with some reluctance and subject to what I say at the end of this judgment) to a conclusion different from that of the tribunal, that is to say, that "right" must include the right to exhibit on or by means of the structure when erected and expressed as "to be erected" in that agreement.

I refer particularly to clause 4 of the agreement containing the obligation of the Imperial Tobacco Company to maintain the sign and apparatus when erected.

[2] (1866) L.R. 1 Q.B. 359. [3] (1866) L.R. 2 Q.B. 8.

The point is very short and not, I think, capable of elaboration; and I have not thought it useful or necessary to refer to the Advertising Stations (Rating) Act, 1889, mentioned in section 56 of the Act of 1948, and now superseded, so far as this case is concerned, by the latter section.

I desire, however, to add the following observations: As I have said, it was clearly conceded for the purposes of this case that the framework and sign "Player's Please" were, when erected, a "structure" within the meaning of section 56; that is, that the word "land" in the section, when expanded by the definition in the parenthesis, includes in this case the physical apparatus plus the sign itself above mentioned. This concession having been made, it has seemed, in the end, to me that the result indicated must follow, since the "rights" acquired by the Imperial Tobacco Company must at least include the "right" to use the apparatus and the sign when erected.

I am not, of course, saying that the concession was wrongly made; but since we were told that this was in the nature of a test case, I am venturing to suggest that for the purposes of other cases the matter should be further considered. I emphasise the words—highly significant as they seem to me—in the third line of the section (and later repeated), "for the purpose of exhibiting "advertisements"—not, be it observed, "for the purposes of "advertising." It was said by Mr. Lyell in this case that the "exhibition" of the advertisement consists of the use of the neon lights inside the frame of the sign, which, when in use, "exhibit" the advertisement, namely, "Player's Please"; and Mr. Lyell pointed out that the cost of the neon light was not included in the calculation which resulted in the figure of £165.

I confess for my part that I have felt and continue to feel uneasy on this matter. Judged by ordinary standards of language, there is surely much to be said (to say the least) for the view that it is the physical thing, the flashing neon sign, frame, letters, lights, the whole apparatus, that is the advertisement, and that the "right" acquired was to use the corporation's wall for the purpose of fixing and thereafter exhibiting that advertisement on it. References to words like "hoarding" and "structure," in parenthesis, would naturally cover cases where the hoarding or structure already existed and belongs to the occupant of the "land," who then grants to the advertiser the right to use the hoarding or structure for exhibiting his advertisement. There might obviously be a case where there is a distinction between the actual sign or advertisement and the frame to which it is fixed; but no such distinction, as I understand, is made in the present case; and I note that when the agreement comes to an end, the frame, sign and all are the property of the Imperial Tobacco Company, who must remove the lot.

This suggested view is at least supported by the terms of the agreement whereby the Imperial Tobacco Company was granted

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the right of "fixing and exhibiting upon the premises of the cor-"poration . . . a flashing neon advertising sign" of a specified kind, and not—in terms, at any rate—a right to use the wall and any structure erected or to be erected thereon for the purposes of advertisement, which I should have thought the more natural phrase on the basis assumed. No doubt, in the ordinary case, anything fixed to a building becomes part of the building; but the concession here made seems to involve the assumption that the "premises" mentioned in the agreement are different after the sign is fixed from what they were before—in spite of the provision that at the end of the agreement the apparatus and sign is the property of the Imperial Tobacco Company and must be removed by them.

Put otherwise, I venture to suggest that there is something to be said for the view that the formula in brackets in the section only means that "land" covers whatever is there or is to be put there as a wall, structure or otherwise, as part of the grantor's property, but does not include something (albeit in some sense a "structure") added by the grantee temporarily as a means of exercising the right granted, and intended to be removed by the grantee when the grant determines.

Nevertheless, for the reasons which I have earlier stated, I have come to the conclusion that the appeal in this case should be allowed.

Romer L.J. It seems to me that the decision on this appeal depends on the answer to two questions. The first question is: What right was vested in the Imperial Tobacco Company on April 12, 1956, under and by virtue of their agreement with the Bradford Corporation dated June 21, 1955? The second question is: What is the effect of section 56 of the Local Government Act, 1948, upon that right?

The answer to the first of these questions can only be found from the terms of the agreement itself. If, on the true construction of the agreement, all that was vested in the Imperial Tobacco Company on April 12, 1956, was the abstract right of using the corporation's land (including a structure to be erected on the land) for the purpose of exhibiting advertisements, then the present appeal fails. If, on the other hand, the company had, at the relevant date, the right to use for exhibiting advertisements a structure which had by then already been erected on the land, the appeal succeeds.

Immediately after the agreement had been signed, it is clear that the Imperial Tobacco Company had no right to use a structure erected on the corporation's land, for no such structure existed. It seems to me quite plain, however, as an irresistible inference arising from the terms of the agreement, that, once the structure contemplated by the agreement had been erected, the company were to be entitled to use it for advertising purposes for so long as the agreement remained on foot. This is clear

enough from clause 1 of the agreement, even if taken by itself. The point, however, ceases to be arguable when one finds that under clause 2 the company were given "liberty at all reasonable "times to enter the said premises for the purpose of repairing "renewing inspecting and testing the said sign and electric "fittings and of doing all work necessary for maintaining the "same in a state of efficiency"; and see also clause 4.

Mr. Williams, for the Imperial Tobacco Company, concedes that the "flashing neon advertising sign reading 'Player's "'Please'" referred to in the agreement is a "structure" within the meaning of, and for the purposes of, section 56 of the Act of 1948. To be taken in conjunction with this concession are the facts that the sign had been erected by the company prior to April 12, 1956; that they had a contractual right on that date, as I have already indicated, to use it; and that they were in fact using it.

Applying section 56, then, to that state of affairs, the section reads, for relevant purposes, as follows: "Where the right to "use any land (including any . . . structure erected . . . on the "land . . .) for the purpose of exhibiting advertisements is let out ". . . to any person other than the occupier of the land . . . that "right shall be deemed for rating purposes to be a separate "hereditament in the occupation of the person for the time being "entitled to the right, and shall be included in the valuation list "as a separate hereditament accordingly . . ."

What then, on April 12, 1956, was the right which was to be deemed for rating purposes to be a separate hereditament in the occupation of the respondents? Surely not merely the right to erect a structure, for that right had already been exercised and was, by then, exhausted. The right, in my judgment, was the right to use the structure which had already been erected. The only possible way of avoiding this view (on the conceded assumption that the sign is in fact within section 56) appears to me to be that the company had no more than a contractual right to erect the sign and had no right under the agreement to use the sign after it had been erected. I am quite unable, as I have already intimated, to attribute such a limited effect to the agreement of June 21, 1955.

If I am correct in thinking that the "right" which, on April 12, 1956, was to be deemed for rating purposes to be a separate hereditament was the right to use for the purpose of exhibiting advertisements the structure which the company were then using, it follows that the case stated must be answered in favour of the appellant.

I would add in conclusion that whilst in no way dissenting from the observations which the Master of the Rolls has made in his judgment as to the meaning of "the right to use any land "(including any hoarding, frame, . . .) for the purpose of exhi-"biting advertisements," I presume that the Imperial Tobacco Company's concession that the neon sign now in question is within

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section 56 is based upon the view that the framework, which secures the sign, is a "structure" and that it is the flashing lights themselves which constitute the "advertisement."

Sellers L.J. Under section 56 of the Local Government Act, 1948, the right, which is to be deemed for rating purposes to be a separate hereditament in the occupation of the person for the time being entitled to the right, is the right to use any land which is let out or reserved to any person (other than the occupier of the land) for the purpose of exhibiting advertisements. Land includes any hoarding, frame, post, wall or structure erected or to be erected on the land and includes also any wall or other part of a building.

Under the agreement of June 21, 1955, the Imperial Tobacco Company obtained from the Bradford Corporation the exclusive right of fixing and exhibiting upon the premises named a flashing neon advertising sign reading "Player's Please" to be erected in the position shown on a rectophot attached to the agreement, together with (and this I think is of importance in this appeal) all necessary rights to connect the sign to electricity supply and to erect and maintain a permanent scaffold and iron ladder.

The scaffold or structure which was in fact erected at the expense of the Imperial Tobacco Company to carry the letters and neon tubing which formed the advertisement "Player's "Please" is shown on a plan accompanying the stated case.

At the time of the assessment all that structure was erected and in use by the Imperial Tobacco Company. They were using not only the wall, but also the structure they had erected on the wall for the purpose of carrying or exhibiting their advertisement. This was clearly the whole purpose of the agreement. The right to use the wall was let out to them by the agreement. As they were given the right to erect the permanent scaffold at their own expense, its use might more appropriately be said to be reserved to them than let out to them, but it was a right they acquired by the agreement.

In my opinion these factors and considerations establish that the Imperial Tobacco Company were in occupation of a separate hereditament used as of right consisting of the whole structure as erected and they are therefore liable to be rated thereon at the agreed figure of £165.

In assessing the right to use any land and structure it does not seem to me to matter whether any hoarding or structure is erected and paid for by the occupier of the land or the person deemed under the section to be in occupation of a separate hereditament.

The purpose of the section is to place the liability to rates in respect of the exhibition of advertisements on land, as defined, directly on the person enjoying the right to advertise instead of upon the occupier of the land. The argument for the ratepayers, as I follow it, would interpret the section as limiting the basis of

assessment as well as altering its incidence so that, in this case, the ratepayers would pay less in paying directly than if the assessment were in the first place on the Bradford Corporation and then claimed over under clause 5 of the agreement, which provides: "In the event of the premises being reassessed for "rates and the rateable value thereof being increased solely on "account of the existence and user of the sign the company will "pay to the corporation the difference between the sum payable "for rates under the present assessment and the sum due in "respect of such increased assessment."

I cannot think that such a result was intended and I do not think it was achieved.

Appeal allowed with costs in Court of Appeal and in the Lands Tribunal. Leave to appeal to the House of Lords.

Solicitors: *Solicitor to the Imperial Tobacco Company (of Great Britain and Ireland) Ltd.; Solicitor of Inland Revenue.*

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[COURT OF APPEAL.]

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Lands Tribunal — Jurisdiction — Appeal from local valuation court — Onus of proof before Lands Tribunal—Lands Tribunal Rules, 1956 (*S.I.* 1956, *No.* 1734), *r.* 45 (4).

Rates and Rating—Assessment—Rateable value—Purchase price—Whether relevant in arriving at notional rent—Valuation for Rating Act, 1953 (1 *&* 2 *Eliz.* 2, *c.* 42), *s.* 2 (2).

The ratepayer, the owner of a dwelling-house of some size, near an aerodrome, appealed to the Lands Tribunal against his rating assessment by the local valuation court. The assessment was upheld and the ratepayer appealed to the Court of Appeal on the ground that the appeal being a rehearing it was for the Lands Tribunal to make its own assessment of value and the tribunal had held that the onus was on him to prove that the assessment of the local valuation court was wrong. He sought to rely on the price he had paid for the house as evidence of its rateable value:—

Held, (1) that although there was a rehearing of the evidence before the Lands Tribunal, the tribunal was entitled under the Lands Tribunal Rules, 1956, r. 45 (4), to refuse to reverse the decision of the local valuation court unless the tribunal was satisfied by the person who complained of such decision that there was something wrong, as a matter of fact, with such decision.

Ellerby v. *March* [1954] 2 Q.B. 357; [1954] 2 All E.R. 375 considered.

(2) That the selling or purchase price of a property was not a relevant factor in arriving at the notional rent figure postulated by the Valuation for Rating Act, 1953, s. 2 (2).

Peche v. *Wilkins* (1959) 4 Ryde's R.C. 49 applied.

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The local valuation officer assessed a dwelling-house called "Edolph" at Charlwood, Surrey, at a gross value of £125, rateable value £101. The ratepayer, Dennis George Sole, who was the owner and occupier of the premises, appealed against that assessment to the local valuation court and the assessment was reduced to a gross value of £90, rateable value £72. The ratepayer was not satisfied with these values and appealed to the Lands Tribunal on the ground that the house, which contained nine bedrooms, was deficient in normal amenities and that there were in addition a great number of special factors depressing its value, including the proximity of the house to Gatwick Airport. The house, which was large and old, was not comparable in character to other properties in the neighbourhood. The ratepayer, an accountant by profession, had purchased the property in 1956 for £4,625 and he sought to deduce the 1939 rent from the price he had paid. The Lands Tribunal upheld the assessment of the local valuation court holding that the burden was on the ratepayer to prove that it was wrong. The finding of the tribunal is more fully stated in the judgment of Lord Evershed M.R.

The ratepayer appealed, contending that the tribunal was wrong in law in holding that the burden was on him to prove that the valuation officer was wrong. It was for the Lands Tribunal to rehear the case.

The ratepayer appeared in person.

J. R. Phillips for the valuation officer.

The cases cited in argument are referred to in the judgments.

Lord Evershed M.R. In this appeal the ratepayer challenges the conclusion of the Lands Tribunal which affirmed an earlier decision of the local valuation court, fixing the figures to be applied for gross value and rateable value in respect of the ratepayer's premises, a house and garage known as "Edolph," Charlwood, in the County of Surrey. The brief history of the matter is, that at first the local valuation officer attributed to these premises a gross value of £125, with an appropriate rateable value, but when the matter came to trial before the local valuation court those figures were reduced to £90 gross value and £72 rateable value. The local valuation officer has not since sought to justify any higher figure, but the ratepayer, who has put forward with clarity and moderation his complaints about the decision, says that the figure is still too high. He knows that by the relevant statutory provision in section 2 (2) of the Valuation for Rating Act, 1953, the rent which the hypothetical tenant (who is the hero of all rating questions) is to be treated as being ready to pay is the one which he would have been expected to pay in June, 1939, upon a tenancy of a kind there mentioned.

The ratepayer has pointed out that this house is to some extent unsuited, or not well suited, to modern conditions. The modern circumstances include the proximity of Gatwick Airport and the new town. There is also the size of the house, which if large, is to that extent never so attractive in days when the cost of repairs is great, the difficulty of getting staff is greater, and so forth. These are obviously very pertinent matters, and in arriving at the figure which Parliament has contemplated, it is plain enough that you have to form an estimate as best you can with the help of such assistance, expert and other, as you can get. In this case the local valuation officer in fact appears, from what Mr. Phillips told us, to be a gentleman of considerable local knowledge, and also some professional qualifications. At the end of the judgment the tribunal expressed itself thus: "I know of no way of valuing this type of house except on the "basis of the experience of someone who has valued houses of "this kind in the neighbourhood—or, better still, has bought "and sold and let them. There is in this case no material "evidence of the 1939 value except the opinion of the valuation "officer. The local valuation court, with its local knowledge, "made a substantial reduction in the original figures and I am "satisfied that they were correct in doing so. The valuation "officer accepted that reduction and defended it; so far, he said, "but no farther. The burden is upon the [ratepayer] to prove "that both are wrong and it is unfortunate, if he feels so strongly "that that is the case, that he was unable to call any valid "evidence of pre-war values, professional or otherwise. He has "failed to provide me with any grounds for interfering with the "decision of the local valuation court and the appeal must be "dismissed."

The ratepayer challenges, first, the basis of that paragraph. He accepts, as he must, that the Court of Appeal has no jurisdiction save in matters of law, but he says that this was a wrong approach, a misdirection of itself by the tribunal, and therefore an error in law. Further, he says, the matter should have been treated as res integra, and it is not right to say that the tribunal performs its function by accepting the decision of the valuation court, unless the ratepayer has affirmatively satisfied the tribunal that the local court was wrong. I think that way of putting it may be giving undue emphasis to the phrase "the burden is "upon the [ratepayer]"; but none the less my view is that the tribunal in matters of this kind is entitled to say, and properly performs its function if it does say, "I am not going to overturn "the decision of the court below unless I am satisfied by him "who complains of it that there is something wrong as a matter "of fact in that court's findings." It is quite true that there is before the tribunal a rehearing of the evidence, but I do not think that there is in the paragraph where I have quoted anything which disqualifies the conclusion based on it, and which, as a consequence, lets in, so to speak, the discussions about the

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method of valution which the ratepayer has also intimated to us in his observations.

On those last matters I will, in passing, say that the ratepayer says "It is all very well, but the local valuation officer "has never bought and sold a house, and I, at any rate, bought "this one"; and the ratepayer based a calculation on the selling price. But I think Mr. Phillips is justified in saying that by virtue of the case in this court of *Peche* v. *Wilkins* [1] the selling price, for the reasons there stated, is not the guide, or a particularly safe guide, in arriving at the notional rent figure postulated by the Act of 1953.

Going back to the main point, I think the way that I have put it finds support also in the language of the Lands Tribunal Rules, 1956, r. 45 (4), which provides: "On an appeal against "the decision of a local valuation court, the tribunal shall give "such directions with respect to the manner in which the "hereditament in question is to be treated in the valuation list "as appear to the tribunal to be necessary to give effect to the "contention of the appellant if and so far as that contention "appears to the tribunal to be well founded." That rule, or its earlier equivalent, and its effect, which is I think consistent with what I have tried to state, is further illustrated and illuminated by another decision of this court, *Ellerby* v. *March*.[2]

It comes, therefore, to this, that there is, in my judgment, no error of law, no misdirection in this vital last paragraph. From that I think it also follows that both the tribunal and the local valuation court were entitled on the evidence which was before them to find as a fact as the tribunal and the court did. If that is right, then we have no further say in the matter. There is no error of law shown and therefore in so far as the question is one of fact, it has been determined, and determined conclusively. For those reasons I would dismiss the appeal.

Romer L.J. I quite agree. The only point which might be regarded as a point of law that the ratepayer sought to introduce before us was this question whether, in the circumstances of this case, the gross annual value should be ascertained by a calculation based on the purchase price which he paid for this property when he bought it. It was by means of such a calculation as that that the ratepayer arrived at the gross annual value of £65 which he urged before the tribunal. But I think it is quite clear, and at all events has been clear since *Peche* v. *Wilkins*,[3] that the selling price or purchase price of a property is not a relevant factor for the purpose for which the ratepayer sought to use it, and for the reasons to which Morris L.J. referred in his judgment in that case. One therefore comes down to a pure question of

[1] (1959) 4 Ryde's R.C. 49.
[2] [1954] 2 Q.B. 357.
[3] 4 Ryde's R.C. 49.

fact. As to that I have nothing to add to what the Master of the Rolls has said, and I agree with him.

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SELLERS L.J. I agree with the judgment of the Master of the Rolls.

Appeal dismissed with costs.

Solicitors: *Solicitor of Inland Revenue.*

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* *In re* NORTH OF ENGLAND ZOOLOGICAL SOCIETY. NORTH OF ENGLAND ZOOLOGICAL SOCIETY *v.* CHESTER RURAL DISTRICT COUNCIL.

[1957 H. No. 968.]

Charity — Education — Zoological Society — Objects — Advancement of education—Rating and Valuation (Miscellaneous Provisions) Act, 1955 (4 *&* 5 *Eliz.* 2, *c.* 9), *s.* 8 (1) (*a*).

Rates and Rating—Social welfare, etc.—"Main objects"—Meaning—Education — Zoological Society — Memorandum — Main objects to encourage study of zoology and kindred sciences — Whether main objects "charitable or . . . otherwise concerned with the advance-"ment of . . . education"—Whether "established or conducted for "profit"—Rating and Valuation (Miscellaneous Provisions) Act, 1955 (4 *&* 5 *Eliz.* 2, *c.* 9), *s.* 8 (1) (*a*).

The plaintiff society was incorporated on May 9, 1934, as a company limited by guarantee. Clause 3 of the society's memorandum of association provided: "The objects of the society are:—"(a) To acquire and take over . . . and conduct as a scientific "and educational undertaking the business heretofore carried on "as the Chester Zoological Gardens . . . (b) To promote, facili-"tate and encourage the study of biology, zoology and animal "physiology . . . botany and horticulture and all kindred sciences "and to foster and develop among the people an interest in and "knowledge of animal life. (c) To establish, equip and carry on "and develop zoological parks or gardens and living zoological "collections . . . (d) To establish sanctuaries for all kinds of "wild life, particularly animal and bird sanctuaries . . ." Then followed a long list of other objects, including, inter alia, the building and provision of cafés, reading-rooms and other buildings for the convenience of visitors, the holding of public meetings, publishing books, raising funds, etc.

On a summons to determine whether on the true construction of section 8 (1) (*a*) [1] of the Rating and Valuation (Miscellaneous

[1] S. 8 of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, provides: "(1) This section "applies to the following heredita-"ments, that is to say—(*a*) any "hereditament occupied for the pur-"poses of an organisation (whether "corporate or unincorporate) which "is not established or conducted for "profit and whose main objects are "charitable or are otherwise con-"cerned with the advancement of "religion, education or social wel-"fare; . . ."

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Provisions) Act, 1955, the society was an organisation which was not established or conducted for profit, and whose main objects were charitable or were otherwise concerned with the advancement of religion, education or social welfare:—

Held, (1) that the main objects of the society were contained in paragraphs (a), (b) and (c) of its memorandum of association and that such objects were charitable objects, or if they were not strictly charitable they were "otherwise" concerned with the advancement of education.

In re Lopes [1931] 2 Ch. 130 approved and applied.

(2) That on the facts the society was "not established or con-"ducted for profit" and that it accordingly satisfied both branches of the test laid down in section 8 (1) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955.

Guinness Trust (London Fund) Founded 1890, Registered 1902 v. *West Ham Borough Council* [1959] 1 W.L.R. 233; [1959] 1 All E.R. 482 considered.

Decision of Vaisey J. [1958] 1 W.L.R. 1258; [1958] 3 All E.R. 535 affirmed.

Appeal from a decision of Vaisey J.[2]

The plaintiff society was incorporated on May 9, 1934, under the Companies Act, 1929, as a company limited by guarantee. It owned and managed zoological gardens of about 145 acres containing some 730 animals, birds and reptiles, and situate at Upton-by-Chester, on the outskirts of the city of Chester. The capital value of the society's property was about £130,000, the principal sources of this being legacies, bank overdraft and an annual surplus of income over expenditure. The whole of such surplus had been spent on the society's property and no part had ever been distributed to members of the society. The main objectives of the society were to maintain livestock under proper conditions and to breed them and display them to the public in an instructive manner. To attain these objectives the society had built specially designed living quarters and enclosures in which were cultivated tropical and other exotic vegetation as like as possible to those natural to the species. Further, the society had built up a permanent and expert staff of keepers and gardeners. The gardens were visited annually by over 500,000 persons, of whom about 45,000 were school-children visiting as part of their school curriculum. The principal source of the society's income was from admission fees. The society had also built and equipped cafés where visitors could obtain refreshments, there being no other catering establishment on the necessary scale within a distance of two miles.

The memorandum of association of the society provided by clause 3 as follows: "The objects of the society are:—(a) To "acquire and take over as a going concern and conduct as a "scientific and educational undertaking the business heretofore "carried on as the Chester Zoological Gardens . . . by Chester "Zoological Gardens Limited, together with any part of the "real or personal property and assets of the company used in

[2] [1958] 1 W.L.R. 1259; [1958] 3 All E.R. 535.

"connection with that business . . . (b) To promote, facilitate "and encourage the study of biology, zoology and animal "physiology, aviculture, aquaria, ichthyology, entomology, "botany and horticulture and all kindred sciences and to foster "and develop among the people an interest in and knowledge of "animal life. (c) To establish, equip and carry on and develop "zoological parks or gardens and living zoological collections at "such places as the society shall determine. (d) To establish "sanctuaries for all kinds of wild life, particularly animal and "bird sanctuaries and to police in such manner and do all "things necessary for the protection of all animal and plant life "therein." The other objects as set out in the memorandum lettered from (f) to (aa) included taking leases of and purchasing property, and building houses and other buildings; to act as trustees of the society's funds; to send out expeditions to foreign countries to investigate animal life; to take any gifts of property for the purposes of the society; to raise contributions to the funds of the society by appeals and so on; to establish museums, libraries, aquaria, laboratories and lecture rooms for the advancement of knowledge; to create and award honours for services to the society; to publish the transactions of the society; to borrow money for the purposes of the society; to acquire businesses which the society is authorised to carry on; to advertise the parks and gardens; to invest the society's moneys in securities authorised by law; to hire orchestras and bands; to build and equip reading-rooms, lounges, cafés and shops for the sale of food, postcards and books required for the convenience of visitors, and to adopt a badge for the society. Clause 4 provided that the income and property of the society should be applied solely towards the promotion of the society's objects and no part should be paid by way of profit to members.

The society claimed to be entitled to the benefit of the provisions of section 8 of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, in respect of their zoological gardens and took out a summons to determine whether, on the true construction of section 8 (1) (*a*) of that Act, they were an organisation which was not established or conducted for profit, and whose main objects were charitable or were otherwise concerned with the advancement of religion, education or social welfare.

Vaisey J. held that the society came within section 8 (1) of the Act of 1955 since the main object of the society was charitable.

The rating authority appealed.

G. D. Squibb Q.C. and *D. G. Widdicombe* for the rating authority.

H. I. Willis Q.C. and *J. F. Coplestone-Boughey* for the society.

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The following cases, in addition to those referred to in the judgments, were cited in argument: *Religious Tract and Book Society of Scotland* v. *Forbes* [3]; *National Deposit Friendly Society Trustees* v. *Skegness Urban District Council* [4]; *Chartered Insurance Institute* v. *London Corporation* [5]; *In re Macduff* [6]; *In re E. K. Cole Ltd.* [7]; *Cotman* v. *Brougham* [8]; *Battersea Borough Council* v. *British Iron and Steel Research Association* [9]; *Working Men's Club and Institute Union Ltd.* v. *Swansea Corporation.* [10]

Lord Evershed M.R. This is another case (one of a considerable number now) which has come before the courts upon the effect of section 8 of the Rating and Valuation (Miscellaneous Provisions) Act, 1955. Subsection (1) of that section is in these terms so far as relevant: "This section applies to the following "hereditaments, that is to say—(*a*) any hereditament occupied "for the purposes of an organisation (whether corporate or unin-"corporate) which is not established or conducted for profit and "whose main objects are charitable or are otherwise concerned "with the advancement of . . . education. . . ."

If the respondents to this appeal, the North of England Zoological Society, as regards the hereditament which it occupies, can bring itself within that formula, then it is exempt at the moment from rates. Such was the conclusion of Vaisey J. From that decision the rating authority, the Chester Rural District Council, has appealed to this court. Let me say at once that their anxiety to test the matter further is certainly understandable, since, according to the figures before the court, this society has over a period of years carried on its affairs so that its income has appreciably exceeded its expenditure. In the year ended December 31, 1956, that surplus was £16,000, and from the balance sheets it would seem that since its incorporation in 1951 the total accumulated net surplus amounts to £84,000. Having made that statement, however, it is fair to say that the surplus has clearly been used in extending and generally bettering the equipment and general characteristics of the zoological gardens which is the hereditament here in question.

From my reading of the section it will be apprehended that there are here two points, for there is no doubt that this respondent, the Zoological Society, is an organisation within the meaning of the section. The two points, expressed interrogatively, are: (1) Is this an organisation which is not established or conducted for profit? (2) Is it one whose main objects are charitable or otherwise concerned with the advancement of education? In order to qualify for exemption, the society must satisfy both those tests: in other words, it must be shown that an affirmative answer should be given to both the questions I have posed.

[3] (1896) 3 T.C. 415.
[4] [1958] 3 W.L.R. 172; [1958] 2 All E.R. 601.
[5] [1957] 1 W.L.R. 867.
[6] [1896] 2 Ch. 451.
[7] [1945] 1 All E.R. 521n.
[8] [1918] A.C. 514.
[9] [1949] 1 K.B. 434; 65 T.L.R. 183.
[10] [1958] 1 W.L.R. 1135; [1958] 3 All E.R. 414.

I will start with some reference to the history of this society and of its ancestry. A zoological garden (which, in common usage, I might perhaps be allowed to abbreviate to "zoo") was started as long ago as 1931 by a Mr. Mottershead, who began it as an undertaking entirely of his own. Mr. Squibb, who saw Mr. Mottershead and indeed cross-examined him, told us quite fairly and frankly, by way of confirmation of what I would have expected from a reading of his affidavit, that Mr. Mottershead is a man who is passionately enthusiastic, as many people are, about animal life. It cannot be doubted that when, in 1931, Mr. Mottershead started this zoo, he was not starting something for the purposes of making money, nor was he starting something for the purposes of providing entertainment or amusement or shows to the inhabitants of the north-west part of England. He is an enthusiast over animal life and he was anxious to do something in that part of England which would present, in proper and carefully designed conditions, species of the animal world, so that those who lived in the neighbourhood would have the advantage of being able to see them and, as he hoped, share his enthusiasm for his favourite subject.

It appears, however, that after a little time, a company, the Chester Zoological Gardens Ltd., was incorporated as a public company in the ordinary way, but, as has happened to other public companies, its life was somewhat short and financially highly unsatisfactory. After two years it was put into liquidation. The present respondents were then formed, originally with the word "Limited" added, as a company limited by guarantee under the then Companies Act, 1929, and all the assets of the zoo itself, with its inmates, its equipment and so forth, were transferred to this new company. We have not been told what exactly happened about the debts of the old company, but it is quite plain that Mr. Mottershead made no sort of profit out of any of these transactions. He is, as he told Mr. Squibb in the course of cross-examination, the most substantial shareholder or proprietor of this new company, which is a company limited by guarantee; and not being a trading corporation for profit purposes, it has since been allowed to omit, and has omitted since 1950, the use of the word "Limited" as part of its name. But it is made clear—Mr. Squibb has again most frankly been ready to admit it—that this is Mr. Mottershead still, in another garb. It is quite true that he is now given a salary which is certainly not princely in amount, and certainly not indicative that he is doing this work and concerning himself with this society with any idea at all of its being a money-making enterprise. There is no doubt at all about that, and I think that important for reasons to which I shall later revert.

Having stated that history, I come now to the memorandum of association of the respondents. Of the two points which I have formulated (namely: (1) is it conducted for profit; (2) are its main objects charitable, etc.?) I shall find it convenient to deal

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with the latter first. In order to answer the question "What are its main objects?", the first duty of the court is to look at the company's document of incorporation, which is designed to set out the objects for which the society is formed.

In certain of the cases, which have arisen under this legislation, the question has been debated to what extent one must confine oneself to the charter or the memorandum of association of the organisation concerned, and to what extent one is entitled to look at the facts, as proved in evidence, of the exact operations in which the organisation has engaged. I think I can state very briefly, by citing a passage from the judgment of this court delivered by my brother Romer last year, the answer to that question. The reference is to the case which was concerned with the Theosophical Society, *Berry* v. *St. Marylebone Borough Council*,[1] which came before this court. Romer L.J., in reading the court's judgment, said: "In our opinion, Devlin J. [in *Chartered Insurance Institute* v. *London Corporation*[2]] was "saying no more than that, when an organisation has several "objects specified in its written constitution, as was the case with "the Chartered Insurance Institute"—that was the subject of Devlin J.'s case—"its activities are relevant to an inquiry as to "what should, for the purposes of section 8, be regarded as its "main objects. We do not think that the judge was intending "to go further than that and, if such was his view, we cannot "see that it is open to any criticism. That, however, is a very "different thing from saying that, where there is no doubt as to "what the main objects of a body are (and there is no doubt in "the present case), evidence may be received of what its activities "have been either in order to construe the language by which the "objects are described or to limit the proper construction of the "language by reference to the activities."

With the guidance of that passage, I take it that the court's duty is, first of all, to look at this memorandum of association and then, having looked at it, to see which of the very numerous clauses which are stated to be the objects comprise the main objects of the society, and to get some assistance from the evidence on the further question as to which of them have been so far in fact the main objects. In so far as the language may be equivocal, it can be seen by reference to what has been done whether assistance can be obtained in solving the equivocation.

As practitioners well know, those who draw up draft memoranda of association these days do not commonly err on the side of brevity. Here the objects of the society are contained in paragraphs which, after exhausting the alphabet from (a) to (z), then include (aa). It is clear when you look at them that some of the objects are plainly not main objects on any view; they are more in the nature of powers or are ancillary. Indeed, (aa),

[1] [1958] Ch. 406, 416; [1957] 3 W.L.R. 1029; [1957] 3 All E.R. 677.

[2] [1957] 1 W.L.R. 867, 875; [1957] 2 All E.R. 638.

although the longest in point of language, is clearly of that nature.

The first three objects of the society read as follows: "(a) To "acquire and take over as a going concern and conduct as a "scientific and educational undertaking the business heretofore "carried on as the Chester Zoological Gardens, Upton-by-Chester, "by Chester Zoological Gardens Ltd., together with or any part "of the real and personal property and assets of the company "used in connection with that business or belonging thereto.

"(b) To promote, facilitate, and encourage the study of "biology, zoology and animal physiology, aviculture, aquaria, "ichthyology, entomology, botany and horticulture and all kin-"dred sciences and to foster and develop among the people an "interest in and knowledge of animal life.

"(c) To establish, equip and carry on and develop zoological "parks or gardens and living zoological collections at such places "as the society shall determine."

Paragraph (d) refers to the establishment of bird sanctuaries and the like, but, as the argument has developed, I think I may properly and fairly say that it is by looking at the first three paragraphs, (a), (b) and (c), that you will find the answer to the question: What are the main objects of this society?

In opening the case Mr. Squibb put his finger on the word "business" twice used in paragraph (a) as indicating that, under whatever guise it be, this really was a trading operation. I hope that he will forgive me if I do not take much time about that. There is no doubt that all that word meant in this reference to taking over "the business heretofore carried on as the Chester "Zoological Gardens" was the "undertaking." The work there referred to had been undertaken by a trading body, namely, the company which had been there and presumably had carried on business, but I do not think that throws any light on the matter for the purposes with which we are concerned. But what is interesting (it is a point emphasised by Mr. Willis) is that the primary object in the first and second line of paragraph (a) of clause 3 of the memorandum of association was expressed thus: "To acquire and take over as a going concern and conduct as "a scientific and educational undertaking" this subject-matter. That is a very important sentence. No doubt if it was shown that this society was doing nothing in the gardens, certain consequences must follow, but at least those words do show that this enterprise (which, let me recall, Mr. Mottershead, this great enthusiast for animal life, had started many years before) was to be conducted as a scientific and educational undertaking. That, and that only, was the sort of thing in which Mr. Mottershead was interested. I am not, however, to be taken as saying that those few words provide the answer to the question: What are the main objects? I think it is impossible to overlook paragraphs

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(b) and (c). But, as Farwell J. said in *In re Lopes*,[3] the London Zoo case, you cannot read these paragraphs in isolation; they must be read all together.

Paragraph (b) is certainly strictly in line with the words previously used, "scientific and educational undertaking," for it is to promote and encourage the study of various sciences, biology, zoology and so on. When you come to paragraph (c), "To establish, equip and carry on and develop zoological parks or gardens," I agree that, if it stood alone, it might be said to cover equally the establishment of a zoological park or garden as a mere showpiece or amusement place, although it might equally be said to cover the establishment of a zoological garden to achieve the continuance of what had gone on before.

It is relevant here to look at Mr. Mottershead's affidavit to see what in fact this society has done. First of all, Mr. Mottershead, with his genius and his enterprise, has made it quite plain that he has taken very special care that the surroundings for the animal inmates of the zoo shall be as near as may be to the natural surroundings in which they would be found in their native haunts. He says (and it is not disputed in any way) that he has carried that aim much further at Chester than it has been carried elsewhere. He gives a number of instances showing how the animals are given these natural surroundings, some of them illustrated by photographs. He says that many wild animals will not breed in captivity unless they are in such natural surroundings, and he states in this part of his affidavit that the society has successfully bred certain creatures and that the zoological gardens are the only place in this country where one particular animal has been successfully bred.

I will at this stage make further reference to what Mr. Mottershead says in the last two paragraphs of his affidavit. In paragraph 21 he says that the School of Tropical Medicine in the University of Liverpool has been a member of the society for 19 years and has made frequent use of the livestock for experimental purposes. In paragraph 22 he says that the society has from time to time provided material for research and instruction to other institutions of learning, for example, the University of Reading and the Liverpool and Manchester Museums, and he gives as other examples some institutions in Manchester and other parts of England.

Whilst I am referring to the affidavit, I should perhaps say, in reference to other paragraphs in the memorandum which authorise the conduct of refreshment rooms, cigarette stalls and so on, that Mr. Mottershead deals also with those. But, as the argument has developed, it has become quite plain that this case is not going to turn, and Mr. Squibb has not suggested that it should turn, on the circumstance that these activities give some

[3] [1931] 2 Ch. 130.

profit to the society from catering, the sale of cigarettes, sweets and the like.

I conclude, therefore, as did the judge, that the answer to the question, "What are the main objects of this society?" is to be found from reading paragraphs (a), (b) and (c), with the assistance of the evidence, and that that material makes good the proposition which Mr. Willis put in the forefront of his case, namely, that this society has conducted and does conduct this zoo not as a place of amusement or as a show-place, but, by and large, as an educational or as a scientific and educational undertaking.

In the course of his judgment Vaisey J. referred to the decision of Farwell J. in *In re Lopes*,[3] which in fact raised the question under a gift in a will whether the Zoological Society of London was a charitable body so that a gift in its favour would be a charitable gift. The London Zoo is an institution far older than this institution at Chester. It is, I think I am right in saying, over 120 years old. Its charter is expressed with much greater brevity than the modern memorandum of association. So far as is relevant, it is confined to "the advancement of zoology "and animal physiology and the introduction of new and curious "subjects of the animal kingdom." Moreover, it is true to say that this institution originally was that of a small number of fellows and that today its fellows number many thousands. By contrast the Chester Zoo has a very small number of fellows, and the fellows of the Chester Zoo are perhaps really little more than season ticket holders. Its main support is derived from ordinary casual entrance fees of so much per day.

In the report of *In re Lopes* I find[4]: "For its scientific "work it maintained a laboratory, where research work in "anatomy and pathology was carried on under the direction "of a full-time trained pathologist and an anatomical fellow. "Research on aquatic life was also carried on in the aquarium "laboratory by an aquarium research fellow. It had also "collected and maintained a library of scientific books and "periodicals relating to zoology, reputed to be the most complete "in the world, and had published continuously annual volumes "of its scientific proceedings, all these things plainly tending to "the advancement of education."

It is pointed out, with justice, that the Chester Zoo cannot boast of any activities at all comparable in scope and reputation with what I have just read. There is no laboratory. It has no full-time trained pathologist or anatomical fellow. It does not contain a library of scientific books and periodicals and its publications are of a much slighter kind than are the Proceedings of the London Zoological Society. But this zoo at Chester is very young. In its thirty years of life it is perhaps not surprising that it has not yet achieved anything like the

[3] [1931] 2 Ch. 130. [4] Ibid. 133.

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equipment or the reputation of the London Zoo; yet it is fair to the Chester Zoo to say that its history since 1950 at any rate seems clearly to be that the excess of income over expenditure has been used to improve in every possible way the equipment and the materials and to raise the standards of the zoo. Again I refer, because I think it is important, to the great interest of Mr. Mottershead in this enterprise.

Posing, therefore, the question, "Considered broadly, is this "zoo, when you look at it, a zoo conducted on lines comparable "with the London Zoo or is it, on the other hand, no more than "a place of amusement?" I unhesitatingly agree with the judge in thinking that it is the former.

In the course of his judgment in *In re Lopes* Farwell J., after stating the facts, said[5]: "Its first object is 'the ad-"'vancement of zoology and animal physiology.' That is "clearly educational, for the advancement of scientific know-"ledge, and therefore charitable. The second object is 'the "'introduction of new and curious subjects of the animal "'kingdom.' That object again, having regard to the form of "the charter, is charitable. In the first place, although the "copulative 'and' is used and no doubt imports two objects, "nevertheless I think that the second object must be read in "connection with the first, which may to some extent neces-"sitate it." I adopt a similar line of reasoning when I refer to paragraph (c) of the memorandum.

Now comes the important sentence: "In the second place, "I think that the introduction here of non-indigenous animals, "exhibited under proper conditions, is distinctly an educational "object. It must widen the mind and outlook of every one to "see, in the flesh, animals now becoming scarce in many parts "of the world, which otherwise they might not see at all. "Taking a broad view of the society's objects I am satisfied that "they are charitable, on the ground that they are for the "advancement of education."

That judgment, of course, is not binding upon this court, though it has stood for 29 years and, so far as I know, has never been challenged. I respectfully agree with it and adopt the passage which I have read. It may be that its language might be applied more widely than is required for the decision of this case; but, at any rate, I think it is true to say that a zoo with objects such as you find in paragraphs (a), (b) and (c) of this memorandum and provided with the means for the exhibition, under proper conditions of non-indigenous animals is an "educational object" when conducted in the manner in which Mr. Mottershead has conducted the affairs of this society.

As regards "scientific," which is also in paragraph (a), I have said that there is at the moment nothing which the Chester

[5] [1931] 2 Ch. 130, 135.

Zoo could boast comparable to the laboratories and other equipment of the London Zoo. But, having regard to the existence of some scientific operations which are conducted at the Chester Zoo as stated at the end of Mr. Mottershead's affidavit, there is at any rate a scientific element present here in accordance with the statement of paragraph (a) of the memorandum.

Taking, as Farwell J. did in *In re Lopes*,[6] the broad view of this society's objects, I think that they satisfy the test that they are charitable. I am at any rate satisfied that, even if they were not for some reason which has not been developed strictly charitable, they are at least otherwise concerned with the advancement of education. There is this support, at any rate, to be given for that view, that, according to paragraph 3 of Mr. Mottershead's affidavit, they have been exempted from income tax under section 448 of the Income Tax Act, 1952, and given other privileges under the Finance Acts which are only consistent with such a view. But that, of course, is not to say that the Chester rating authority is thereby bound.

Having reached that conclusion upon what I have thought to be the main point in the case, I can come to the next question which presents itself on the subsection: Is this organisation one not established or conducted for profit? Mr. Squibb did not press us to say that it had been established for profit. The terms of the memorandum, which prohibited the payment of dividends during the existence of the society or the distribution of its assets upon its dissolution, indicate that upon no ordinary use of language could you describe this society (which has been allowed to drop the word "Limited" from its name) as being established for profit. But Mr. Squibb did contend that the satisfactory financial history of the past five or six years, plus the use of the word "business" in paragraph (a) of clause 3 of the memorandum, produces the result that this was an organisation "conducted for profit." That it has made a profit in the sense that for those years its income has appreciably exceeded its expenditure is quite plain, but the words of the statute are "conducted for profit," and upon those words we have again guidance of the highest kind.

In the last case in which the matter was raised, *Guinness Trust (London Fund) Founded 1890, Registered 1902* v. *West Ham Borough Council*,[7] Jenkins L.J., in the course of delivering the leading judgment, referred to the judgment of Parker L.J. in this court in the earlier case of *National Deposit Friendly Society* v. *Skegness Urban District Council*[8] and also to the speeches of Lord Keith of Avonholm, Lord MacDermott and Lord Denning in that case in the House of Lords.[9] Having

[6] [1931] 2 Ch. 130.
[7] [1959] 1 W.L.R. 233; [1959] 1 All E.R. 482.
[8] [1957] 2 Q.B. 573; [1957] 3 W.L.R. 550; [1957] 3 All E.R. 199.
[9] [1958] 3 W.L.R. 172; [1958] 2 All E.R. 601.

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made those references, Jenkins L.J. said[10]: "I think those "are all the passages to which I can usefully refer, and "notwithstanding the difference between the two cases, they "fortify me in the view that 'established or conducted for "'profit' in section 8 (1) of the Act means established for "the purpose of making profit or conducted for the purpose of "making profit, and does not extend to every organisation which "in any circumstances or at any stage in its activities receives "something which might be considered in itself to constitute a "profit."

I add a brief reference to what Lord Denning had said in *National Deposit Friendly Society* v. *Skegness Urban District Council*, which was cited by Jenkins L.J.[11]: "But the fact that "the society has made profits does not mean that it is 'conducted "'for profit,' which I take to mean 'conducted for the purpose "'of making profit.' Many charitable bodies, such as colleges "and religious foundations, have large funds which they invest "at interest in stocks and shares, or purchase land which they "let at a profit. Yet they are not established or conducted for "profit. The reason is because their objects are to advance "education or religion, as the case may be. The investing of "funds is not one of their objects properly so called, but only a "means of achieving those objects."

In truth the matter is one which I think must be answered according to the common sense of the matter. If you pose the question, "Looking at the history, looking at the operations "which this society has conducted, is it a society which is being "conducted for profit?" I must say that I would have no hesitation in answering that question negatively. In giving that answer I am now assuming the correctness of my answer upon the main question that this is an educational charity. If it were otherwise, if the true view was that this was an amusement park, then the answer to the question, "Is it conducted for "profit?", might be very different; but given that this is an educational charity or an educational organisation, then it seems to me that the answer that I have suggested must be given to the further question which I have posed, "Is it one which is "conducted for profit?", is that it is not; it is one conducted for the advancement of its educational objects and the profits have been entirely used in the furtherance of those objects and for no other purpose.

I do not think *Brighton College* v. *Marriott*[12] can assist for present purposes on the question we have to decide, because the question whether it was conducted for profit was not the question which was there debated.

I therefore conclude that the society in this case has satisfied both branches of the test in section 8 (1) of the Act, which is

[10] [1959] 1 W.L.R. 233, 239.
[11] [1958] 3 W.L.R. 172, 187.
[12] [1926] A.C. 192.

what Vaisey J. also thought. I would accordingly dismiss the appeal.

ROMER L.J. I agree. I can summarise my views on this appeal very briefly. It has been quite clearly established by the authorities (there have been quite a number of decisions on section 8 of the Act of 1955) that in order to claim the benefit of that section a society or other organisation has to show that all its main objects are charitable or otherwise concerned with the advancement of religion, education or social welfare. Accordingly, the respondent society in the present case can only obtain the benefit of the section by saying, in effect, that they are, having regard to the whole of their main objects, an educational charity. I agree with the Master of the Rolls in thinking that, beyond any reasonable doubt, the main objects of the society are to be found in sub-clauses (a), (b) and (c) of clause 3 in the memorandum of association.

It is to be observed that under sub-clauses (a) and (b) a distinction is to some extent drawn on the language of the sub-paragraphs between scientific activities and other activities. But taking these three sub-clauses by themselves, I have no doubt at all—indeed without the assistance of *In re Lopes* [13] I should have had no difficulty at all in coming to this conclusion—that they reveal a charitable object in the educational sense.

Mr. Squibb said that, so far as the scientific aspect of the activities was concerned, the evidence shows that they have been disregarded and all that remains is the other objects which are referred to in these three sub-clauses. I think it is true that the scientific activities have rather occupied a subordinate place, although they have not by any means been wholly disregarded. But, even if the scientific aspects had been wholly omitted from the factual activities of the society, I do not for my part see why the society's objects should be any less charitable, provided that the other parts of them were charitable and had been carried out by the society. The only result of discarding one branch of their activities might be that the members might complain, but, for the purposes of section 8, to my mind it is quite unimportant whether they did or did not give full or indeed any effect to the scientific approach to the enterprise for which they were incorporated. But apart from the scientific matters which are mentioned in the objects (for example, in sub-clause (b), "To promote, facilitate, and encourage the study of biology, "zoology . . . and all kindred sciences"), which are clearly charitable, the rest of the objects in sub-clauses (a), (b) and (c) appear to me to be charitable as tending to educate people and to broaden their minds.

As the Master of the Rolls said, a similar matter was considered by Farwell J. in *In re Lopes*,[14] and he expressed himself

[13] [1931] 2 Ch. 130. [14] Ibid. 135.

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in language which my Lord has already read and one sentence only of which I will repeat: "I think that the introduction here "of non-indigenous animals, exhibited under proper conditions, "is distinctly an educational object." With that sentence I fully agree.

I would emphasise that in the present case the affidavit of Mr. Mottershead shows that the public here have an advantage which they do not have in a good many zoos in this country or elsewhere, deriving from the fact that Mr. Mottershead and his colleagues have given considerable thought and attention to providing, and have provided, a more or less natural setting in which these various kinds of animals can be seen, so that the public have the advantage not merely of seeing wild animals behind bars, which is perhaps in itself somewhat unedifying, but they have the advantage, which to my mind is a distinct educational advantage, of seeing them behaving in surroundings which approximate to their natural surroundings and their native habitat, so that they can observe the habits and conduct of the animals in these surroundings; in other words, the conditions in the present case in which the public can see these animals are essentially the "proper conditions" referred to in the phrase which Farwell J. used.

Accordingly, it is quite clear to me that, both on the relevant object clauses of the memorandum and on the evidence which has been filed as to the precise activities which the society has undertaken, the society has shown (and I entirely agree with the judge in so finding) that they are an educational charity. Accordingly, I agree with the judgment which Vaisey J. gave on that point.

There only remains the further question, which logically I suppose comes first, as to whether the society was established or conducted for profit. As to that there is nothing I desire to add to what the Master of the Rolls has said. It appears to me to be clear that, so far as this court is concerned, the question must be answered in the negative because of the reasoning in the decision of this court in the *Guinness Trust* case.[15]

I accordingly agree that this appeal should be dismissed.

Pearce L.J. I entirely agree with what my Lords have said. The main objects of this undertaking are to be found in subclauses (a), (b) and (c) of the memorandum of association. The judge rightly held that this case came within the reasoning and the authority of *In re Lopes.*[16] I, too, agree with the observations of Farwell J. in that case which my Lord has read.

Further, in my view, the undertaking was not established or conducted for profit for the reasons given by this court in the case of *Guinness Trust (London Fund)* v. *West Ham Borough*

[15] [1959] 1 W.L.R. 233. [16] [1931] 2 Ch. 130.

Council,[17] reasons which are equally applicable to the facts of this case.

For the reasons which my Lord has given more fully, I agree that this appeal must be dismissed.

Appeal dismissed with costs.

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Solicitors: *Preston, Lane-Claypon & O'Kelly for Gamon & Co., Chester; Field, Roscoe & Co. for Ouseley-Smith & Co., Chester.*

B. A. B.

[17] [1959] 1 W.L.R. 233

[COURT OF APPEAL.]

* SOCIÉTÉ FRANCO-TUNISIENNE D'ARMEMENT-TUNIS *v.* GOVERNMENT OF CEYLON.

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May 26, 27, 28, 29.
Morris L.J and Pilcher J.

Arbitration—Arbitrator—Misconduct—Natural justice—Radical departure from cases submitted by parties—Insufficient warning to parties.
Natural Justice.
Arbitration — Arbitrator — Jurisdiction — Admission disregarded — Unclaimed claim allowed.

A vessel was chartered for the carriage of goods to Colombo. Those goods were overstowed by others. Clause 6 of the charterparty provided: "Time to commence at 2 p.m. if notice of readiness to "discharge is given before noon. . . . Time lost in waiting for "berth to count as discharging time."

The vessel arrived at Colombo on October 18, 1956, and notice of readiness was given at 9 a.m. on that date, but owing to congestion in the port, the vessel did not obtain a berth until October 24, when discharging began. Discharge of owners' overstowed cargo was completed on October 29, and all discharge completed on November 3.

A dispute between owners and charterers as to demurrage payable was referred to an umpire. The two arbitrators appeared before him as advocates on December 11, 1958, presented arguments, and left with him written statements of the cases of the respective parties. Each of those cases proceeded on the basis that time was to count from 2 p.m. on October 18. On that basis the charterers admitted liability for demurrage of £829 6s. 10d. The owners claimed that the total for demurrage due was £1,878 16s. 5d.; and in each written case an allowance, different in quantum, was made in respect of the owners' overstowed cargo.

The umpire disallowed the whole of the owners' claim of £1,878 for demurrage and awarded the charterers a sum for dispatch money which they had not claimed, either within six months of final discharge, as required by the charterparty, or at any time, on the ground that, so long as cargo was overstowed, the vessel was not ready, and, accordingly, that time did not start to run until October 29.

On the owners' motion to set aside or remit the award:—

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Held, (1) that the umpire had exceeded his jurisdiction in awarding dispatch money to the charterers.

(2) That he had not exceeded his jurisdiction in disregarding the charterers' admission of liability for demurrage based on time starting on October 18, and substituting his finding that time started on October 29, for the question when time started was a question of law applied to the facts, and if the umpire's view of the law was a possible view, he was entitled to make his award in accordance with it and to decide that no demurrage was due to the owners.

(3) That the umpire had, however, misconducted himself in a technical sense, since his view of the law as applied to the facts before him involved a radical departure from the cases as presented by the parties, and raised complicated issues of law on which further evidence might be required; and as on the evidence before the court it did not appear either that that change was made sufficiently clear to the owners, or that they were given a sufficient opportunity to reframe their case in the light of an unexpected development, the proceedings were unsatisfactory and contrary to natural justice. The award should, accordingly, be remitted to the umpire with directions to exclude considerations of dispatch money, and to reconsider the issue as to demurrage at Colombo and the question of costs.

Per Pilcher J. Even if the court has power to direct the umpire to state his award in the form of a special case on an application to remit, it would not be desirable for the court so to direct. If a special case is to be stated it is better that it should be done at the request of the parties.

Order of McNair J. varied.

Appeal from McNair J. on a motion to set aside or remit an award of an umpire on an arbitration.

By a charterparty dated July 16, 1956, in the Gencon form, the Société Franco-Tunisienne d'Armement-Tunis, owners of the *Massalia*, agreed with the Government of Ceylon, as charterers, to charter the vessel to proceed to Antwerp and Bordeaux and there load a part cargo of 4,450/4,700 long tons of flour in bags. When loaded, the vessel was to proceed to Colombo (to "good "and safe berth) . . . and there deliver the cargo. . . ."

Clause 6 provided: "Time to commence at 2 p.m. if notice "of readiness to discharge is given before noon, and at 8 a.m. "next working day if notice given during office hours after noon. "Time lost in waiting for berth to count as discharging time"; and it referred to clause 16, which was as follows: "Cargo to "be loaded and stowed, free of expense to the vessel, at the rate "of 1,000 tons of 2,240 lbs. per weather working day, Sundays "and holidays excepted, and to be discharged at receivers' risk "and expense at the rate of 750 tons of 2,240 lbs. per weather "working day, Sundays and holidays excepted." Clause 7 provided: "Any demurrage at the rate of £250 per day or pro rata "for any part of a day comparable day by day, at ports of "loading and discharge. Owners to pay charterers dispatch "money for all working time saved at half demurrage rate at "loading and discharging ports."

Clause 27 provided that all disputes arising out of the contract

should be referred to arbitrators carrying on business in London "who shall be members of the Baltic and engaged in the shipping "and/or grain trades . . . with power . . . to appoint an umpire." It continued, so far as relevant: "Any claim must be made in "writing and claimant's arbitrator appointed within six months "of final discharge and where this provision is not complied with "the claim shall be deemed to be waived and absolutely barred."

By clause 30: "Owners to have the liberty to complete "cargo 'en route' with other goods. . ."

In August, 1956, the vessel loaded at Antwerp and Bordeaux some 4,338 long tons of flour in bags, distributed over the five holds of the ship. When the vessel was at Port Said on her way to Colombo, the owners, under the right given to them by clause 30, loaded a quantity of other cargo, something over 400 tons, for Colombo, that cargo being overstowed in three out of the five holds.

The vessel arrived at Colombo on October 18, 1956, at 06 hours 12 min. The master gave a notice of readiness to discharge at 9 a.m., but as no berth was available, the vessel was kept waiting until October 24, when she berthed; and discharging began at 17 hours 30 min. and was completed on November 3 at 03.00 hours. The last of the owners' cargo—8 per cent. of the total cargo—was discharged on October 29.

A time-sheet was prepared on November 3 by the charterers' shipping agents. It set out the facts as to date and time of arrival, notice, berthing, commencement and completion of discharge; and on the basis stated thereon of "Time to count from "October 18, 14.00 hours," computed time lost during the period to October 23 while the vessel was not at her berth as two-fifths of 24 hours, on the ground that only two out of the five holds were free of the owners' cargo. Laytime was stated to have expired on October 30, and additional time from that date to completion of discharge of charterers' cargo on November 3 set down as "3 days 9 hrs. 37 mins."

Disputes arose between the parties on a number of matters, including charterers' liability for demurrage at Colombo. In January, 1957, these were referred to arbitration in accordance with clause 27. Mr. Owen Ellis was appointed as owners' arbitrator and Mr. Malcolm Browne for the charterers.

In May, 1957, the charterers wrote a letter to the owners giving information apparently asked for earlier. That letter included an admission of liability by charterers for a sum of £829 6s. 10d., specifically described as for demurrage at Colombo calculated by reference to the "3 days 9 hrs. 37 mins." set out in the time-sheet. On their overall calculations, the charterers admitted that a balance of £266 18s. 10d. was the total sum owing by them to the owners, subject to the arbitration, and they paid that amount into Hambro's Bank.

The arbitrators were unable to agree and an umpire (Mr. John Chesterman) was accordingly appointed. The arbitrators appeared

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before him on December 11, 1958, and, acting as advocates, presented arguments; and each left him a written statement of the respective cases.

The charterers' case set out nine separate items of claim against the ship, and by paragraph 4 stated: "As against the "above claims the charterers admit liability to the owners for "demurrage incurred by the vessel at Colombo £829 6s. 10d."

The owners' case set out, inter alia, their claim for demurrage at Colombo, which was also based on "Time to start on October "18, at 14.00 hours"; but the claim was for 8 days 4 hours and 39 minutes as time lost, from which time they deducted eight per cent. on the ground that this percentage of the total cargo was owners' cargo; and accordingly they claimed for demurrage at Colombo 7 days 12 hours 22 minutes—a total of £1,878 16s. 5d.

On December 19, 1958, the umpire made his award as follows: "I award and determine that the amount of £266 18s. 10d. if "still held by Hambro's Bank London be returned forthwith to "the claimants" [charterers]. And. . . in addition to this sum. . . "the claimants are entitled to recover from the "respondents" [owners] "the sum of £127 1s. 5d."

With that award the umpire sent to each arbitrator certain of his notes, expressly stated not to be part of his award, explaining how he had made the award. The notes referred to certain legal authorities and under the heading "Time used at Colombo," stated: "Time at discharging port was to count at 2 p.m. if notice "of readiness was given before noon. Again, as for the loading "port, notice of readiness could not be given until the vessel was "ready, and according to the owners' own calculations, the "vessel was not ready and with all five holds at charterers' dis-"posal until October 29, so that notice could not be given until "that time and time therefore began at 14.00 hrs. on that day. ". . ." With his notes the umpire incorporated the time-sheet which he himself had worked out. On that basis he found that there had been a saving of time by the charterers of 1 day 6 hours 45 minutes which, under clause 7 relating to dispatch money, amounted to £160 3s. 1d. A "final account" at the end of the notes showed how the umpire had dealt with the various items of all claims by either side.

The notes thus showed that not only had the umpire completely disallowed any demurrage at Colombo to the owners, despite the charterers' unchallenged admission of liability for £829, but had also awarded the charterers £160 3s. 1d. as dispatch money, which they had not claimed, either within the six months as required by clause 27 of the charterparty, or at any time.

The receipt of that award caused surprise and dismay to the owners, and their solicitors wrote to the umpire expressing that surprise and the reasons for it, stating that the owners would apply to the court to set aside the award, and asking that the umpire's notes might be made available for the court.

The umpire in reply on January 19, 1958, stated: "It was my "understanding at the time when the parties' arbitrators "appeared before me for oral argument that I was required to "review the respective time-sheets at Colombo and to make the "necessary adjustments." He added that he had no objection to his notes being used on any application to the court.

A motion was thereupon presented to the court for an order that the award be set aside or remitted on the grounds (1) that it was beyond the jurisdiction of the umpire in that it included certain matters not in dispute between the parties and/or not submitted by them to arbitration; and (2) that the umpire had misconducted himself in respect of the reference in that he had awarded to the charterers certain sums which they had admitted were due to the owners and/or were not claimed by the charterers in the arbitration, and/or in that he exceeded his jurisdiction and/or in that he awarded certain sums to the charterers which were not in issue between the parties and in relation to which the owners had no opportunity of making submissions to him.

The motion was supported by an affidavit by Mr. Owen Ellis for the owners, which stated, so far as relevant, that the charterers' contention at the hearing in regard to the dispute about demurrage at Colombo had proceeded on the basis of admitted liability for £829 odd based on their time-sheet; that the owners' contention on demurrage at Colombo had been that they were entitled to recover £1,878 odd; and that neither during the hearing nor at any other time had the charterers withdrawn their admissions, nor had their admitted liability to the owners in respect of the £829, and the balance of £266 paid into Hambro's Bank ever been in issue at the arbitration. He continued: "Nor did I at any time have any opportunity to make any "submissions to the umpire, or reason for making any submission "to the umpire, in respect of the legal and factual position "which would have been material if the aforesaid admissions "had not been made on behalf of the respondents. The only "matter relating to the vessel's discharge at Colombo which "was in issue between the parties and referred to the umpire "for decision was whether or not the applicants were entitled "to a further sum of £1,049 9s. 7d. by way of demurrage in "addition to the said admitted sum of £829 6s. 10d."

The umpire, Mr. Chesterman, thereupon voluntarily swore an affidavit, which, by paragraph 3 stated: "The time-sheet on "which the claimants [charterers] relied, disclosed a liability "for demurrage at Colombo of £829 6s. 10d. The time-sheet "relied on by the respondents [owners] disclosed a liability "for demurrage at Colombo of £1,878 16s. 5d. Oral argument "took place on the issues disclosed by these contrasting time-"sheets. It seemed to me at an early stage that neither time-"sheet was entirely accurate. I accordingly raised certain queries "in this respect. In particular, it seemed to me that no time "could begin to run until the vessel was ready to discharge,

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"and that she could not be deemed to be so ready until she was "in a condition in which she was able to make available all "hatches to the claimants for the purposes of enabling them "to discharge. I suggested that the respondents could not be "heard to say that time was lost in waiting for a berth so long "as the vessel herself would not have been ready to discharge "had a berth been available. In saying this I had in mind the "remarks of Parker L.J. in *North River Freighters Ltd.* v. *H. E.* "*President of India.*[1] The claimants' time-sheet had been com-"puted on the basis of an allowance of laytime calculated by "reference to the proportion of hatches at any time available "for working, such proportion being applied notionally to the "charterparty rate for discharging."

Paragraph 4 stated: "It frequently happens in cases which "are concerned with disputes about the calculation of laytime "that neither of the time-sheets relied on by the respective "parties will be accepted in their entirety by the umpire. In the "present case I made it clear to the respective arbitrators that "in my view it was doubtful if either time-sheet submitted by "them was correct. After discussion, I was left with the clear "impression that both arbitrators expected me to recompute the "time-sheets on the basis which I considered to be accurate, "and to make my award accordingly. I was aware that the "claimants had originally submitted a time-sheet showing "demurrage due from them at Colombo of £829 6s. 10d. It was "never suggested to me by either arbitrator that I was not to "be at liberty to make an award, if I saw fit, in which the "demurrage payable by the claimants might be a lesser sum or "indeed in which an allowance might be made to the claimants "in respect of dispatch money at Colombo. I understood I was "being asked to deal with the computation of laytime at, inter "alia, Colombo and that any award which I might ultimately "make would take into account whatever amount (whether by "way of demurrage or of dispatch) I might find to be due from "one party to the other as a result of the computation which I "found to be correct upon the true construction of the charter-"party."

Mr. Owen Ellis then swore a second affidavit, which stated: "As regards paragraph 3 of the umpire's affidavit, to the best of "my recollection and belief, the umpire never suggested during "the hearing, or at any other time, that the owners were not "entitled to claim that any time was lost in waiting for a berth at "Colombo because part of the charterers' cargo had been over-"stowed with cargo which the owners had loaded en route to "Colombo pursuant to clause 30 of the charterparty. If the "umpire had made any suggestion to this effect, or if he had ever "indicated that, notwithstanding the charterers' admission that "time under clause 6 began to count at 14.00 hours on October

[1] [1956] 1 Q.B. 333, 350; [1956] 2 W.L.R. 117; [1956] 1 All E.R. 50.

"18, 1956, he might nevertheless award that the owners were to "get no compensation whatever in respect of the time while "the vessel was waiting for a discharging berth, I should certainly "have made a number of additional submissions on behalf of "the owners. First, I should have submitted that this point was "not in issue between the parties and that the umpire accordingly had no jurisdiction to deal therewith. Secondly, I should "have submitted that the owners' exercise of their rights under "clause 30 could not affect their rights under clause 6 if the "vessel was kept waiting for a discharging berth. Thirdly, I "should have submitted that the time during which the vessel "had to wait for a discharging berth was clearly 'lost' time to "the owners, irrespective of whether the charterers' cargo in one "or more of the vessel's holds was overstowed with cargo carried "for the account of the owners. As regards the reference to the "judgment of Parker L.J. in *North River Freighters Ltd.* v. "*H. E. President of India*,[1] to the best of my knowledge and "belief this was never referred to in the course of the hearing "before the umpire, and I note that it was also not referred to "by the umpire in his 'Notes' . . . in which he set out the "authorities which had guided him in making his award. If the "umpire had referred to it, I should certainly have submitted to "him that the remark at the top of page 350 was not an "authority against the owners' contention, since the Lord "Justice [Parker L.J.] must there have intended to refer to "a case where the vessel would have lost no time while waiting "for a berth on the ground that she would not have been ready "to load or discharge, as the case might be, even if a berth had "been available for her, as would be the case, for instance, if "she had had to carry out repairs to her cargo gear during the "period which she spent waiting for a berth. However, none of "these points became material during the hearing before the "umpire both because the matter was covered by an admission "on behalf of the charterers and because the umpire never sought "to question the correctness of this admission. I therefore never "had any reason or opportunity to make any submissions in "relation to any of the foregoing points."

Mr. Malcolm Browne, the charterers' arbitrator, did not give any evidence on affidavit owing to his inability to recollect with sufficient clarity what had taken place at the hearing.

On the motion before the court, McNair J. considered all the documentary evidence referred to above. On the first ground, that the umpire had acted in excess of jurisdiction, the judge held that the statement in the charterers' time-sheet of November 3, 1956, that time was to count from 14.00 hrs. on October 18 (on which both parties had proceeded thereafter), was a conclusion of law based on the construction of the charterparty applied to the stated facts and that the umpire was entitled to apply his

[1] [1956] 1 Q.B. 333, 350.

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view of the law and to disregard the charterers' admission of liability based on what he regarded as a wrong view of the law; and that in that respect the umpire had not exceeded his jurisdiction. The judge held, however, that, in awarding dispatch money which had not been claimed by the charterers within six months of completion of discharge, the umpire had exceeded his jurisdiction; and he remitted the award for the variation of that part of it which awarded the £160 odd to the charterers by way of dispatch money.

On the second ground, that the umpire had misconducted himself, the judge accepted the evidence of the umpire in his affidavit, and taking the view that Mr. Owen Ellis for the owners ought to have appreciated that the umpire was proposing to consider the whole question of the discharge at Colombo de novo, held that as he had not taken the point raised by the umpire he could not be heard to say that the umpire had misconducted himself. He ordered that each of the parties should pay their own costs.

The owners appealed.

Michael Kerr and *M. J. Mustill* for the owners.
Ralph Millner for the charterers.

The following cases were referred to in the course of the argument: *Porteus* v. *Watney*[2]; *North River Freighters Ltd.* v. *H. E. President of India*[3]; *Kiril Mischeff Ltd.* v. *Constant Smith & Co.*[4]; *Roland-Linie Schiffahrt G.m.b.H.* v. *Spillers Ltd.*[5]; *Falkingham* v. *Victorian Railways Commissioner*[6]; *Skipworth* v. *Skipworth*[7]; *In re Green & Co. and Balfour, Williamson & Co.*[8]

Morris L.J., stating the facts, said that one of the prominent questions before the court had been what exactly were the disputes referred to arbitration: though the court did not have before it many contemporary documents it was possible to ascertain the extent and nature of the disputes by looking at the documents which were before the court. The award itself was not a speaking award which contained any error of law on its face; and in so far as the accompanying notes gave the umpire's reasons for the award they were not a part of it; but they had been made an exhibit to an affidavit before the court; and the judge and the Court of Appeal had looked at and could look at them only because of the nature of the application now the subject of the appeal.

His Lordship continued: But it was said that the umpire had acted in excess of jurisdiction and that in a technical sense

[2] (1878) 3 Q.B.D. 227; 523 (C.A.).
[3] [1956] 1 Q.B. 333; [1956] 2 W.L.R. 117; [1956] 1 All E.R. 50.
[4] [1950] 2 K.B. 616; 66 T.L.R. (Pt. 1) 742; [1950] 1 All E.R. 890.
[5] [1957] 1 Q.B. 109; [1956] 3 W.L.R. 620: [1956] 3 All E.R. 383.
[6] [1900] A.C. 452.
[7] (1846) 9 Beav. 135.
[8] (1890) 63 L.T. 325.

there had been what is called misconduct. It was said that the hearing before the umpire was not, in a technical sense, satisfactory. It has always been made abundantly clear that there is not any sort of personal imputation against the umpire in any way nor, indeed, against the arbitrators. They are all skilled gentlemen of great experience and the only complaints made against any of them are complaints in a legal and somewhat technical sense.

But when the notes made by the umpire were looked at, it was revealed how he had arrived at his conclusion. One thing that was revealed was that not only had he completely disallowed any demurrage for the owners but he had held that the charterers were entitled to dispatch money. He held that time was saved and that the charterers must receive dispatch money from the owners. It was on that basis that his figures were calculated. [His Lordship read from the notes the passages set out above and the terms of the owners' motion to the court, and continued:]

So there were two main matters before the judge. One was that the umpire had exceeded his jurisdiction, and the second was, as expressed in the words that I have read, that the proceedings were unsatisfactory, because, among other reasons, the owners had no opportunity of making their submissions to the umpire in regard to quite a new development in the case. It appears to me quite clear that there never has been a claim for dispatch money, and it is beyond all question that the umpire exceeded his jurisdiction when he awarded dispatch money. There was the provision in the charterparty, which I have read, which stated that claims must be made in writing and within six months of the final discharge and that where that provision was not complied with the claim should be deemed to be waived and absolutely barred. The charterers had never thought of claiming dispatch money. They never did claim it. Accordingly, the judge held that the umpire had exceeded his jurisdiction in that respect. But he held that he had not otherwise exceeded his jurisdiction. The judge did not accede to the motion of the owners on the second ground that I have stated. Accordingly, he remitted the matter to the umpire with a direction to exclude the amount allowed by way of dispatch money and to make consequential amendments.

When the motion was presented to the court, it was supported by an affidavit of Mr. Owen Ellis, the arbitrator appointed by the owners. The arbitrator appointed by the charterers did not make any affidavit. The umpire swore an affidavit—he did that quite voluntarily—and that affidavit was sent by the owners to the charterers who decided to avail themselves of it at the hearing before the judge. Mr. Ellis made a second affidavit after reading that of the umpire. Those affidavits have all been fully before the court but I must refer to one or two paragraphs in them, for, without doing so, it is not possible fully to state the nature of the questions which arise. It is particularly necessary

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to have the affidavits in mind when considering the second issue in the case, though they are also relevant when considering the jurisdiction issue. There is clearly a conflict between the recollection of Mr. Chesterman and Mr. Ellis. The judge was disposed to accept Mr. Chesterman's views as put forward in his affidavit. Mention has been made during the hearing of the fact that neither side thought of cross-examining either of those two gentlemen on their affidavits. I must read two paragraphs from Mr. Ellis's first affidavit which was dated January 23, 1959, and which was therefore sworn within two months of the hearing before the umpire, which had been on December 11, 1958.

[His Lordship read from that affidavit the paragraphs summarised above, and from the affidavit of the umpire and the second affidavit of Mr. Owen Ellis set out above, and continued:]

The position is therefore rather unfortunate, for there is considerable conflict between the recollection of these gentlemen, both of them being experienced and trusted men accustomed to dealing with topics of this kind. And it is plain that Mr. Ellis is saying that the award took him by surprise, and that the award reflects a view of the case with which he had no real opportunity to deal. It must be quite plain that the point which the umpire says he raised was a point that was new to all concerned. It was not a point that occurred to the charterers' arbitrator who was making submissions on behalf of the charterers. The charterers' arbitrator, as I have said, has not sworn an affidavit: we are told that the reason was that his recollection was not such as would enable him to assist the court.

I think it is clear that the point raised by the umpire was a very important point which cast an entirely new light on the matters which were in dispute: if the point was really appreciated by Mr. Owen Ellis it would certainly have called for submissions from him. In the affidavit which I have read it is indicated that he might in the first place have said, "Well, this is not "open at all"; but, in any event, he would have wished to deal with the legal position.

So the matter came before the judge, and I have indicated what his conclusions were. We now have to consider whether there was an excess of jurisdiction beyond that which was held by the judge: there has been no cross-appeal—and there hardly could have been as it is beyond doubt that there was excess of jurisdiction in awarding dispatch money. The issue which we have to consider is whether there was excess of jurisdiction depriving the owners of any right to receive demurrage. I hope that I will make it clear in the course of this judgment that it is not for us to decide the legal issues that have emerged in this case. There is no error of law on the face of the award. There was no case stated. This is not the moment to express any opinion in regard to the quite difficult questions of law which may arise if there is a new consideration of any of the issues.

We were referred to the decision in this court in *North River Freighters Ltd.* v. *H. E. President of India.*[1]

Dealing first with the issue as to jurisdiction, it is quite plain that there was no claim by the charterers for dispatch money. There was a claim for demurrage made by the owners. That was a claim for £1,878. Both arbitrators appear to have considered the matter simply by considering whether the amount of demurrage should be something over £829, that is to say, some greater sum up to £1,878. It did not occur to either of them that there should be no award of demurrage. The charterers had admitted that they were liable. The arbitrators could not agree: so the matter went to the umpire and the umpire was called on to decide this issue. The issue was:—Are the owners entitled to £1,878 by way of demurrage? Mr. Michael Kerr submits that the issue was that which I have stated, but with the qualification that in any event the sum of £829 was to be awarded. The arbitrators both proceeded on the basis that time began to count from 2 p.m. on October 18. The charterers calculated the demurrage in one way, by making a partial allowance of time in respect of certain days. The owners then proceeded to make a calculation in quite a different way, as recorded in their case. But it would appear that the basis on which the £829 was calculated is not a basis that is really defended by anyone. Mr. Michael Kerr says that if clause 30 of the charterparty is studied, it will be seen that the owners had liberty to carry cargo as they did. He further says that under clause 6 of the charterparty time lost in waiting for a berth is to count as discharging time. Therefore, he submits that when the decision of this court in the *North River Freighters* [1] case is regarded, he is entitled to say that all the time between October 18 and October 24 must count as discharging time, and that as to the period between October 24 and 29, when all the owners' cargo was discharged, different considerations may arise. He recognises that not all the time between those two dates was occupied in discharging the charterers' cargo; but he submits that, nevertheless, because of the provisions of clause 30, time was to count. After the 29th all the time was spent in discharging the charterers' cargo. Mr. Michael Kerr submits that, on any correct approach, the charterers will in fact be shown to be liable for something much more than £829. Thus he does not contend that £829 is a figure which, on any basis that he defends, can be supported.

Mr. Millner submits that because the five holds were not at the charterers' disposal and would not have been at the charterers' disposal till October 29, the vessel was not ready to discharge, and so, according to his submission, time did not begin to run until all the overstowed cargo was discharged.

It is manifest that there are many important and difficult points which could be argued in this case. It is manifest that

[1] [1956] 1 Q.B. 333; [1956] 2 W.L.R. 117; [1956] 1 All E.R. 50.

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the decision in the *North River Freighters* case [1] is not a decision that covers all the points that can be here raised. Again, I say, we are not called on to express any view as to the law which is applicable. We know what was in the umpire's mind but we only know it because, in the special circumstances, we have seen his notes, and we have seen them in order to decide this motion. It seems to me that once there was before the umpire this claim for demurrage for £1,878, the umpire was not precluded from deciding what, in his judgment, was the correct legal approach.

I have reached the conclusion that, if it is a possible view in law, that is to say, the law as applied to the facts of this case, that no demurrage became due to the owners, then it does not appear to me that the umpire ought to be precluded from saying so. It is true that the arbitrators never thought of looking at the matter in the way the umpire states that he looked at the matter. But, if his view is a possible one—again I express no opinion whether it is or is not—is he forbidden from giving expression to it and deciding what he believes to be correct in law merely by reason of what the charterers admitted? That is the question which is before us. I have reached the conclusion that the admission was really an admission based on a view as to the law. The facts were not really in dispute. It was not in dispute that the vessel arrived on October 18: it was not in dispute that she berthed on the 24th and that she started discharging on that day: it was not in dispute that there were some overstowed cargo in three out of the five holds. When, therefore, the time sheet which came into existence on November 3, 1956, is looked at, the words "Time to count from 14.00 hours on October 18, 1956" are words which, in my judgment, really represent a view of the law or a view based on an application of the law to certain stated facts.

The judge on this part of the case said: "He" [the umpire] "did not, as I understand the position, disregard any admission "of fact, but merely certain conclusions of law. I cannot believe "that any umpire can be obliged to incorporate into his award "a conclusion which he believes to be without legal foundation, "even though one party has, in the course of the argument or "in a document submitted to him, made an admission contrary "to what the arbitrator believes to be the true position and "contrary to the party's own interest." It seems to me that that is a justifiable viewpoint, and I find myself in agreement with the judge in that expression of opinion. Mr. Kerr, in his very helpful argument, did not defend the figure of £829. He says that is wrong. Nobody now defends the calculation which yields the figure of £829. It seems to me that it would be very unsatisfactory if the court said that the umpire must be bound (although he is charged with the duty of deciding what he believes

[1] [1956] 1 Q.B. 333.

to be correct and proceeds to do that) to record and to commit himself to a figure which everybody says is incorrect and which is really based on a purported application of law to the agreed facts. I have, therefore, come to the conclusion that it would not be in excess of his jurisdiction for the umpire to come to the conclusion that no demurrage is payable, if that is a possible view in law.

I now pass to the other aspect of the case. I start by reading a few words from the judgment of the judge which recorded his view about this part of the case. He said: "As to the submission "that the umpire misconducted himself on the second ground "which I have set out in my summary of Mr. Kerr's argument, "I accept the umpire's deposition in his affidavit that he did in "the presence of Mr. Ellis expressly raise the vital point, "namely, that the respondents (i.e., the owners) could not be "heard to say that time was lost in waiting for a berth so long "as the vessel herself would not have been ready to discharge "had a berth been available. I accept in substance the accuracy "of Mr. Chesterman's evidence as set out in paragraphs 3 and 4 "of his affidavit. The raising of this point should have made it "clear to Mr. Ellis that the umpire was proposing to consider "the whole question of the Colombo discharge de novo. It may "be that Mr. Ellis did not fully appreciate the force of the point "which was being made, and accordingly has not a very clear "recollection of what occurred. But I am quite unable to agree "that, in proceeding to make his award on the basis of his own "assessment of the Colombo discharge, having given that warn-"ing to the parties, and it having been passed in silence, that "the umpire was in any way failing to conduct the proceedings "in accordance with natural justice."

On this part of the case, I find myself diverging from the conclusion reached by the judge. A consideration of the whole of the evidence leads me to a different view. That view involves no reflection on any one of the gentlemen concerned. The umpire says that he had in mind the remarks made by Parker L.J. in the *North River Freighters* case.[2] But that case was never mentioned during the hearing. That case is not referred to in the umpire's notes; though other cases are set out that case is not.

It seems to me that the point that occurred to the umpire was a point that would bring about a dramatic development of the case, and I am satisfied that the import of it was not communicated to Mr. Ellis in such a way as enabled him to deal with it. I have no doubt that something was said; but it was essential, in view of the way in which the case had been presented and the way in which it had proceeded for very nearly two years, that if some entirely new point, not taken by the charterers, and running quite counter to their willingness to pay

[2] [1956] 1 Q.B. 333, 350.

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a sum, was being taken, it should be made quite clear. The new point which appealed to the umpire—it may be right or it may be wrong, it is not for me to say—involves a complete departure from the course followed in the litigation up to that moment. It had not been thought of by the charterers' arbitrator. The charterers' case was: "We admit we are liable for demurrage up "to a certain amount." That admission was left in the written case that was handed in by Mr. Browne, the charterers' arbitrator, to the umpire. The new point was a very considerable gift to Mr. Browne, if it were right; but it does not appear that it made any impact on Mr. Browne's mind. Owing to lack of recollection, Mr. Browne was not able to assist by any evidence. But Mr. Browne had completely overlooked the point if it was one that could be taken. It was certainly a point which required exploration. It has been stressed that Mr. Owen Ellis is an experienced man, as he doubtless is. But that reflection suggests to my mind that one of his experience would not have failed to probe and explore this new point had he really appreciated that it was being put forward. Mr. Chesterman says that it was made clear. That must mean that it was only made clear to Mr. Ellis. But Mr. Ellis said that it was not made clear. His recollection diverges completely from that of the umpire.

Mr. Michael Kerr submits that on a correct application of the *North River Freighters* case and on a true application of what Parker L.J. said,[2] the claim for demurrage on the part of the owners can be supported. It would have been very desirable to have given Mr. Ellis an opportunity to present an argument on what the umpire says was in his mind. Mr. Michael Kerr submits that an argument can be presented, based on what Parker L.J. said, which would refute the line of reasoning thought of by the umpire. Mr. Ellis has stated in his affidavit the course which he might have followed had he appreciated that the new point was being taken. Mr. Mustill in his reply submitted that Mr. Ellis might have wanted an adjournment, or might possibly have wanted to call some evidence. Clearly there was a dramatic new turn to the case if this possible point had emerged clearly. I think that the present position is unsatisfactory, and that, though the umpire acted with the best of intentions, he did decide the case on a basis which differed from that which the charterers were asserting and on a basis of which the owners did not have satisfactory warning. Both parties had previously thought that the time began to count from 2 p.m. on October 18, though they differed as to their calculations.

In my judgment, the umpire could not have made clear that he was proposing not to accept the starting time which both parties had accepted. Whether he was right in law is not for me to say in these proceedings. But the owners, in my judgment, ought to have had a real opportunity of dealing with the new

[2] [1956] 1 Q.B. 333, 350.

point, and of putting forward reasons for submitting that it was wrong.

I accept fully that in cases of this kind the court will lean against disturbing the decision of a tribunal selected by the parties; but I feel that the present position is not satisfactory, and that there may be a grave risk of injustice if matters are left as they are.

The judge said: "It is right, however, that I should say "that, as at present advised, I feel that there is a very great "deal to be said for the view that the decision of the Court of "Appeal in the [*North River Freighters*] case [2] (to which I have "referred) was primarily based on the finding of fact by the "umpire in that case that 'while awaiting berth the ship was "'completely ready in all respects', and that, had the facts "been, as here, that while awaiting berth the ship was not "ready to discharge the charterers' cargo by reason of the "overstowing of the owners' cargo, the decision of the court "would have gone the other way." Mr. Millner points out that all the judge says is that, as at present advised, he thought there was a good deal to be said for that view. Speaking for myself, I reserve the point entirely and express no opinion in regard to it. I think the umpire must deal with this matter as though this court has expressed no sort of conclusion in regard to the law.

In the result, I have reached the conclusion that this award should be remitted, not only in the way decided by the judge, that is, with a direction to exclude any consideration of dispatch money or the award of a sum in regard to the dispatch money, but also for reconsideration of the issue as to demurrage at Colombo. That will involve that the parties should have the opportunity of making submissions to the umpire in regard to this issue. It seems to me further that the umpire should reconsider the question as to what award in the matter of costs should be made.

PILCHER J. The facts of this rather complicated case have been very fully set out by my Lord in his judgment and accordingly I do not propose to go through them at all because I agree so entirely with what he has said as to the background and history of the case.

The judge, against whose order this interlocutory appeal has been brought, decided that, in awarding dispatch money in all the circumstances of the case, amounting to £160 odd, in respect of the discharge of the vessel's cargo at Colombo, the umpire had exceeded his jurisdiction. Against that order by the judge there is no appeal. Accordingly, one approaches the case on the basis that the umpire, in acting in the way he did, exceeded his

[2] [1956] 1 Q.B. 333, 350.

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jurisdiction and went outside the matters which had been submitted to him in regard to the question of dispatch money.

My Lord has traced out very clearly through all the documents the dispute which appears to have existed between the parties in regard to demurrage at Colombo. I think it is perfectly clear that, when the charterers' time sheet was presented to the owners—a time sheet which showed that on the computation made by the charterers the owners were entitled to receive from them 3 days 9 hrs. and 37 min. demurrage at the appropriate rate—the parties or the arbitrators right up to the hearing before the umpire proceeded on the basis that the only matter which was in dispute between them was whether the owners were entitled, as they said, to receive a sum of £1,858 in respect of demurrage, or whether they were only entitled to receive £829 which the charterers had given credit for in the account and had in substance, without using the words in a technical sense, admitted liability for. That was the position until the arbitrators attended before the umpire and presented their cases. There the charterers' case again showed that they were prepared to concede this sum of £829 odd in respect of demurrage at Colombo. Up to then, it would seem that that was a matter which never had been in dispute between the parties or the arbitrators, who took up the attitude that this £829 was due from the charterers in account on the final statement. This £829 is based, as I have said, on the charterers' time sheet, which was a document made up on the last day of the discharging. The owners, on the other hand, contended that they were entitled by way of demurrage to a sum not less than £1,858 and this seems to have been the ambit of the dispute until the matter came before the umpire. The document on which the whole of this dispute is based is this charterers' time sheet, and the time sheet sets out a number of matters of fact such as dates and times. Most of these matters are admittedly questions of fact—when did the vessel arrive: when did she berth: when did the discharging start and when was it completed.

But there is this one other matter, and this is the one which has given rise to dispute. In their time sheet the charterers have stated this: "Time to count from October 18, 1956, 1400," which was the same day as the vessel arrived in port and long before she had got to her berth. If one looks at the charterparty one finds in clause 6: "Time to commence at 2 p.m. if notice "of readiness to discharge is given before noon and at 8 a.m. "next working day if notice given during office hours after noon. "Time lost in waiting for berth to count as discharging time." Therefore, when the charterers inserted in their time sheet the words "Time to count from October 18," they were there stating the view which they had then formed, on a matter which required very careful consideration of the terms of the clause in the charterparty which I have just set out.

There have been in the past countless cases in which the

dispute under the charterparty has been as to when the time begins to run. That can only be determined by a consideration of the terms of the charterparty on their true construction. That is a matter of law. That is very important here, because it was said by Mr. Michael Kerr in his argument and also by Mr. Mustill in reply that it is clear that there never was any dispute between the parties as to the charterers' liability to the owners for this sum of £829 based upon time counting from October 18. Consequently, it was not a matter which the arbitrators, in the circumstances, would ever have to consider, because there is no dispute about it; and it was not a matter which the arbitrators, when they failed to agree, would place before the umpire except as an accepted fact. Consequently, it was said before the judge, and it has been said here, that the umpire, in depriving the owners of any demurrage, had acted outside his jurisdiction, and outside the matters which were submitted to him, because what had been submitted to him was how much demurrage in excess of the admitted £829 were the charterers to pay.

My Lord has expressed his view on that point, and I respectfully agree with it. I think that it would be a great pity if we were constrained to hold that the umpire had exceeded his jurisdiction in depriving the owners of all demurrage on the ground that it had been agreed between the parties, and, I think, between the arbitrators, that at least £829 had been agreed by the charterers as being payable under this head. I do not think there is any necessity to do that, because it seems to me that it was impossible in a case of this kind, where a dispute as to the amount of demurrage at the port of discharge is submitted to arbitrators, and through them to an umpire, to fetter the umpire, who, after all, is a very experienced gentleman, in regard to his consideration of the true construction of the charterparty—a document with which, no doubt, he is extremely familiar—and to say that, having had the question of demurrage submitted to him, he is bound to adopt a view of the law on the construction of the charterparty which he thinks is erroneous. Consequently, I agree with my Lord that we cannot find that the umpire had exceeded his jurisdiction in depriving the owners of all demurrage because he has taken a view of the law which did not agree with the view of either party. In my view, therefore, the contention put forward by the owners that the umpire exceeded his jurisdiction in depriving the owners of all demurrage falls.

I agree with the view which the judge took as regards the question of jurisdiction in regard to demurrage. I also agree with what the judge said and the order which he made, in directing that the award be remitted to the umpire to eliminate from it all questions of dispatch money and to make such consequential amendments as are necessary. I agree with him that the umpire has not exceeded his authority in depriving the owners of all demurrage.

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But I have the misfortune not to agree with him on the next matter, which is the question of whether this award was arrived at by the umpire in a satisfactory fashion. It is sought here by the owners to obtain from this court an order which the judge was unwilling to grant them directing that the award of the umpire be set aside, or that the question of demurrage be remitted to him for further consideration, because, to use the legal phrase, the proceedings before the umpire were not, in all the circumstances, conducted in accordance with the principles of natural justice.

My Lord has read out from the two affidavits of Mr. Ellis, the owners' arbitrator, and from the affidavit of Mr. Chesterman, the umpire, their recollection of what occurred when the matter was first submitted to the umpire, and I do not propose to read the whole of those passages again, nor are there any other passages in those affidavits which I think require citation. But, perhaps, without reading all the passages, I might put the matter briefly in this way. On January 23, 1959, which was only some weeks after the hearing before the umpire, Mr. Ellis raised this matter in his first affidavit of that date, and he makes it clear from the passages which my Lord has read that when he saw the award, surprise is too mild a word; he was astounded at what the umpire had done in his award. While we in this court are taking the view that the umpire had jurisdiction to deprive the owners of all demurrage, Mr. Ellis said that the award technically amounted to misconduct; and he gave his reasons. Then, on March 17, 1959, Mr. Chesterman, having seen Mr. Ellis's affidavit, gave his views about the matter, and what he said in substance was this, "It became apparent"—as no doubt it did—"that one of the main issues in the case was the computa-"tion of laytime at the port of Colombo, which was the discharg-"ing port under the said charterparty. Each side had submitted "a time sheet setting forth computation on which it relied." He then goes on to say: "Oral argument took place on the "issues disclosed by these contrasting time sheets. It seemed "to me at an early stage that neither time sheet was entirely "accurate. I accordingly raised certain queries in this respect." This is the matter with which Mr. Ellis did not agree. "I "accordingly raised certain queries in this respect." That is a very general statement. "In particular, it seemed to me that no "time could begin to run until the vessel was ready to discharge, "and that she could not be deemed to be so ready until she was "in a condition in which she was able to make available all "hatches to the claimants for the purposes of enabling them to "discharge. I suggested that the respondents could not be heard "to say that time was lost in waiting for a berth so long as the "vessel herself would not have been ready to discharge had a "berth been available. In saying this I had in mind the remarks

"of Parker L.J. in *North River Freighters Ltd.* v. *H. E. President of India.*[3]"

The only other point which Mr. Chesterman seems to suggest is important is that stated in paragraph 4: "In the present case I made it clear to the respective arbitrators that in my view it was doubtful if either time sheet submitted by them was correct." No doubt he did. "After discussion I was left with the clear impression that both arbitrators expected me to re-compute the time sheets upon the basis which I considered to be accurate and to make my award accordingly." In that sentence, he does not say that he put this point which he had in his mind to the arbitrators. I do not find that affidavit a very satisfactory one. That affidavit was answered on April 3, 1959, by Mr. Ellis, who in his affidavit, the material portions of which have been read by my Lord, categorically denied that Mr. Chesterman ever made or indicated to him this rather surprising suggestion as to how the time sheets should be drawn up.

I think that this was such a radical change in the position that it is one that Mr. Chesterman should have made perfectly clear to both arbitrators. He says in his affidavit that he had in mind *North River Freighters Ltd.* v. *H. E. President of India.* He was asked soon after he published his award for a copy of his notes and he sent them to the parties, but there is no mention of that case in any of the notes.

Having read the affidavits of these two gentlemen, and having regard to the probabilities of the case, I confess that my own inclination, if I have to believe one party as against the other, or to give preference to one party as against the other, is to prefer the account given by Mr. Ellis in his second affidavit of April 3 to the account given by Mr. Chesterman. I have the misfortune to differ from the trial judge on this matter, and that is a thing which I am naturally very reluctant to do. But I cannot myself conceive, if Mr. Chesterman made the matter completely clear, as I think he ought to have done, to both arbitrators, how, in the first place the charterers' arbitrator—who has not sworn any affidavit in the matter because he did not feel any recollection he had would be helpful—would not have appreciated the change in the situation arising from the observation which Mr. Chesterman says he made in regard to what he was proposing to do or what he had in mind, because those observations meant that Mr. Browne had been taking a wrong view of his clients' case and had presented a view which was entirely unfavourable to them as against the one which was appealing to the umpire. Similarly, it seems to me almost impossible that, if Mr. Chesterman had said anything like what he says he said to Mr. Ellis, Mr. Ellis would not at once have objected in the terms in which he said he would have objected in his second affidavit. I think the

[3] [1956] 1 Q.B. 333, 350.

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probabilities are overwhelming in favour of the view that Mr. Chesterman, while he no doubt had these things in mind, never brought them clearly, if he brought them at all, to the attention of the two arbitrators. That being so, I cannot help feeling that the trial of this matter was unsatisfactory, because Mr. Ellis might have presented an interesting and important argument to the umpire and might have invited the umpire to state his award in the form of a special case. But he never had that opportunity, on the view which I take of the facts. Consequently, I think that the hearing before the umpire was of so unsatisfactory a nature that this court is justified in saying that the case must be remitted to the umpire to consider further the whole question as to the amount of demurrage, if any, which was due to the owners at Colombo.

It is suggested that this court can incorporate a direction that the umpire be required to state his award in the form of a special case. Speaking for myself, I rather doubt whether we have power to do that, but, even if we had, I do not feel it is desirable. It would seem to me almost inevitable, having regard to what has occurred, that both parties or one of the parties will request the umpire to state his award in that form, and I think it is very much better that it should be done at the request of the parties rather than on a direction of this court.

I should like to associate myself with what my Lord has said about the decision in the *North River Freighters* case[4] and the observations, which I think were obiter, made on that case by the judge. I should like to reserve consideration of the point or argument, because one thing which seems to me to be very clear in this matter is that when the rather unusual circumstances of this case come to be considered on the particular terms of this charterparty, they will give rise to an interesting argument of law which might be determined in one way or another.

For these reasons, I agree with my Lord that the matter be remitted to the umpire to carry out the order of the judge in regard to the question of dispatch money, and also to reconsider the question of demurrage at Colombo.

Appeal allowed with costs.
Leave to appeal to the House of Lords refused.
Order as to costs made by McNair J. left undisturbed.

Solicitors: *Holman, Fenwick & Willan; T. L. Wilson & Co.*

M. M. H.

[4] [1956] 1 Q.B. 333.

[COURT OF APPEAL.]

* *In re* HASTINGS (No. 3).

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June 15.

Lord Evershed M.R., Romer and Pearce L.JJ.

Court of Appeal—Jurisdiction—Criminal cause or matter—Application for habeas corpus—Successive applications—Refusal of applications by Queen's Bench Divisional Court—Application renewed to Chancery Divisional Court—Based on same evidence and same grounds—Appeal to Court of Appeal—Habeas Corpus Act, 1679 (31 *Car.* 2, *c.* 2), *s.* 2—*Habeas Corpus Act,* 1816 (56 *Geo.* 3, *c.* 100), *ss.* 3, 6—*Supreme Court of Judicature (Consolidation) Act,* 1925 (15 *&* 16 *Geo.* 5, *c.* 49), *ss.* 1, 31 (1), 63.

The applicant, whose appeal against conviction had been dismissed by the Court of Criminal Appeal, applied for a writ of habeas corpus to a Divisional Court of the Queen's Bench Division, which was refused. His appeal from that decision to the Court of Appeal was dismissed. After a further application for a writ of habeas corpus to a Divisional Court of the Queen's Bench Division differently constituted which was also refused, the applicant applied for a writ of habeas corpus to a Divisional Court of the Chancery Division. That application was dismissed on the ground that an applicant for a writ of habeas corpus in a criminal cause or matter, who has once been heard by a Divisional Court of the Queen's Bench Division, cannot be heard again, on a renewed application made on the same evidence and the same grounds, by a Divisional Court of the Chancery Division, since the decision of a Divisional Court is equivalent to the decision of all the judges of the High Court.

On the applicant's appeal from that decision the preliminary objection was taken that no appeal lay having regard to section 31 (1) of the Supreme Court of Judicature (Consolidation) Act, 1925 [1]:—

Held, that an application for an order of habeas corpus and ad subjiciendum on an appeal such as this could not be regarded as sufficiently distinct from the original trial and conviction to enable the applicant to say that the application was not in "a "criminal cause or matter" within section 31 (1) of the Judicature Act of 1873 and it followed that no appeal lay to the Court of Appeal.

In re Hastings, The Times, July 29, 1958, followed.

Decision of the Divisional Court of the Chancery Division [1959] Ch. 368; [1959] 2 W.L.R. 454; [1959] 1 All E.R. 698 affirmed.

APPEAL from the Divisional Court of the Chancery Division (Vaisey and Harman JJ.).[2]

On July 25, 1957, the applicant, Edward Thomas Hastings, was convicted at Liverpool Crown Court on each count of an indictment containing five counts to which he had pleaded Not Guilty. The first count charged him with felony, larceny as a bailee, while the other counts were for misdemeanours, counts

[1] The Supreme Court of Judicature (Consolidation) Act, 1925, s. 31: "(1) No appeal shall lie—(*a*) except "as provided by the Criminal Appeal "Act, 1907, or this Act, from any "judgment of the High Court in any "criminal cause or matter. . . ."

[2] [1959] Ch. 368; [1959] 2 W.L.R. 454; [1959] 1 All E.R. 698.

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two, three and four charging false pretences and count five fraudulent conversion. Separate verdicts were returned in respect of each count.

The recorder, in sentencing the applicant to four years' corrective training, did not say "concurrent on each count." The sentence endorsed on the indictment was merely "four "years' corrective training."

The applicant appealed against conviction to the Court of Criminal Appeal in respect of the first and two other counts. On December 18, 1957, his appeal was heard and the count for felony was quashed, the appeal in relation to the two other counts being dismissed. There was no alteration in the sentence. Pearson J., who gave the judgment of the court, stated expressly that, although leave to appeal against sentence had not been asked for, the sentence was in the view of the court reasonable and there would be no reason for interfering with it on any view.

The applicant applied for a writ of habeas corpus directed to the Governor of Walton Prison and to the Home Secretary on the ground, inter alia, that only one general sentence had been passed on him and that, since the conviction on the first count had been quashed, there was no lawful sentence upon him in existence and he was not lawfully detained.

The application was heard by a Divisional Court consisting of Lord Goddard C.J., Streatfeild and Slade JJ. on March 7, 1958,[3] but the writ was refused, the court holding that, as a matter of construction, the words used by the recorder amounted to concurrent sentences of four years' corrective training on each count and that accordingly the quashing of one count had no effect on the sentence, which remained a valid sentence. The applicant appealed from that decision to the Court of Appeal who refused to entertain the appeal on the ground that it arose in a criminal cause or matter in which they had no jurisdiction.[4]

On October 24, 1958, the applicant made a fresh application for the writ (on this occasion directed to the Governor of H.M. Prison, Wandsworth, where he was then detained) to a Divisional Court of the Queen's Bench Division consisting of three different judges, it being contended that he had the right to go from judge to judge and from one Divisional Court of three judges to another Divisional Court of three different judges; the fresh application was made on exactly the same grounds and on the same evidence as in the previous application. The court gave leave to move subject to their being satisfied that they had jurisdiction to hear and were bound to hear a fresh application.

At the hearing of that application on November 4, 1958,[5] the court, acceding to an objection by the Solicitor-General, held that it had no jurisdiction to hear an application which, on the

[3] [1958] 1 W.L.R. 372; [1958] 1 All E.R. 707.
[4] The Times, July 29, 1958.
[5] [1959] 1 Q.B. 358; [1958] 3 W.L.R. 768; [1958] 3 All E.R. 625.

same evidence and on the same grounds, had already been decided by the Divisional Court.

The applicant applied to a Divisional Court of the Chancery Division convened by Vaisey J. at the request of the Lord Chancellor.

The Solicitor-General took a preliminary objection that the court, as constituted, was not a Divisional Court of the Chancery Division, such courts being the creation of statute alone to hear the application; but he suggested that if, pursuant to section 46 of the Judicature Act of 1873 (a section which remained unrepealed), one member of the court were to withdraw, the remaining member of the court sitting "elsewhere than in a Divisional "Court might reserve the point for the consideration of a "Divisional Court. . . ." Harman J. accordingly withdrew, and the application was then made to Vaisey J., who reserved the point as a proper one to be referred to a Divisional Court. Harman J. returned and the hearing proceeded before the Divisional Court thus set up. The Solicitor-General took the objection, which he had taken before the Divisional Court of the Queen's Bench Division, that there was no jurisdiction to hear the application.

The Divisional Court of the Chancery Division refused the application.

The applicant appealed.

The Solicitor-General took the preliminary objection that no appeal lay to the Court of Appeal since this was "a criminal "cause or matter" within section 31 (1) of the Judicature Act, 1925.

The applicant in person.

Sir Harry Hylton-Foster Q.C., S.-G., and *J. R. Cumming-Bruce* for the Crown.

The cases mentioned in argument are referred to in the judgments.

LORD EVERSHED M.R. The appellant in this court, Edward Thomas Hastings, was convicted in July, 1957, in the Crown Court at Liverpool, on five counts. The first count was for alleged felony and the second to the fifth inclusive were for alleged misdemeanours. Having been convicted on all five counts, the sentence imposed upon him was as follows: "four "years' corrective training." It will be observed that the sentence did not say anything about any particular charge; it did not link the sentence or parts of it with any of the charges, nor did it say expressly whether the four years was intended to be concurrent on all the charges or consecutive on some or all of them.

The appellant appealed to the Court of Criminal Appeal by leave and he succeeded in getting the conviction on the first

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count for felony quashed. He had also appealed on the second and third counts, but in those respects he failed.

The next step was that the applicant applied for an order of habeas corpus ad subjiciendum to a Divisional Court of the Queen's Bench Division presided over by the then Lord Chief Justice, Lord Goddard. The appellant's point was that the four years' corrective training should be related exclusively to the charge of felony, which had now been quashed, and that he therefore had no effective sentence outstanding against him and was entitled to be released. The Divisional Court rejected that view, holding that, in the circumstances, the sentence of four years' corrective training must be treated as having been concurrent in respect of all the charges, so that the quashing of the conviction on the felony left the four years' corrective training sentence outstanding and effective in respect of the second to the fifth charges respectively.

Against that decision of the Divisional Court the applicant sought to appeal to this court. The judgment of this court [1] was delivered on July 28 of last year. On that occasion the applicant was represented by leading counsel and the respondents, the Governor of Walton Prison and the Home Secretary, were represented by the Solicitor-General and two other counsel.

A preliminary objection was taken by the Solicitor-General that no appeal lay upon this matter to this court having regard to the language of section 31 (1) of the Judicature Act of 1925, which says: "No appeal shall lie—(*a*) except as provided by "the Criminal Appeal Act, 1907, or this Act, from any judgment "of the High Court in any criminal cause or matter." This court pointed out that no question arose out of the exceptions (that is, the references to the Criminal Appeal Act, 1907, or to the Judicature Act itself), so that the single point for decision was whether the attempted appeal was or would, if entertained, be an appeal in a criminal cause or matter.

The members of this court then sitting referred to certain decisions, *Ex parte Woodhall*,[2] the later case of *The King* v. *Governor of Maidstone Prison, Ex parte Maguire*,[3] and the still later case of *Amand* v. *Home Secretary*,[4] a decision of the House of Lords. The court pointed out that the first two decisions were decisions under the earlier Judicature Act of 1873, though they observed that the material statutory language did not differ, and also that they had been since approved in decisions since 1925. The case of *Amand* [4] was, of course, a case since the Act of 1925 had been passed.

I do not propose to refer at length to the judgment of this court in the applicant's earlier appeal or to citations from the three authorities which I have mentioned. It is sufficient to say that this court clearly took the view that an application for an

[1] The Times, July 29, 1958.
[2] (1888) 20 Q.B.D. 832.
[3] (1925) 41 T.L.R. 554.
[4] [1943] A.C. 147; [1942] 2 All E.R. 381.

order of habeas corpus ad subjiciendum in a case such as this could not be regarded as sufficiently distinct from the original proceeding, namely, his trial and conviction at the Crown Court at Liverpool, to enable him to say that the application was not in a criminal cause or matter; and it followed from that, they held, that no appeal lay to this court.

Since that judgment two other events have occurred. In the first place the applicant made another original application for an order of habeas corpus to another Divisional Court of the Queen's Bench Division, in this instance presided over by the present Lord Chief Justice, Lord Parker, the other members of the court also being different from those who constituted Lord Goddard's court. It was suggested on the appellant's behalf that he could go from judge to judge, or from groups of judges to groups of judges, until he had exhausted the entire personnel of the Queen's Bench Division. But the Divisional Court rejected that view, holding that, if on a matter of this kind a Divisional Court of the Queen's Bench Division, properly constituted, had dealt with an application for habeas corpus, they must be treated as speaking for all the judges of the Queen's Bench Division. They did not, however, go on to say anything about the jurisdiction of judges of other divisions; and encouraged thereby the appellant then proceeded, in March of this year, to apply to the Chancery Division for the same order of habeas corpus based on the identical contentions which he had put forward before the original Queen's Bench Divisional Court.

There was some preliminary difficulty about the constitution in the Chancery Division of a Divisional Court at all, but that was successfully got over; so that the matter was heard before Vaisey and Harman JJ., sitting as a Divisional Court of the Chancery Division. They took the view that, since the Judicature Act of 1873, the Chancery Court, as it previously was called, no longer was a separate court and that the judges of the Chancery Division were, no less than the judges of the Queen's Bench Division or of the Probate, Divorce and Admiralty Division, judges of the High Court, from which it followed that, if Lord Goddard's Divisional Court upon the original application had spoken for the Queen's Bench Division, it must also be taken to have spoken for the personnel of the High Court as a whole and as a single entity. The preliminary objection having been taken by the Solicitor-General, the order made was, in terms, that the motion do stand dismissed out of this court.

The applicant now appeals to this court, and the question therefore arises once again upon the objection taken by the Solicitor-General: Is this appeal, if we entertain it, an appeal in a criminal cause or matter?

There is obviously only one matter of distinction between the case as it now comes before us and the case as it came before this court a year ago. It is said by the applicant that the

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Chancery Divisional Court wrongly took the view that the judgment of the first Divisional Court of the Queen's Bench Division spoke for the entire High Court, and, accordingly, that he was entitled to have his case reheard by the Chancery Divisional Court. But even assuming that that argument is well founded, it seems to me quite plain that, none the less, this present appeal, if entertained, would be an appeal in a criminal cause or matter. The essential subject-matter, which is raised by the application from which he now seeks to appeal, is the question whether in the circumstances he is rightly incarcerated in prison; and that challenges the validity of the view of the first Divisional Court that the four years' corrective training must be treated as having been concurrent on all the charges, which in turn inevitably links this present application with the original proceeding when the conviction was entered. It seems to me that there can be no escape from that conclusion.

In one of the earlier cases it was said that the words "criminal cause or matter" must be given a very wide significance, and in that same case the question was put whether it could be said that the question now sought to be raised was in or with regard to proceedings the subject-matter of which is criminal. No doubt that formula should not be carried to extreme lengths.

The applicant referred to the case of *Auten* v. *Rayner & Co.*[5] in this court. The question there was whether the Home Secretary had been entitled to make a determination preventing or refusing the production by police officers, on discovery in a civil action, of certain police records. The applicant said that to some extent those police records were related to quite different criminal proceedings. It seems to me quite plain that the appeal to this court in *Auten* v. *Rayner & Co.*,[5] which was concerned with discovery, could not fairly be said to be in regard to the criminal proceedings to which certain of the records related or might have related. But in the present case the link between the original criminal proceedings and the present application is far closer and is indeed, as I think, incapable of severance.

The applicant is seeking to challenge the effect of what transpired in July, 1957, when he was convicted of the charges as to four of which he still remains convicted. In my judgment the further point whether, once a Divisional Court has refused an application, that concludes the matter and prevents him making the identical application to other judges of the High Court does not suffice to distinguish this case from the conclusion of this court pronounced on July 28, 1958, and I am therefore clear that the preliminary objection taken by the Solicitor-General must be sustained. In the terms of section 31 of the Judicature Act of 1925, we have no jurisdiction to entertain this appeal.

[5] [1958] 1 W.L.R. 1300.

ROMER L.J. I entirely agree with the Master of the Rolls and there is nothing that I wish to add.

PEARCE L.J. I also entirely agree with what my Lord has said.

Appeal dismissed.

Solicitors: *Treasury Solicitor.*

B. A. B.

[HOUSE OF LORDS.]

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July 13, 14, 29.

* RACECOURSE BETTING CONTROL BOARD APPELLANTS;
AND
YOUNG (INSPECTOR OF TAXES) . . . RESPONDENT.
AND BETWEEN
RACECOURSE BETTING CONTROL BOARD APPELLANTS;
AND
INLAND REVENUE COMMISSIONERS . RESPONDENTS.

Revenue—Income tax—Expenses—Racecourse Betting Control Board—Operation of totalisator on racecourses—Totalisator fund—Expenditure prescribed by statute for benefit of owners of racecourses and racehorses—Board carrying on trade—Whether deductible expenses—"Working expenses"—Meaning—Racecourse Betting Act, 1928 (18 *&* 19 *Geo.* 5, *c.* 41), *s.* 3—*Betting and Lotteries Act,* 1934 (24 *&* 25 *Geo.* 5, *c.* 58), *s.* 18 (5)—*Income Tax Act,* 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 10), *s.* 137 (*a*) (*f*) (*g*).

The Racecourse Betting Control Board was a corporation set up under the Racecourse Betting Act, 1928, to operate a totalisator on approved racecourses. The board established the totalisator fund pursuant to section 3 (4) of the Act from a percentage of the moneys staked on the totalisator. Under section 3 (6) the board applied this fund in accordance with schemes prepared by them and approved by the Secretary of State for purposes conducive to the "improvement of breeds of horses or the sport of horse racing" but subject to the payment thereout of "all taxes, rates, charges, "and working expenses" and "the retention of . . . sums . . . "to meet contingencies. . . ."

The board included in their "working expenses" under section 3 (6) of the Act "runners' allowance"—sums paid to racehorse owners who ran horses at any racecourse with which the board was concerned.

The board paid from the totalisator fund sums to racecourse owners for use by them in improvements upon such racecourses, subject to a substantial measure of control or supervision by the board in each case, sums to owners and trainers towards their expenses in bringing racehorses to those racecourses, sums to assist in meeting the administrative expenses of the Jockey Club, the National Hunt Committee and the like, sums to assist those responsible in discharging the expenses of point-to-point meetings, and

† *Present*: VISCOUNT SIMONDS, LORD REID, LORD RADCLIFFE, LORD TUCKER and LORD KEITH OF AVONHOLM.

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sums to assist and encourage racing under the rules of the Pony Turf Club.

It was conceded that the board was carrying on the trade of totalisator operator. Upjohn J. held, overruling the special commissioners, that neither the runners' allowances nor the sums paid out of the totalisator fund were deductible as expenses laid out for the purposes of the board's trade as such totalisator operator within the meaning of section 137 (*a*) of the Income Tax Act, 1952.

The Court of Appeal affirmed that decision. On appeal to the House of Lords:—

Held, (1) that the business of the board was the operation of totalisators on racecourses and that it was expenditure for the purposes of that trade which was deductible in computing the amount of the board's profits or gains.

(2) That all the items, including the runners' allowance, failed to qualify as deductions for income tax purposes since they were laid out for purposes not exclusive to the board's trade as totalisator operator.

Attorney-General v. *Racecourse Betting Control Board* [1935] Ch. 34; 51 T.L.R. 36 considered.

Decision of the Court of Appeal [1958] 1 W.L.R. 705; [1958] 2 All E.R. 385 affirmed.

Appeal from the Court of Appeal (Lord Evershed M.R., Morris and Ormerod L.JJ.).

This was an appeal, consolidated by leave of the House of Lords, from two orders of the Court of Appeal dated May 7, 1958, dismissing the appeals of the appellants, the Racecourse Betting Control Board, from two orders of Upjohn J. dated December 6, 1957, whereby the appeals of the respondents, M. Young (Inspector of Taxes) and the Commissioners of Inland Revenue, from a determination of the Commissioners for the Special Purposes of the Income Tax Acts were allowed and the decision of those Commissioners reversed.

The appellants carried on the trade of running totalisators at a large number of racecourses in England pursuant to the Racecourse Betting Act, 1928.[1]

[1] Racecourse Betting Act, 1928, s. 1: "(1) Nothing contained in the "Betting Act, 1853, shall apply to "any approved racecourse . . . "(2) . . . it shall be lawful on any "approved racecourse . . . (*a*) for the "Racecourse Betting Control Board ". . . to set up and keep a totalisa- "tor; (*b*) for the Board . . . to "operate, . . . for the purposes of "effecting betting transactions on "horse races only, a totalisator. . . ."

S. 2: "(1) For the purposes of "this Act there shall be established a "Racecourse Betting Control Board ". . . (2) The board shall be a body "corporate. . . ."

S. 3: "The Racecourse Betting "Control Board—(1) may for the pur- "poses of this Act issue (subject to "such conditions as they may impose) "and at any time revoke certificates "of approval in respect of race- "courses and ground adjacent there- "to; (2) shall make it a condition "of the grant of a certificate of "approval of any racecourse that the "persons having the management of "such racecourse shall provide a "place, whether in a building or not, "where bookmakers may carry on "their business and to which the "public may resort for the purpose "of betting, and that the charge to "a bookmaker and to any assistant "accompanying him, for admission "to an enclosure on the racecourse "for the purpose of the bookmaker's "business shall, in the case of a "bookmaker, not exceed five times

The question which arose on these appeals was whether certain items of expenditure of the board were wholly and exclusively laid out or expended for the purposes of the trade, within the meaning of section 137 (*a*) of the Income Tax Act, 1952,[2] and secondly, whether such payments or any of them were of a capital nature whose deduction would be prohibited by sub-paragraph (*f*) or (*g*) of the same section.

The special commissioners held that the disputed payments were made wholly and exclusively for the purpose of the board's trade, but that certain of the payments in question were reimbursements of expenditure upon the provision of certain physical installations on racecourses and since such installations were of enduring advantage to the board held that such payments were of a capital nature and not proper deductions in arriving at the board's profits.

"the amount, and in the case of an "assistant not exceed the amount of "the highest charge made to members of the public for admission to "the enclosure; (3) shall distribute "or cause to be distributed the whole "of the moneys staked by means of "a totalisator on any race among "the persons winning bets made by "means of the totalisator on that "race, after deducting or causing "to be deducted such percentage of "those moneys as the Board may "from time to time determine either "generally or with respect to any "particular racecourse; (4) shall "establish a fund known as the "totalisator fund, into which shall "be paid the percentage deducted "as aforesaid of moneys staked by "means of the totalisator, and any "other moneys received by the "Board; (5) may, for the purposes "of this Act, borrow money upon "the security of such fund or otherwise, and lend money for the "purpose of setting up or operating "totalisators in accordance with the "provisions of this Act; (6) shall "(subject to the payment out of the "totalisator fund of all taxes, rates, "charges, and working expenses, "and to the retention of such sums "as they think fit to meet contingencies, and to the payment out of "the said fund of such sums as they "think fit to charitable purposes) "apply the moneys from time to "time comprised in the totalisator "fund in accordance with a scheme "prepared by the Board and approved "by the Secretary of State for "purposes conducive to the improvement of breeds of horses or the "sport of horse racing; (7) may do "all such things as are incidental "to the foregoing matters; (8) shall "submit annually to the Secretary "of State a report of their proceedings, together with an account, in "such form as may be prescribed "by the Secretary of State, of the "moneys received and expended by "them during the year, and such "report and account shall be laid by "the Secretary of State before both "Houses of Parliament."

Betting and Lotteries Act, 1934, s. 18: "(5) The purposes for which "the Racecourse Betting Control "Board, acting under paragraph (6) "of section three of the Racecourse "Betting Act, 1928, may, in accordance with a scheme approved by "the Secretary of State, apply "moneys comprised in the totalisator fund shall include purposes "conducive to the advancement and "encouragement of veterinary science "and education."

[2] Income Tax Act, 1952, s. 137: "Subject to the provisions of this "Act, in computing the amount of "the profits or gains to be charged "under Case I or Case II of "Schedule D, no sum shall be "deducted in respect of—(*a*) any disbursement or expenses, not being "money wholly and exclusively laid "out or expended for the purposes "of the trade, profession or vocation . . . (*f*) any capital withdrawn "from, or any sum employed or "intended to be employed as capital "in, such trade, profession or vocation; (*g*) any capital employed in "improvement of premises occupied "for the purposes of the trade, "profession or vocation. . . ."

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The case stated on the appeal from the decision of the commissioners is fully set out in the report of the hearing before Upjohn J.[3] Upjohn J. allowed the Crown's appeal from the decision of the commissioners and held that none of the items of expenditure were deductible as expenses laid out for the purposes of the board's trade. On appeal by the appellants the Court of Appeal affirmed the decision of Upjohn J. The appellants appealed.

Charles Russell Q.C., *F. Heyworth Talbot Q.C.* and *Desmond Miller* for the appellants.

F. N. Bucher Q.C., *Alan Orr* and *H. H. Monroe* for the respondents.

The following case, in addition to those referred to in their Lordships' opinions, was cited in argument: *Morgan* v. *Tate & Lyle Ltd.*[4]

Their Lordships took time for consideration.

VISCOUNT SIMONDS. My Lords, the main issue in these consolidated appeals, of which one relates to income tax and the other to profits tax, is whether the appellants, the Racecourse Betting Control Board (whom I will call "the board"), were entitled in computing the profits of the trade of totalisator operator for the years 1953–54 and 1954–55 to deduct certain payments which I will describe in due course. This they could do only if the payments were of "money wholly and exclusively "laid out or expended for the purposes of the trade" within section 137 of the Income Tax Act, 1952. If your Lordships were of opinion that the payments were of this character, the further question would arise whether any of the payments were of a capital nature and for that reason not deductible in computing the amount of the profits and gains. But, as will presently appear, this question does not arise.

It is first necessary to consider the constitution and functions of the board. They were constituted a body corporate under the Racecourse Betting Act, 1928, which by section 1 (2) enacted that, notwithstanding any rule of law or enactment to the contrary, it should be lawful on any approved racecourse and whether in a building or not for the board or any person authorised by them to set up and keep a totalisator. The expression "totalisa- "tor" is defined to mean the contrivance for betting known as the totalisator or pari-mutuel or any other machine or instrument of betting of a like nature whether mechanically operated or not. Section 3 is all important for the determination of this appeal. After providing for certificates of approval of racecourses and other matters not immediately relevant, it enacted by subsection

[3] [1958] 1 W.L.R. 122; [1958] 1 All E.R. 274.

[4] [1955] A.C. 21; [1954] 3 W.L.R. 85; [1954] 2 All E.R. 413; 35 T.C. 367.

(3) that the board should distribute the whole of the moneys staked by means of a totalisator on any race among the persons winning bets made by means of the totalisator on that race, after deducting or causing to be deducted such percentage of those moneys as the board might from time to time determine either generally or with respect to any particular racecourse, by subsection (4) that the board should establish a fund known as the totalisator fund into which should be paid the percentage deducted as aforesaid of moneys staked by means of the totalisator and any other moneys received by the board, and by subsection (6) that the board should (subject to the payment out of the totalisator fund of all taxes, rates, charges and working expenses and to the retention of such sums as they think fit to meet contingencies and to the payment out of the said fund of such sums as they think fit to charitable purposes) apply the moneys from time to time comprised in the totalisator fund in accordance with a scheme prepared by the board and approved by the Secretary of State for purposes conducive to the improvement of breeds of horses or the sport of horse racing. Subsection (7) empowered the board to do all such things as are incidental to the foregoing matters and subsection (8) required them to submit annually to the Secretary of State a report of their proceedings together with an account in such form as might be prescribed of the moneys received and expended by them during the year, such report and account to be laid by the Secretary of State before both Houses of Parliament.

By section 18 (5) of the Betting and Lotteries Act, 1934, the purposes for which the board might under section 3 (6) of the Act of 1928 in accordance with a scheme approved by the Secretary of State apply moneys included in the totalisator fund were extended to include purposes conducive to the advancement and encouragement of veterinary science and education.

From the time that the board were established they have operated totalisators on many racecourses and have by deducting a percentage of money staked created a totalisator fund. Out of this fund they have paid the working expenses of running the totalisator and such other administration expenses as were necessary. In addition they have made the payments with which this appeal is concerned. They claim that such payments were wholly and exclusively laid out or expended for the purpose of their trade, and their claim was upheld by the Commissioners for the Special Purposes of the Income Tax Acts. It was, however, rejected upon case stated by Upjohn J. and by the Court of Appeal.

I will briefly describe the payments in question, all of which were voluntary payments.

They fall under six heads and are not in any relevant way distinguishable from each other except that the third head "runners' allowance" has a special feature which will require consideration.

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The first of these heads is described in the board's accounts as "To racecourse executives from the Racecourse Fund." This is a fund created by contributions from the totalisator fund and from it payments are made to each of the 73 racecourses upon which the board operated a totalisator. I need not state in any detail the purposes for which the money was used: it is sufficient to say generally that it was used for the rehabilitation of racecourses and buildings, the provision of various amenities and latterly for increasing the prize money for races.

The second head is described as "To owners and trainers in "reduction of the cost of travelling racehorses to race meetings." No further explanation of this title is necessary.

The third head is "runners' allowance." This was first introduced in 1954. It was an allowance to owners of horses who ran their horses in any race, the amount being fixed at £1 per runner. The distinctive feature of this payment is that it was not part of the distribution made under a scheme which the Secretary of State sanctioned but was treated in account as part of the working expenses of the trade.

The fourth head is described as "Towards the administrative "expenses of the Jockey Club and National Hunt Committee and "the cost of the race finish recording camera." Payments in this category were used to meet the salaries of racing officials, starters, judges and clerks of the course who were provided by the Jockey Club or the National Hunt Committee and for similar purposes.

The fifth and sixth heads were sums paid "towards expenses "of point-to-point meetings" and "for the assistance of racing "under the rules of the Pony Turf Club" respectively.

All these payments, with the exception, as I have already said, of the "runners' allowance," were included in schemes prepared by the board in accordance with the provisions of the Act and submitted to and approved by the Secretary of State. The excepted item appears to have been treated as part of the board's working expenses in order to test whether inclusion in a scheme was material for tax purposes.

I have very briefly summarised the facts as they appear in the case stated and will only add that the special commissioners had before them a quantity of evidence in regard to the relationship between the volume of totalisator betting and the number of horses running in a race and the number of people attending the race meeting, in regard to the influence of racecourse amenities upon attendances by the public and to the necessity of public confidence in the proper conduct of racing and the accuracy of the official supervision and decision, in regard to the need for augmenting prize money and the increase in the cost of maintaining racehorses and bringing them to meetings and the need for subventions to point-to-point and Pony Turf Club meetings.

On this evidence the special commissioners came to this

conclusion: "We were satisfied on the evidence that all the "payments set out in Exhibits B, B1 and B2 [being the relevant "statements of account] were made by the board with the "object of increasing the receipts of its totalisators, although "such payments might and in all cases did (in the words of "section 3 (6) of the Act of 1928) improve the breed of horses "or the sport of horse racing and although the increase in such "receipts was not in all cases expected to be exactly proportionate "to the expenditure." They accordingly determined that all such payments were wholly and exclusively made for the purpose of the board's trade of operating totalisators. This determination was, as I have said, reversed by Upjohn J., who was upheld by the Court of Appeal.

My Lords, a considerable part of the debate in this House turned upon the meaning of the conclusion of the special commissioners which has been set out verbatim. It was urged that it was a finding of fact which must be accepted by the court and, being accepted, could lead to no other result than that the payments fell within section 137 of the Income Tax Act, 1952, and were deductible in a computation of profits and gains. It could only mean, it was said, that the only object of the board in making the payments was to increase the receipts of the totalisators. If so, it followed that they were made wholly and exclusively for the purpose of their trade: the concluding part of the paragraph could be disregarded.

My Lords, I cannot regard this as a correct interpretation of the conclusion. It is altogether too ingenuous to suppose that the board, in making these payments, had not in mind the justification, if not the very purpose, of their creation and had not the object of improving the breed of horses and the sport of horse racing. It is true that the sentence beginning with the word "although" suggests that the ensuing result was fortuitous and unintended. But, if this is what the commissioners meant, I should not hesitate to regard the finding as irrational and even perverse.

The difficulty in the case no doubt arises out of the somewhat anomalous position of the board, which is not that of an ordinary trading corporation. The same difficulty may well arise in the case of all nationalised industries. In such cases the distinction is likely to be obscured between expenditure made in order to earn profits of the trade and expenditure out of earned profits. It is often a fine distinction—see, for instance, *Mersey Docks and Harbour Board* v. *Lucas*,[1] *Inland Revenue Commissioners* v. *Stonehaven Recreation Ground Trustees*,[2] and in particular the observations of my noble and learned friend Lord Reid in the recent case of *Inland Revenue Commissioners* v. *Dowdall O'Mahoney & Co. Ltd.*[3] But in the present case the line is

[1] (1883) 8 App.Cas. 891; 2 T.C. 25.
[2] 1930 S.C. 206; 15 T.C. 419.
[3] [1952] A.C. 401, 417, 418; [1952] 1 T.L.R. 560; [1952] 1 All E.R. 531; 33 T.C. 259.

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clearly drawn by the Act itself and the commissioners have, I think, fallen into error because they have ignored its structure and assumed that the tax position was precisely what it would have been if the board was an ordinary corporation whose object was under its memorandum of association to carry on the trade of operating totalisators on racecourses and other objects incidental thereto and nothing had been prescribed in regard to the distribution of its profits. I do not say—it is unnecessary for me to say—what the result would be if that had been the case, and there had been a similar finding of fact. Here, however, the Act distinguishes between, on the one hand, the trading activities of the board and its attendant expenditure and, on the other, the payments which are to be made out of any balance that remains. The payments or appropriations so made must accord with the directions of the Act and must be approved by the Secretary of State, and it would, as it appears to me, be inconsistent with its scheme and purpose to treat those very payments as expenditure made wholly and exclusively for the purpose of its trade. The same result is reached if the matter is looked at from a slightly different angle. It may be asked what is the trade which the board carries on. The answer is that it is the trade of operating totalisators on racecourses. It is the expenditure for the purpose of that trade which is deductible in computing the amount of its profits or gains. No doubt, as was held in *Attorney-General* v. *Racecourse Betting Control Board*,[4] the legitimate activity of the board extends to matters fairly incidental to its express powers, but the question in that case was solely one of vires and it is not to be regarded as an authority for saying that every activity which might indirectly result in an increased patronage of the totalisator was a part of the trade of the board. On the contrary, I would hold that, though the appropriations may benefit the board, it is no part of their trade to assist racecourse executives or to encourage racing in other ways. That is the object to which under the control of the Secretary of State the profits of their trade may be devoted.

It remains to say something about the third item of expenditure. This was the so-called runners' allowance to owners of horses of £1 per runner in every race. The object was beyond doubt to induce owners to enter and run their horses in races and thus presumably to increase the amount of betting. The only difference that I have been able to detect between this and the other expenditure with which I have been dealing is that in their accounts the board have treated this payment as part of their "working expenses" which did not require the approval of the Secretary of State. But this does not determine their character for taxation purposes, and I am clearly of opinion that they are not properly described as "working expenses" of operating the totalisators but were payments which might be

[4] [1935] Ch. 34; 51 T.L.R. 36.

made out of the balance of the fund under an approved scheme. Without such approval they were ultra vires payments.

In the result, therefore, I am of opinion that Upjohn J. and the Court of Appeal came to a correct conclusion and these appeals must be dismissed with costs.

My noble and learned friend Lord Radcliffe, who is unable to be here today, has asked me to say that he has read and concurs in the opinion which I have just expressed.

LORD REID. My Lords, I entirely agree with the speech which my noble and learned friend Lord Simonds has just delivered, and I cannot usefully add anything.

LORD TUCKER. My Lords, I agree that these appeals should be dismissed, for the reasons stated by my noble and learned friend on the Woolsack.

LORD KEITH OF AVONHOLM. My Lords, the point on which the appellants mainly, if not entirely, rely in this appeal is finding 7 of the case stated by the special commissioners, which has already been recited to your Lordships and which I do not repeat. I am unable to appreciate how the commissioners could have reached this finding without some element of misdirection, and their conclusion that all the items referred to in that finding were paid wholly and exclusively for the purposes of the trade is equally vitiated. All the items with the exception of the item paid in the year 1954 known as "runners' allowance," were payments made pursuant to schemes approved by the Secretary of State in accordance with section 3 (6) of the Act of 1928. Under that section the schemes had to be "for purposes con-"ducive to the improvement of breeds of horses or the sport of "horse racing." The Act of 1934 extended the purposes to which the surplus of the totalisator fund might be applied. For the purposes of this case that extension is immaterial. The commissioners in their finding 7 expressly accept it that the payments "in all cases did (in the words of section 3 (6) of the "Act of 1928) improve the breed of horses or the sport of horse "racing." Looking to this part of the finding and to the fact that the appellants put forward their scheme for approval of the Home Secretary in terms of the Act, I fail to see how the conclusion can be reached, as the commissioners have done, that "all the items . . . were paid wholly and exclusively for the "purposes of such trade," i.e., with the object of increasing the receipts of their totalisators. It is not possible, in my opinion, to say, in the circumstances of this case, that that was the whole purpose and that the other was merely an accidental, or incidental, consequence.

I would be prepared, however, to treat the matter on broader grounds. The appellants have a statutory duty, under statutory procedure, to make a defined class of payments out of the

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totalisator fund. In my opinion these payments and payments that may be called "working expenses" are mutually exclusive. It is not permissible to diminish what would otherwise be the surplus of the totalisator fund by payments of the kind to which the totalisator fund falls to be applied. This, I think, is explicit in the Act. The deductions to be made before striking the balance to be applied to the statutory purposes are expressed to be all taxes, rates, charges and working expenses, such sums as the board think fit to meet contingencies and such sums as they think fit to pay to charitable purposes. It is only as working expenses that the appellants can put forward their claim here. But I cannot hold that the very payments to which the totalisator fund falls to be applied can be working expenses within the meaning of the statute. The Act has, in my view, drawn a clear distinction between these two things.

There remains the point about the runners' allowance. These were introduced in only one of the years in question for the express purpose of testing the claim in a situation unembarrassed by their having been approved as an authorised payment by the Secretary of State. But this payment is of the same type as the others and the same result must follow. It should, in my opinion, have been paid, if at all, under an approved scheme, and the fact that it was not cannot improve the position. The commissioners themselves seem to have made no distinction with regard to the runners' allowance.

I would dismiss the appeals.

Appeals dismissed with costs.

Solicitors: *Simmons & Simmons; Solicitor, Inland Revenue.*

J. A. G.

[QUEEN'S BENCH DIVISION.]

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* PRACTICE DIRECTION (CHAMBERS APPLICATIONS).

Practice—Chambers applications—Publication in Cause List—Estimate of length of hearing.

As from October 1, 1959, the list of applications to be dealt with by the Queen's Bench judge in chambers will, except in vacations, be published in the Daily Cause List as well as in the Chamber List.

Applications in the ordinary lists on Tuesdays and Fridays will still be issued returnable at 10.30 a.m. (if attended by counsel) and 12 noon (non-counsel), but, depending on the number of applications to be dealt with, the list may be divided into two

parts, one to be heard at 10.30 a.m. and the other not before 2 o'clock. For this purpose it will be necessary to have an estimate of the duration of the hearing of each application, and, on the issue of the notice of appeal or summons (other than a summons for bail), a copy will be required to be filed endorsed with such estimate. Any alteration in the estimated time or any settlement should be notified to the Chief Clerk, Summons and Order Department, not later than 12 noon on the day preceding the hearing.

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PRACTICE DIRECTION (CHAMBERS APPLICATIONS).

Applications estimated to last more than 45 minutes should, by consent of the parties, be taken out of the ordinary list for a special appointment on Wednesdays or Thursdays.

PARKER OF WADDINGTON C.J.

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[COURT OF APPEAL.]

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Lord Evershed M.R., Romer and Pearce L.JJ.

[Plaint No. 1958 K. 575.]

By-law—Construction—"Majority of fellows [of Zoological Society] "entitled to vote"—Meaning—Whether restricted to those qualified to vote and present or represented at ballot meeting.

The by-laws of the respondent society made in exercise of powers conferred by the charters provided that a proposal for the making, alteration or repeal of any such by-law required, inter alia, the confirmation of "a majority of fellows entitled to vote":—

Held, that these words meant a majority of those fellows who, not being disqualified from voting for non-payment of subscriptions or any other reason, were present or represented at the meeting at which the ballot was to take place and were, therefore, entitled to vote on the proposal; a construction that required a majority of the total number of fellows at the particular moment, whether or not present at the meeting, would lead to absurd results and was repugnant to the provisions in the charter of the society: the court, leaning against such a construction on these grounds, was not compelled to adopt it by the language used; accordingly, a resolution for the adoption of new by-laws had been confirmed by "a majority of the fellows entitled to vote."

Decision of Vaisey J. reversed.

APPEAL from Vaisey J.

At a general meeting of the Zoological Society of London held on April 16, 1958, and convened in accordance with the by-laws of the society for the purpose of obtaining the confirmation of the fellows of the society to a proposal to adopt new by-laws, 1,788 fellows voted in favour of the resolution making the proposal and 1,227 voted against it. Eighteen fellows abstained from voting

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and one vote was disallowed. It was not disputed that due notice of the meeting had been given and that the proposal had been published in accordance with the requirements of the current by-laws, in force since 1948, and of the charters of the society.

[The relevant passages of these documents are set out in the judgment of Lord Evershed M.R.]

At the date of the meeting the total number of the fellows of the society was over 7,000 (including an unascertained number who were probably disqualified, and some who, no doubt, were not entitled to receive and had not received notice of the meeting).

By chapter 13, section 3, of the by-laws of 1948, a proposal for making, altering or repealing a by-law had to be confirmed by a majority of the fellows entitled to vote in its favour in person or by proxy.

The plaintiff, a fellow of the society, suing on behalf of himself and all other fellows, took out a summons on July 8, 1958, asking for a declaration, first, that the by-laws of 1948 were not modified or abrogated by the resolution voted on at the meeting and, secondly, that the new by-laws were not effectively adopted at the meeting and, thirdly, that, on the true construction of the charters and by-laws, a resolution to make, alter or repeal a by-law required the confirming vote of a majority of all the fellows of the society for the time being entitled to vote on the resolution, whether actually voting thereon or not.

Vaisey J. made the declaration asked for and the society appealed.

Charles Russell Q.C. and *W. A. Bagnall* for the Zoological Society of London, the defendants.

Ralph Instone for the plaintiff.

In addition to the cases referred to in the judgment, the following cases were cited in argument: *Bottomley's Case, In re Alma Spinning Co.*[1]; *Grundt* v. *Great Boulder Proprietary Gold Mines*[2]; *Eyre* v. *Milton Proprietary Ltd.*[3]; *Leah* v. *Two Worlds Publishing Co. Ltd.*[4]

Lord Evershed M.R. In this case I should, in many ways, have preferred to have taken time to put my judgment in order, particularly since I have come to a conclusion different from that of Vaisey J., and so, if for no other reason than my respect for him, I should have wished to take a little time; but it is nearly the end of the sittings and it may, therefore, be desirable that we should give our judgments at once. [Having stated the facts his Lordship continued:]

Vaisey J. accepted the contention of the plaintiff that the formula " . . . the majority of fellows entitled to vote . . . "

[1] (1880) 16 Ch.D. 681.
[2] [1948] Ch. 145; [1948] 1 All E.R. 21.
[3] [1936] Ch. 244.
[4] [1951] Ch. 393; [1951] 1 T.L.R. 298.

meant, and must be taken as a matter of construction to mean, the majority of the total number of fellows of the society at the relevant date who were entitled to vote—that is to say, who were not for any reason disqualified from voting. What that figure would be—the figure, that is, of the "majority"—is, for reasons already indicated, uncertain; but it may be taken to have been somewhere in the region of 3,500, a number in excess of the total who were represented in person or by proxy at the meeting. A point much stressed—and, in my judgment, rightly stressed—by Mr. Russell for the defendants is that if that view of the construction is correct, it results in an absurdity—in the sense that it would, for practical purposes, be impossible either to ascertain what the exact arithmetical figure of the "majority" would be, and almost certainly hardly less possible ever to achieve such a vote.

But I should first read certain relevant parts of the charter of the society and of the by-laws. The original charter is dated March 27, 1829, and it appears therefrom that the society then consisted, or was about to consist, of no more than 21 fellows. The part of the charter which I wish to read is towards the end. After providing that there should be a council of the society, it ended thus: "And we do further declare and grant that the "council of the said society for the time being . . . shall and may "from time to time nominate and appoint such persons as they "shall think proper to be officers," and so forth, "And also shall "and may have power according to the best of their judgment "and discretion to make and establish" inter alia "such . . . "by-laws as shall appear to them useful for the regulation of "the said society for the management of the estates," etc., "and "businesses thereof and for fixing and determining the times and "places of meeting of the said society," and matters of that kind. It continues: " . . . and the same orders and by-laws from time "to time as they may see occasion to alter suspend or repeal "and to make such new orders and by-laws in their stead as they "shall think most proper and expedient so as the same"—that is, the by-laws for present purposes—"be not repugnant to "these presents . . ." There then follows this concluding proviso: "Provided that no by-laws to be made or alteration . . . of any "by-law shall be considered to have passed and be binding on the "said society until notice of such by-laws or such alteration . . . "of any by-law shall have been publicly given at a general "meeting nor until the same shall have been hung up in writing "in some conspicuous place in the common meeting room of the "said society" for a space of time indicated, "nor until the same "shall have been confirmed by method of ballot by the fellows of "the said society or any 11 or more of them at the next general "meeting of the said society to take place after such notices shall "have been given as aforesaid."

I shall have to come back to say something of the meaning which I give to those last words; but it may be taken that the

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procedure, there indicated, was followed in this case; that is to say, the council having resolved upon the new by-law or by-laws, those new by-laws were screened in the way prescribed and came up for confirmation at the next general meeting after that process of screening; and it was at that meeting that the resolution received the support of the votes which I have mentioned.

There was a supplementary charter granted by His late Majesty, King George the Sixth, in May, 1948, and it contained powers for the society, by a special resolution passed at a general meeting of the fellows—and the special resolution was of a kind following the well-known concept of special resolutions in company law, that is, passed by a three-fourths majority of those voting thereat—to amend the charter subject to the approval of His Majesty in Council of the amendment.

I now come to the by-laws which, we were informed, were brought into operation at or about the same time as the supplementary charter, namely, in 1948.

The first section of the by-laws bears the heading "Fellows" and it states, in brief, how to become a fellow, the obligations in the way of subscription, and so forth. Section 8 of that chapter says: "The fellows have the right to be present and to vote at all "general meetings," and that I interpret to mean they have the right to be present at, and to vote at, all general meetings. Section 9, however, says that "no fellow shall be entitled to "vote who is in arrear with his subscription" for a certain specified period. It follows, therefore, that the fellow who is entitled to vote, prima facie, means a fellow who has not been disqualified from voting by the terms of section 9 of the first chapter.

The next chapter deals with honorary fellows, and that I pass over. The third chapter deals with the annual general meeting and the business which it will transact, and I note that by subparagraph (4) of section 7 of the chapter if there is a contested election provision is made for a postal ballot.

The next chapter deals with the offices of president and vice-president, the next with the treasurer and accounts, the next with the secretary, and the next with employees. Chapter 8 deals with ordinary meetings, which it distinguishes from scientific meetings, and it is true to say that in section 2 there is a reference to the quorum expressed as follows: "Eleven fellows "present in person and entitled to vote shall be a quorum." The figure 11 as a quorum obviously reflects a similar reference to the number 11 at the end of the original charter.

There follow chapters on other matters, publications, council, committees, and such like, and so we come to chapter 13, which is headed "By-laws."

The first section provides that "the council shall give notice "at an ordinary general meeting of its intention to propose the "making of new by-laws or the alteration" of an existing by-law, "after which a copy of such proposal shall be suspended," etc.,

following what has been forecast by the charter, "and then submitted to the next following ordinary general meeting for confirmation by method of ballot," again plainly a reflection of the final language in the charter.

Section 2 provides: "As soon as practicable after the meeting" mentioned in the previous section, and "before the date of the meeting at which the ballot is to take place, a copy of the proposal together with a notice stating the place, the date and the hour of the last-mentioned meeting and a form of proxy shall be sent through the post to all fellows . . . whose registered or last-known places of address are within the British Isles." I refer to that provision because I have already stated that a fellow who has not such an address is clearly not entitled to receive a notice of a meeting for amending the by-laws and, presumably, therefore, would be unlikely to know anything about it.

In section 3 I have already referred to the vital sentences, but I should read the entire section: "A proposal for the making of new by-laws or for the alteration or repeal of any by-law shall be either confirmed or rejected and the president or other fellow in the chair shall refuse to accept any amendment to the proposal. Any such proposal shall be deemed to have been confirmed if the majority of fellows entitled to vote shall vote in its favour and for this purpose voting may be in person or by proxy."

The last section deals with the form of the proxy.

It will be noticed about section 3, and particularly about the first sentence, that, although it speaks of the proposal being either confirmed or rejected and what the president or the fellow in the chair is to do, it does not in terms state "at the second above-mentioned meeting"; but, to my mind, it is quite plain that the whole of that section is dealing with what takes place at the second meeting of which notice has been given in accordance with the first section, and that matter of context is, to my mind, of great importance.

The last chapter deals with matters relating to the charter, and I can pass it over.

The view of the judge, as I have already stated, was that the words "the majority of the fellows entitled to vote" meant exactly what they say, namely, the arithmetical majority of all the fellows entitled to vote; that is, not disqualified from voting. If this sentence appeared bereft of its actual context I should agree that that is what, on its face, it means; that would be in conformity with the language in the first chapter which I have read about all fellows being entitled to vote save those disqualified by the terms of section 9; but, as I have indicated more than once, the formula we have to construe is in this special context which is related to a particular meeting.

The submission of the defendant society is that, having regard to the context, what is meant by the words "if the majority of fellows entitled to vote shall vote," etc., is the majority of

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fellows entitled to vote on the particular resolution by the fact of their being in attendance at the meeting, just as the earlier part of the section is only made intelligible by assuming it to be related to the transactions at the meeting.

There is an alternative view of the meaning of these words which would limit the phrase "the majority of fellows entitled "to vote" to the majority of fellows in fact voting as distinct from those entitled by attendance to vote. In his judgment the judge appeared clearly, I think, to have treated the only alternatives before him as being the second alternative put forward by Mr. Russell (namely the majority of fellows actually voting) on the one hand and what I will call Mr. Instone's construction on the other, and between those two he decided in favour of the latter. It may well be that if, in truth, those were the only two alternatives, that should be the right answer; but what the judge has not noticed in his judgment is that Mr. Russell's first suggestion—as he has put it in this court, at any rate—is that the true meaning of this phrase is neither the one nor the other of those two alternatives. Mr. Russell concedes, in other words, that "entitled to vote" is a qualification of the word "fellows" and means what it says, that he is not disqualified from voting; but the majority, says he, which is indicated is the majority of those not disqualified who, by being there (as later appears, either in person or by proxy) are entitled to vote on the particular resolution at the particular meeting.

In support of that view Mr. Russell has also raised two, as I think, very formidable arguments. The first is what may be called the argumentum ab inconvenienti which, it is true, the judge did notice, although slightly. The second and further argument is that the view for which Mr. Instone contends would, in truth, be repugnant to the terms of the charter and if it were right, therefore, the result, presumably, would be that the by-law was ultra vires.

In support of that last submission Mr. Russell cited a case to us (to which I will presently allude) which was not brought to the attention of Vaisey J. I am, therefore, somewhat comforted by thinking that, perhaps, if the judge had seen that case and had considered the matter which Mr. Russell has put before us upon that authority, he might well have arrived at the same conclusion as that which, I must confess, I have felt clear in reaching.

I will, therefore, first say something about the argument as to inconvenience, for the inconvenience is by no means slight; it is grave. In the first place, as I have indicated, it would really be impossible to ascertain at any given moment, for any practical purpose, who the fellows were who were entitled to vote. Many of them, under the terms of the regulations, will have become life members so that there will be no means of ascertaining whether at any point of time they will have died. Nor would it be at all easy at any given time to discover who exactly of

those that were still living had fallen into the necessary amount of arrear in payment of their subscription. But as a practical matter it must, I should have thought, be plain enough to anyone who has some experience in collecting votes that to obtain more than half of the total votes in favour of a particular resolution would be, not only difficult, but virtually impossible. I note that even the most trivial alteration to a by-law, the alteration such as Pearce L.J. indicated, altering for obvious convenience the date of the financial year, would require this remarkable procedure, which would be difficult and, indeed, as I think, virtually unattainable.

Then there is the further difficulty which, though not going to practicability so much, goes to the obvious sense of it, that many of those fellows who might well have been entitled to vote would, in the ordinary course, not have had notice of the meeting, and would not be entitled to have had it, because they would not have addresses in the United Kingdom; and there might have been others who would not, for one reason or another, accident and the like, have received notice.

These matters seem to me to be more than just difficulties; they are, I think, difficulties of so great a magnitude as to justify the word "absurdity" which Mr. Russell used. They are so great that, applying common-sense standards, I think the court should be slow to impose them upon the society unless the construction of the words in question is so plain as to leave any other course impossible.

I would add under this head a reference to the provisions about altering the charter. It is true that no alteration to the charter can be made without the Sovereign's approval, but it is made plain enough that a special resolution carried in the ordinary way by three-quarters of those present at a particular meeting will suffice to alter the charter, given that the sovereign's approval follows. It seems to me highly unlikely that the majority of fellows required to approve or confirm a proposal should be so vastly greater in the case of a simple by-law than it is for an amendment of the charter itself.

So I come back in the end to the last point earlier mentioned, that of repugnancy. It will be recalled that by the terms of the charter the council was given power to make and alter by-laws subject to the proviso or limitation that the proposed by-laws or proposed alterations must be confirmed by method of ballot by the fellows of the society or any 11 or more of them at the next general meeting of the society to take place after the notice. Mr. Instone addressed some argument to us about the meaning of the word "ballot" but, with the greatest respect to him, I cannot think that it helps. It seems to me quite plain from the language of the charter that it contemplates that confirmation may be given to an alteration at a meeting at which no more than 11 fellows are present, that being made (as later appears from the by-laws) the quorum for a fellows' meeting. It is true that this

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appears in a proviso, but the point of the proviso is to place a particular qualification or limitation on the otherwise unlimited power of the council to amend or make by-laws. If the by-law which we have to construe means what Mr. Instone and the judge say, then I cannot see any answer to the point that it would be inconsistent with the language at the end of the charter; it would place far more severe limitations upon the council's power to amend the by-laws than the charter contemplates or states. It will be remembered that by the earlier passage in this part of the charter the power to make by-laws—and these were made in 1948—is also subject to the limitation that they must not, when made, be repugnant to the charter.

The result, therefore, of this argument based on inconvenience and repugnance comes to this, as I think, that the court will not, and should not, construe this particular section of chapter 13 in a sense which creates inconsistency and repugnancy—unless it is really compelled by the language so to do; and I have, perhaps, already said enough to indicate that I find no such compulsion in the language. Indeed, once the premise is granted—as I think it must be—that the whole of this section is dealing with what takes place at a particular ordinary meeting, all else, as a matter of common-sense and meaning of words, falls into place. I, of course, agree that the language is not chosen with that perfection which, no doubt, wisdom after the event would dictate; but, none the less, the references to the proposal being confirmed or rejected and the president or other fellow in the chair refusing amendments, and the like, are all related to what is going on at a meeting. So I find no difficulty in the way of construing this language, "if "the majority of fellows entitled to vote shall vote," as meaning: "if the majority of fellows who attend this meeting in person or "by proxy and are not disqualified from voting shall vote," etc.

A number of cases were cited to us, but I do not think it necessary—and I hope I shall not be thought disrespectful to counsel—to cite more than one or two. I should, I think, refer to *Clay* v. *Grand Junction Water Works* [1] because it was much relied upon by Vaisey J. It should be said at once that the words there which were weighed and construed were quite different from those with which we are concerned. The words were ". . . the majority "in value of the shareholders or of the shareholders of a par-"ticular class." By the requisite statutory provision it was provided that if certain schemes of arrangement were to be effective, then they must not be, in effect, vetoed by a majority in value of the shareholders, or shareholders of a particular class; and if such a majority of shareholders, or shareholders of a particular class, voted adversely to the proposal, then provision was made for going before a Chancery judge.

I agree with Mr. Instone that the case is more relevant upon what I have called Mr. Russell's alternative suggestion which the judge dealt with and rejected, the suggestion that "fellows

[1] (1904) 21 T.L.R. 31.

"entitled to vote" meant, or was limited to, the fellows actually voting; but there are other substantial differences in the present case from the *Clay* case[1] which are, I think, worth a brief mention. In the first place the arithmetical question posed in *Clay's* case[1] was the "majority in value of the shareholders" and that by itself, no doubt, means what it says. Nor is there any comparable inconvenience in so doing. There is no difficulty in ascertaining at any given point of time what is the majority in value of the issued shareholding or the issued shareholding of a particular class. And, as I say, this was not a provision required to give effect to something, but a provision which enabled the majority in value to put a stop to a scheme going through without the intervention of the courts.

Upon the last point, that of repugnance with the charter, I have derived assistance from the case which I earlier mentioned and which Vaisey J. did not, I think, have the advantage of seeing, namely, *Reg.* v. *Darlington Free Grammar School Governors*.[2] In that case there was a charter and there were by-laws, and the substance of the matter was that the governors of the school, by the charter, were entitled, among other things, to appoint and dismiss, if they thought fit, the headmaster of the school. Certain by-laws were introduced which required that before a headmaster was dismissed a written statement of the adverse view of the governors to the headmaster's conduct of the school should be submitted to the headmaster, and that, in fact, had not been done. The relevant part of the judgments of the court show that such a by-law, if effective, would have been an added fetter to what the charter authorised the governors to do and, on that ground, must be rejected.

Thus[3]: "But another plea set forth a by-law made in the "year 1784, declaring certain qualifications to be requisite for a "master, and prescribing a certain process for removing any, "giving the master a fair opportunity of being heard in his de-"fence, whenever he may be accused with a view to his removal, "with an averment that such process had not been followed nor "such opportunity given to the prosecutor. Issue having been "taken on this plea, a verdict was found on this also for the "prosecutor. But the defendants have moved for judgment not-"withstanding the verdict on these points, arguing that the by-law "is invalid in law, because inconsistent with the trust and power "vested in the governors by the letters patent. . . . We are "clearly of opinion that this objection is fatal to the validity of "the by-law."

Lord Denman continued: "They"—that is the governors—"are bound to remove any master whom, according to their sound "discretion, they think unfit and improper for the office; and, as "that discretion may possibly be well exercised for defects of "various kinds not amounting to misconduct, so there may be

[1] (1904) 21 T.L.R. 31.
[2] (1844) 6 Q.B. 682.
[3] Ibid. 695.

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"misconduct, incapable of proof by witnesses, but fully known "to the governors themselves, on which they could not abstain "from exercising their power of removing the master without the "abandonment of their duty."

Again, Tindal C.J. said[4]: "But we think the governors for "the time being had no authority under the letters patent to "make such by-law so as to bind their successors in the execution "of their duty; nothing can be better established than that a "by-law by a corporation, which alters the constitution of the "corporation, is void; and upon the same principle a by-law which "restrains and limits the powers originally given to the governors "by the founder himself we think must be bad."

I have earlier indicated that the court should very strongly lean against a construction of the by-law which leads both to repugnance with the charter and also to absurdities. I feel no doubt, therefore, that the court should construe this by-law in the sense for which Mr. Russell contends unless the language is compelling to the contrary. In my judgment, it is not so compelling and, therefore, I would allow the appeal.

ROMER L.J. I agree, and I only add a word or two of my own because we are taking a different view of this matter from that which commended itself to the judge.

In his main submission on the question of construction Mr. Russell contended that the phrase "the majority of fellows "entitled to vote," whatever it might mean in other contexts and in other sections, meant, for the purposes of section 3 of chapter 13, fellows who were entitled, by reason of being at the particular meeting in person or by valid proxy, and not disentitled through being in arrear of subscription, to vote, and the same result would be arrived at by reading the clause as "fellows entitled to vote "at the meeting." It seems to me there is to be found in section 3 itself support for that view. As the Master of the Rolls pointed out in the course of the argument, there is a reference, among other things, to the president or fellow in the chair, and that obviously means the president of that particular meeting or other fellow in the chair at that particular meeting. In other words, the draftsman of this section was, as it were, projecting his mind forward to a meeting which had been already convened and was taking place. Therefore, there is not very much difficulty in reading into this such words as "if the majority of fellows 'at "'the meeting' and entitled to vote," and so on. I think, for my part, that there is force in that way of looking at it.

The contrary view submitted by Mr. Instone, that it meant the whole of the fellows of the society, would appear to be negatived to some extent by certain other considerations. For example, the meeting at which the question of confirmation was to be brought up was an ordinary general meeting, and by

[4] (1844) 6 Q.B. 682, 717.

chapter 8, section 2, it is provided that at ordinary general meetings "Eleven fellows present in person and entitled to vote "shall be a quorum," which is an echo of that part of the charter which the Master of the Rolls has read. It would appear, at all events at first sight, that at such a meeting, a meeting at which this question of confirmation was to be brought up, effective business could be done provided that 11 fellows were there; you did not need to have the presence in person or by proxy, of all the fellows of the society, and that such was the position which was in the contemplation of the draftsman of section 3 of chapter 13.

I think, too, that the view of Mr. Instone is also to some extent negatived by a further consideration to which the Master of the Rolls referred in the course of the argument, namely, that it is perfectly plain from the terms of the supplementary charter and from chapter 14, section 1, that (with the approval of the Privy Council) the charter itself or the supplementary charter, documents of far greater consequence than the by-laws, could be amended by a special resolution passed by three-quarters of the fellows present and voting at that meeting, and it would seem rather extraordinary to think that far greater formalities and far greater difficulties should be put in the way or have to be observed in altering the by-laws themselves than are necessary in the case of altering the charter.

Taking all these considerations into account, I have little doubt that the construction which Mr. Russell seeks to put upon the relevant words in section 3 of chapter 13 is the right one. But, even if that view of the matter be wrong, I am at least convinced that it is a possible construction of section 3 of chapter 13 and, if it be a possible construction, then it is permissible for, and, indeed, obligatory on, the court to consider the consequences of applying the one possible construction or the other. Such cases as *In re Rothermere*[5] show that in such a case the court will prefer the construction which avoids an absurdity involved in adopting the other construction.

Mr. Russell referred to a number of what he described, and I think rightly described, as absurdities involved in adopting the view put forward by Mr. Instone. He referred to the virtual impossibility of getting over half of the 7,000 fellows to bestir themselves in any matter, and, in particular, matters which might constantly arise of the most trivial importance. In connection with that he pointed out that in order to make the calculation which is involved in the plaintiff's contention, it would be necessary to take into account people who had no address in the British Isles and who, consequently, would not receive notice of the meeting at all; also people who had not received a notice through an accidental omission. Finally, he said that it is absurd to have a system which involves exact knowledge by the council, or the secretary or other official at any given point of time, of how many members there are. Some of them may be abroad or their

[5] [1943] 1 All E.R. 307.

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addresses may be unknown, and he said the cumulative effect of such considerations as those would drive the court, if the alternative construction be possible, to reject that which is submitted by the plaintiff. I think there is very great force in that submission also. So whether I am right in thinking that the construction which Mr. Russell suggests is the right one, or whether the true view be that the matter is open to doubt and the construction which Mr. Russell suggests is a possible one, one arrives at the same result.

With regard to the question of repugnancy, there is nothing I desire to add to what Lord Evershed M.R. has said, with which I entirely agree. It seems to me that *Reg.* v. *Darlington Free Grammar School Governors* [6] is very much in point when one considers the terms of the charter and compares them with the construction which the respondent seeks to put upon section 3 of chapter 13. It seems to me almost impossible to deny that on the true construction of the relevant part of the charter, the interpretation which the respondent desires to attach to section 3 of chapter 13 is inconsistent with the charter, at least to the extent that it adds, and adds very materially indeed, to the fetters upon the exercise by the council of the powers which are vested in them by the charter itself. To that extent, on the authority of the *Darlington School* case [6] (if authority be needed), it appears to me quite plain that the section, if it means what the plaintiff says it means, cannot be given any effective force.

I, accordingly, agree that the appeal should be allowed.

PEARCE L.J. I agree.

The section in question deals with what shall happen at the meeting at which the new by-laws are to be considered. To my mind the natural meaning, in that particular context, of the words "the majority of the fellows entitled to vote" is the majority of the fellows present, personally or by proxy, at the meeting when the proposal is put to it, who at that moment can properly vote; absentees who have not appointed proxies are not included in the words.

Even if the words can be said to be ambiguous, that is by far the more sensible and workable interpretation of the words and should, therefore, I think, be preferred. Moreover, that construction makes the by-laws consistent with the charter while the construction put forward by the plaintiff would, in my view, make the by-law repugnant to the charter and, therefore, invalid.

I have not dealt in greater detail with the arguments because my Lords have stated them in clear terms, with which I agree.

Appeal allowed with costs as between party and party in both courts.

Solicitors: *Slaughter and May; Blakeney & Co.*

E. D.

[6] 6 Q.B. 682.

[NOTTINGHAMSHIRE ASSIZES.]

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Factory — Dangerous machinery (fencing) — Woodworking machine — Circular saw—Licensee—Injury caused while voluntarily helping another on private work after "clocking-off"—"Person employed"—"Working"—Factories Act, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 67), *ss.* 14 (1), 60 (1) (*as amended by the Factories Act,* 1948 (11 *&* 12 *Geo.* 6, *c.* 55), *s.* 12 (1) *and Sch.* 1)—*Woodworking Machinery Regulations,* 1922 (*S.R. & O.,* 1922, *No.* 1196), *reg.* 10 (*c*).

The plaintiff was employed by the defendants in their factory as a joiner and french polisher. In the course of his employment the plaintiff used a circular saw which was not securely fenced as required by section 14 (1) of the Factories Act, 1937, and regulation 10 (*c*) of the Woodworking Machinery Regulations, 1922. On October 28, 1955, his duties for the defendants having terminated at 4.30 p.m. he was free to "clock-off," and leave the premises; instead of so doing he remained on the premises and volunteered to help a fellow workman with a private job, namely, the making for himself of a bedside cabinet. While so engaged the plaintiff used the circular saw. By reason of the defective condition of the circular saw an accident occurred and the plaintiff's hand was severely injured. The plaintiff brought this action for damages alleging against the defendants negligence at common law and breaches of statutory duty under section 14 of the Factories Act, 1937, and the Woodworking Machinery Regulations, 1922:—

Held, that at the time of the accident the plaintiff was not employed, but was voluntarily engaged, in manual labour in doing something on his own account and not in the course of his employment or for the benefit of his employers; that if he could be said to be "working" he was not working by way of agreement with the employers or under any contract of service; and that the plaintiff was, therefore, not within section 14 of the Factories Act, 1937, or the Woodworking Machinery Regulations, 1922, and the defendants at that time owed no duty towards him.

ACTION.

The plaintiff, Felicjan Napieralski, was employed as a joiner and french polisher by the defendants at their premises which were admitted to be a factory within the meaning of the Factories Acts, 1937 and 1948. The plaintiff, who was a skilled worker, had worked for a long time on woodworking machines and fully understood the dangers of a circular saw. He knew it ought to have a guard to cover the top of the blade and he knew the guard should come down as far as possible to the cutting edge of the saw. In October, 1955, the defendants had amongst the machinery in their machine shop a circular saw which was defective and unsafe in that, inter alia, the top guard could not be fully lowered so that a gap of two to three inches was left between the guard and the bottom of the saw. Furthermore, the saw was not true and wobbled while in operation and the

[Reported by R. J. TOYN, Esq., Barrister-at-Law.]

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fence was not of sufficient length. The plaintiff was well aware of the defects and the unsafe position of the guard and had spoken to one of the directors of the defendant company about the matter, but nothing substantial was done. The defendants knew that from time to time employees used the company's machines for their own purposes after working hours without asking for formal permission and the defendants acquiesced in it. A day or two before October 28, 1955, Brian Thompson, an apprentice joiner employed by the defendants, had procured some timber to make for himself a bedside cabinet. Thompson was at the time working on an outside job and therefore sent the timber to the plaintiff at the factory with a message by another workman requesting the plaintiff to cut the timber into one-inch strips. At 4.30 p.m. on October 28, 1955, the plaintiff finished his duty as a joiner and was at liberty to "clock-off" and leave the premises. Thompson, having finished his work, had returned to the factory to look for his timber. The plaintiff informed him that it had not yet been cut. The plaintiff went to the office and "clocked-off" and then he accompanied Thompson to the machine shop to assist him in the preparation of the timber. The job which Thompson was going to do was a purely private job for himself and the plaintiff, as a volunteer helping him in that job, was not performing any duty on behalf of the defendants or doing anything in the course of his employment for them. To assist Thompson the plaintiff began to cut the timber with the circular saw after first attempting unsuccessfully to lower the guard. Whilst he was cutting with the saw it wobbled and threw the timber out so that his hand was struck and caught against the blade causing severe injuries.

The plaintiff brought this action against the defendants for damages in respect of these injuries, alleging negligence at common law and also breaches by the defendants of their statutory duties under section 14 of the Factories Act, 1937,[1] and regulation 10 (*c*) of the Woodworking Machinery Regulations, 1922.[2] The defendants alleged that the accident was caused by the plaintiff's own negligence or breach of statutory duty; whilst conceding that the saw was not fenced in accordance with the requirements of section 14 of the Act of 1937 or regulation 10 (*c*) of the Regulations of 1922, they denied that they owed any duty to the plaintiff either under section 14 or

[1] Factories Act, 1937, s. 14 (1): "Every dangerous part of any machinery, other than prime movers and transmission machinery, shall be securely fenced unless it is in such a position or of such construction as to be as safe to every person employed or working on the premises as it would be if securely fenced."

[2] Woodworking Machinery Regulations, 1922: "10. Every circular saw shall be fenced as follows:— . . . (*c*) The top of the saw shall be covered by a strong and easily adjustable guard, with a flange at the side of the saw farthest from the fence. The guard shall be kept so adjusted that the said flange shall extend below the roots of the teeth of the saw. The guard shall extend from the top of the riving knife to a point as low as practicable at the cutting edge of the saw."

under the regulations; they further alleged that the accident did not occur during working hours, but at a time when the plaintiff was not working in the course of his employment and was using the saw without the licence or consent of the defendants.

R. K. Brown Q.C. and *T. R. Heald* for the plaintiff.
A. E. James for the defendants.

The cases cited in argument are referred to in the judgment.

HAVERS J., having stated the facts, found (i) that the injury happened because there was too big a gap between the bottom of the guard and the top of the saw; (ii) that the plaintiff's position was that of a gratuitous licensee of the defendants; and (iii) that the defendants were not guilty of any breach of duty to the plaintiff at common law, and continued: I now turn to section 14 of the Factories Act, 1937, and the Woodworking Machinery Regulations, 1922; and I have to consider to whom is the duty owed under the regulations and under this section of the Factories Act. Mr. James, for the defendants, conceded that he did not think there was any distinction between the regulations or the Factories Act so far as persons are concerned to whom the defendants owed a duty. I think that he is right about that. Section 60 of the Factories Act, 1937, gave the Minister power to make special regulations for safety. Section 60 (1), as amended by the Factories Act, 1948, s. 12 (1) and Sch. I, provides: "Where the "Minister is satisfied that any manufacture, machinery, plant, "equipment, appliance, process, or description of manual labour, "used in factories (*a*) is of such a nature as to cause risk of bodily "injury to the persons employed, or any class of these persons, "he may, subject to the provisions of this Act, make such special "regulations as appear to him to be reasonably practicable and "to meet the necessity of the case." That section as amended by the Act of 1948 has the words "the persons employed" substituted for the words "persons employed in connection "therewith" contained in the original section 60 (1). Section 60 (2) provides: "Special regulations so made may, among other "things,—(*a*) prohibit the employment of, or modify or limit the "hours of employment of, all persons or any class of persons in "connection with any manufacture, machinery, plant, process, "or description of manual labour; or (*b*) prohibit, limit, or "control the use of any material, or process; or (*c*) modify or "extend with respect to any class or description of factory any "provisions of Part I, Part II or this Part of this Act, being "provisions imposing requirements as to health or safety; and "may impose duties on owners, employed persons and other "persons, as well as on occupiers."

The Woodworking Machinery Regulations, 1922, contain the usual preamble which states that the Secretary of State made certain regulations. The preamble continues: "Provided that if

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"the Chief Inspector of Factories is satisfied in respect of any "factory or other place to which these regulations apply that, "owing to the special conditions of the work or otherwise, any "of the requirements of the regulations can be suspended or "relaxed without danger to the persons employed therein, he "may by certificate in writing authorise such suspension or "relaxation for such period and on such conditions as he may "think fit." Under the heading of "Duties" it provides: "It "shall be the duty of the occupier to observe Part I of these "regulations. It shall be the duty of all persons employed to "observe Part II of these regulations." Regulation 9 (*b*) is in these terms: "No person shall be employed at a woodworking "machine unless he has been sufficiently trained to work that "class of machine or unless he works under the adequate super-"vision of a person who has a thorough knowledge of the working "of the machine."

Regulation 10 provides that "every circular saw shall be "fenced as follows . . ." Paragraph (*c*), which is the one relied upon in this case, provides: "The top of the saw shall be covered "by a strong and easily adjustable guard, with a flange at the "side of the saw farthest from the fence. The guard shall be "kept so adjusted that the said flange shall extend below the "roots of the teeth of the saw. The guard shall extend from "the top of the riving knife to a point as low as practicable at "the cutting edge of the saw."

As regards Part II, "Duty of persons employed," rule 23 provides: "Every person employed on a woodworking machine "shall—(i) use and maintain in proper adjustment the guards "provided in accordance with these regulations; (ii) use the "'spikes' or push-sticks and holders provided in compliance "with regulations 11, 14, 18 and 19; except when, owing to "the nature of the work being done, the use of the guards or "appliances is rendered impracticable."

There have been a number of decisions dealing with various regulations which throw some light upon the matter. In *Mulready* v. *J. H. & W. Bell Ltd.*[1] it was held that the duty under the Building (Safety, Health and Welfare) Regulations, 1948, extended to persons who were in the service of a contractor.

Lord Goddard C.J. dealt with a similar question in *Massey-Harris-Ferguson (Manufacturing) Ltd.* v. *Piper.*[2] He said[3]: "Mr. Naylor, who has argued this point with great care, does not "suggest that he can support some of the contentions, but the "point he has taken is that, as this man who was killed "was not employed by the appellants, none of these regulations "apply to him and, therefore, no offence has been committed. "He relied especially for that contention on a decision of the

[1] [1953] 2 Q.B. 117; [1953] 3 W.L.R. 100; [1953] 2 All E.R. 215.

[2] [1956] 2 Q.B. 396; [1956] 3 W.L.R. 271; [1956] 2 All E.R. 722.

[3] [1956] 2 Q.B. 396, 401.

"Court of Appeal in *Hartley* v. *Mayoh & Co.*[4]" I need not deal with that case. The Lord Chief Justice distinguished that case, and then he went on to say[5]: "The test is whether a "person is employed in the factory, not whether he is employed "by the occupier." Having dealt with *Stanton Ironworks Co. Ltd.* v. *Skipper*,[6] Lord Goddard C.J. referred to *Smith* v. *Cammell Laird & Co. Ltd.*[7] and *Mulready* v. *J. H. & W. Bell Ltd.*[8] and said ". . . both in my opinion show quite clearly that the words "'persons employed' in these cases are not limited to persons "who are employed by the factory occupier or owner, but include "men doing work in the factory by whoever they are employed. "I was a party to the decision in *Mulready's* case,[8] and I hope "I made it clear in that judgment that that was the position. It "is not without interest to note that section 60 of the Factories "Act, 1937, was amended by the Act of 1948, so that the words "were made to read 'is of such a nature as to cause risk of "'bodily injury to the persons employed,' perfectly general "words, though in the Act of 1937 those words were qualified "to this extent, that the section before the amendment read "'cause risk of bodily injury to persons employed in connection "'therewith.' This amendment made in 1948 was obviously "intended to widen the scope. I think there is no question "about it that these regulations now are intended to protect, "not only the servants of the factory occupier, but any other "person who may be called on to do work in the factory, such "as sub-contractors. Those are the type of people who par-"ticularly need protection."

Mr. James also cited to me *Herbert* v. *Harold Shaw, Ltd.*,[9] a decision of Streatfeild J., in which he had to consider a point of somewhat similar character. This was whether an independent contractor himself personally came within the scope of the regulation. It is sufficient for me to read one of the passages from his judgment: "Now that was the position and that letter once "more, together with the question of insurance, I think again "is a pointer to Mr. Herbert [the plaintiff] being an independent "contractor. Putting those facts together, as it seems to me "the position in law is this. I do not think that it can be said "on those facts that Mr. Herbert was a person who, being a "craftsman, has entered into, or works under, a contract with "an employer, that being a contract personally to execute any "work or labour. That that was the hope and the expectation "I have no doubt, but that it was the contract I do not think is "proved. For that reason, therefore, I do not think that any "contract of employment, either for service or for services, ever "came into existence, quite apart from their hope and expecta-"tion, and indeed their practice. I think that at all material

[4] [1954] 1 Q.B. 383; [1954] 1 W.L.R. 355; [1954] 1 All E.R. 375.
[5] [1956] 2 Q.B. 401.
[6] [1956] 1 Q.B. 255; [1955] 3 W.L.R. 752; [1955] 3 All E.R. 544.
[7] [1940] A.C. 242; 56 T.L.R. 164; [1939] 4 All E.R. 381.
[8] [1953] 2 Q.B. 117.
[9] Unreported, Nottingham Assizes, June 24, 1958.

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"times Mr. Herbert was carrying on as he preferred to carry "on, namely, as an independent contractor. For those reasons, "therefore, certainly the duties under regulation 4 (1) cannot "possibly apply, and that rules out, therefore, regulations 5 "and 24."

Mr. James also reminded me of the provisions of the Employers and Workmen Act, 1875, which defines "workman" for the purposes of that Act. "The expression 'workman' does "not include a domestic or menial servant, but save as afore-"said, means any person who, being a labourer, servant in "husbandry, journeyman, artificer, handicraftsman, miner, or "otherwise engaged in manual labour, whether under the age "of twenty-one years or above that age, has entered into or "works under a contract with an employer, whether the contract "be made before or after the passing of this Act, be express or "implied, oral or in writing, and be a contract of service or a "contract personally to execute any work or labour."

It is quite clear further that the regulations do apply to persons employed and they are not limited to persons employed by the occupier; they extend to persons employed by an independent contractor.

I turn now to the Act itself. My attention was called to section 26, which provides: "There shall, so far as is reasonably "practicable, be provided and maintained safe means of access "to every place at which any person has at any time to work." The construction of this subsection was considered in *Lavender* v. *Diamints Ltd.*[10] It is a short passage from the judgment of Tucker L.J., who gave the leading judgment. He said[11]: "A "study of sections 12 to 40, which form Part II of the Act of "1937, satisfies me that this part of the Act has not the limited "application contended for by the defendants, but it is sufficient "for present purposes to confine my decision to section 26, the "language of which is, I think, clearly designed to include in its "protection persons working in a factory whether or not they are "directly employed by the occupier."

My attention was also called to section 151, which is the definition of "factory." It provides: "Subject to the provisions "of this section, the expression 'factory' means any premises "in which, or within the close or curtilage or precincts of which, "persons are employed in manual labour in any process for or "incidental to any of the following purposes, namely:—(*a*) the "making of any article or of part of any article; or (*b*) the "altering, repairing, ornamenting, finishing, cleaning, or washing, "or the breaking up or demolition of any article; or (*c*) the "adapting for sale of any article; being premises in which, or "within the close or curtilage or precincts of which, the work "is carried on by way of trade or for purposes of gain and to or

[10] [1949] 1 K.B. 585; 65 T.L.R. 163; [1949] 1 All E.R. 532.

[11] [1949] 1 K.B. 585, 592.

"over which the employer of the persons employed therein has "the right of access or control."

Mr. Brown, for the plaintiff, contended that both the regulations and section 14 are wide enough to cover the case of a gratuitous licensee, and he relies in particular upon the wording of section 14 which, of course, is the section under which he founds his claim, apart from the regulations. [His Lordship read section 14 and continued:] Mr. Brown contended that, generally speaking, the plaintiff could be said to be employed and that at the material time, even if he could not be said to be employed, he certainly was working on the premises. It does seem incongruous that if he had been operating this saw at any time before 4.30, doing work for his employers, undoubtedly they would have owed a duty to him under section 14 and the regulations and he would have been able to found a claim for damages if he had suffered this accident.

On the other hand, if Mr. James is right, at any time after 4.30 when he "clocked-off" no duty rests upon the employers under this section or these regulations. Mr. Brown contended that the words are wide enough to include any person who is employed or legitimately working on the premises.

I find myself, after consideration, unable to accept that interpretation. I do not think myself that the word "working" is wide enough to cover what the plaintiff was doing at the time. Thompson was really pursuing a hobby of his own, making a table for himself, and all the plaintiff was doing was helping him to pursue his hobby. He was a mere volunteer not employed under any contract of service at the time or for services. He was voluntarily helping Thompson to do a private job of his own. The plaintiff was not at that time employed in manual labour; he was voluntarily engaged in manual labour. He was doing it on his own account and not in the course of his employment or for the benefit of his employers. If he could be said to be "working," he was not working under an agreement with the defendants or under any contract of service. I therefore hold that the plaintiff is not within the section or regulations and the defendants owed no duty under section 14 of the Act or the Woodworking Machinery Regulations to the plaintiff at the time he was operating this saw and sustained those injuries. The action therefore fails.

Assuming that the plaintiff had succeeded I should have felt bound to hold that he was guilty of a very serious breach of care to look after himself, to take reasonable care for his own safety, and I should have held him two-thirds to blame and the employers one-third to blame.

Solicitors: *Richards & Flewitt, Nottingham; Brown, Jacobson & Roose, Nottingham.*

[COURT OF APPEAL.]

C. A.

1959
June 22, 23, 24.

Hodson, Sellers and Harman L.JJ.

* BAMPTON *v.* BAMPTON.

Husband and Wife—Divorce—Sodomy—Wife consenting to acts of sodomy—Subsequent intercourse—Whether consent or condonation bar to petition for sodomy.

Husband and Wife—Condonation—Sodomy—Whether condonation bar to petition.

A wife petitioned for divorce, inter alia, on the ground of sodomy committed on her by her husband. The first attempt by the husband to commit sodomy was successfully opposed by the wife, but in the two years after the first attempt the husband committed several acts of sodomy on her. The wife consented to these acts partly because she felt her refusal to agree might imperil the marriage, which she desired to be successful.

The parties had intercourse together after the acts of sodomy, but in September, 1957, after an incident in which the husband went out with two women, the wife left the matrimonial home and petitioned for divorce:—

Held, that consent and condonation were bars to a petition based on sodomy; and since the wife had consented to the sodomy, her petition must be dismissed.

Statham v. *Statham* [1929] P. 131; 45 T.L.R. 127 applied.

APPEAL from Barnard J., sitting at Winchester.

The parties, Doreen Eileen Bampton and Richard William Bampton, were married in 1953 when the wife was 19 and the husband 25. In April, 1955, shortly before the birth of the second child, the husband attempted to commit sodomy on her but that attempt was successfully rejected by her. During the next two years, until August, 1957, the husband committed sodomy on the wife on several occasions with her consent. She consented partly because she felt that the marriage might be imperilled if she refused to agree; she also consented to other forms of sexual perversion. The parties had sexual intercourse together after the sodomy had been committed. On September 10, 1957, the wife left the matrimonial home, the husband having departed for Jamaica in the course of his service as a steward on board a merchant ship. The wife finally left because of her husband's deceit in telling her that he was going to a friend's birthday party when he went out with two women.

The wife petitioned for divorce on the grounds of her husband's cruelty and sodomy. The judge found that there had been no injury or reasonable apprehension of injury to the wife's health, and that she had consented to the sodomy. He therefore dismissed her petition. The wife appealed on the issue of sodomy.

[Reported by NORMAN PRIMOST, Esq., Barrister-at-Law.]

John Thompson Q.C., *E. Terence Read* and *Miss Deborah M. Rowland* for the wife.

Thomas G. Field-Fisher for the husband.

The following cases were cited in argument in addition to those referred to in the judgments: *Curtis* v. *Curtis* [1]; *Marezuk* v. *Marezuk* [2]; *Beard* v. *Beard* [3]; *D. B.* v. *W. B.* [4]; *Davidson* v. *Davidson* [5]; *Lawson* v. *Lawson.* [6]

HODSON L.J. set out the findings of the trial judge and continued: The question which falls for decision is whether the consent of the wife to the act of sodomy as opposed to the cruelty was a bar to her obtaining relief; and, if such consent is a bar, whether it is right to say that there was here a real consent. In considering the second question, the relationship of husband and wife lies in the background. It should be recognised that the relationship of husband and wife being what it is, and the obligations of one to the other being what they are, it is not readily to be taken against a wife in a situation such as exists in this case, especially a young wife, that there has been a real consent. If the same acts were under consideration between two persons not being husband and wife where this relationship did not exist, the presence or absence of consent would have to be considered in a different way.

[His Lordship stated the facts and continued:] Bearing in mind not only the relationship between husband and wife which I have mentioned, but also the fact that there were still other disgusting activities which took place between these two people which the wife, whether she disliked them or not, assented to over a period of time, I feel it impossible to find myself in disagreement with the judge in holding that there was consent—and when I say consent, I mean a real consent. There was no question of consent being compelled by fraud or duress; there was no threat, nothing of that kind. There is nothing in the case, having regard particularly to the number of occasions when this act was successfully achieved, which enables me to form an opinion different from that which the judge, in my view, rightly formed, namely, that there was here the element of consent which would bar the wife's claim to relief.

So far as the law about consent is concerned, the submission made was, first, that consent in itself is no bar, and, secondly, that there was here no real consent. As to the first submission, it was pointed out that in the statute (and indeed in all the statutes relating to this offence) there is no reference to consent. The history of the matter appears from the historical introduction in Rayden on Divorce, 7th ed. (1958), p. 4, that in the

[1] (1859) 4 Sw. & Tr. (Supp.) 234.
[2] [1956] P. 238; [1956] 2 W.L.R. 849; [1956] 1 All E.R. 657.
[3] [1946] P. 8; 61 T.L.R. 555; [1945] 2 All E.R. 306.
[4] [1935] P. 80.
[5] [1953] 1 W.L.R. 387; [1953] 1 All E.R. 611.
[6] [1955] 1 W.L.R. 200; [1955] 1 All E.R. 341.

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ecclesiastical courts divorce a mensa et thoro could be granted on the ground of adultery, cruelty or unnatural offences, and sodomy would be an unnatural offence. When the matter came to be regulated by statute in 1857 [Matrimonial Causes Act, 1857], divorce a vinculo matrimonii was for the first time made available, and the grounds which were open to a wife were these, that the husband had been guilty of adultery coupled with such aggravated enormity as incest, bigamy, rape, sodomy, bestiality, cruelty or desertion without reasonable excuse for two years or upwards. The word "sodomy" appeared in the statute between the words "rape" and "bestiality," which would not involve the relationship of husband and wife; and it may be that the legislature had in mind sodomy committed by the husband with a third party. But there were cases brought by wives on the ground of sodomy with themselves as appears from the decision of Bargrave Deane J. in *C.* v. *C.*,[1] where the point was taken on behalf of the husband that sodomy with a wife was not a matrimonial offence under the provisions of the Act to which I have referred, which related to offences with a third person; and the judge said that within his own knowledge "many decrees have been pronounced in similar cases."

That statement of the law and interpretation of the statute has been accepted, and was accepted in *Statham* v. *Statham*,[2] with which the attention of the court has been much engaged. In that case, there was a charge of sodomy brought by the wife based on sodomy by the husband with herself, and she had succeeded in establishing that charge before a jury. The case went to appeal, and it was argued by Mr. Thompson for the wife in the present case that although in that case the consent, or the presence of consent, was insisted upon as being a bar to the relief claimed by at least two members of the court, those statements were obiter. I cannot accept that view. I think that what happened in the *Statham* case [3] was that the members of the court first considered the question of whether the jury had been properly directed in regard to the necessity of corroboration. That question does not arise in this case. If that had been the only question, and the court had thought there had been an insufficient direction, there would, I think, have been an order for a new trial. But the members of the Court of Appeal were unanimously of the opinion that there should not be a new trial, and that the petition should be dismissed; and amongst their grounds for that view were three matters: first, the want of corroboration, which, as I say, would not probably have been a ground for dismissing the petition, but only relevant on the question of directing a new trial; secondly, the fact that the wife had consented; and thirdly, condonation. As to the second point, Lord Hanworth M.R., perhaps because it was a jury case, did not say that the wife's evidence was conclusive on consent. He

[1] (1905) 22 T.L.R. 26.
[2] [1929] P. 131; 45 T.L.R. 127.
[3] [1929] P. 131.

said[4]: "There is, according to her own story, strong evidence "of consent on the part of the wife." He used the same expression about condonation; and, in considering the question whether there ought to be a new trial, or whether the petition ought to be dismissed, he said[5]: "In view, however, of the evidence of the "consent of the wife to the act at the time, of the distance of "time which separated the act alleged from any charge made in "respect of it, the condonation over a long period of time, the "doubt whether there is any sure evidence on which the reviver "of the charge can be established, the negation of the evidence "of cruelty which was the pretext for separation, and the "abundant opportunity afforded of collecting all the available "and material evidence, I have come to the conclusion that it "would not be right upon this evidence to send the case for a "new trial."

Greer L.J. said[6]: "It seems to me impossible to say that "where two people commit sodomy together, either of them is "entitled to ask the court for a decree based on an act to which "he or she was a party," and the judge cannot shut his eyes to it. He then read some of the evidence which the wife gave in that case, and concluded with these words[7]: "This falls far "short of showing that she did not understand that what she was "consenting to was wrong. She must have known that it was "wrong, improper and unnatural, and she does not venture to "say that she did not. There is no indication of any sort of "duress exercised by the appellant, and it is noteworthy that "when he suggested doing it again, she maintained her refusal "without difficulty. In my judgment, the learned judge ought "to have dismissed the claim for divorce on the ground that the "petitioner was a willing party to the act on which she founded "her claim." The Lord Justice deals with the question of condonation and consent to some extent together, although no doubt he recognised that the question of consent would arise before or contemporaneously with the act charged, and condonation would arise subsequently.

Russell L.J., in his judgment, analysed the wife's evidence, which, he said,[8] made it quite clear "(1) that her husband "explained to her quite plainly the exact physical act which he "wished to do upon her; (2) that she assented and placed her "body at his disposal for the purpose of that act being committed; (3) that no compulsion of any kind was brought to "bear upon her; and (4) that the only reason given by her for "refusing subsequent invitations to a similar act was fear of "pain. It thus appears that the wife was a consenting party "to the only act upon which a decree for divorce could be "founded. It is immaterial whether or not she knew that the "act to which she consented was called sodomy or that it was "a crime. The act was accurately explained to her beforehand,

[4] [1929] P. 131, 139. [5] Ibid. 143. [6] Ibid. 145.
[7] Ibid. [8] Ibid. 156.

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"she must have known that it was against nature, yet she consented of her free will to its commission. In these circumstances it is impossible for her to obtain a decree for divorce based solely upon an act of the husband to which she was a consenting party. The husband is entitled, in my opinion, to have the petition for divorce dismissed."

Part of the ratio of *Statham's* case, in so far as the question to be determined was whether the petition should be dismissed, or whether there should be a new trial, was that the presence of consent was a bar to the wife claiming relief notwithstanding the fact that no words which carry the necessity of showing absence of consent appear in the statute, although it is otherwise where the offence of adultery appears, for the statute provides that connivance (which is consent in advance) is a bar to relief upon the ground of adultery. I think that unless this court could come to a different conclusion upon the facts—which I do not think it can—it is bound by the decision of the Court of Appeal in *Statham* v. *Statham* [9] to support the judge's judgment, and to uphold his dismissal of the petition on that ground.

So far as condonation is concerned, it is not necessary for this court to express any opinion about it. But as the matter has been argued, I think I should mention what the point is in order that it may be understood that I think that the question of condonation is also governed by the decision in *Statham* v. *Statham*. It is said that, although the various Acts of Parliament refer to condonation as a bar to relief where adultery and cruelty are concerned, the wording of the statute is such that if the maxim "expressio unius est exclusis alterius" applies, condonation covers only those matters to which it was expressly directed, and does not apply to sodomy. I think that in view of the decision in *Statham* v. *Statham*—where again condonation was one of the grounds upon which the court came to its conclusion that the petition should be dismissed—that argument is not open. I need not refer to the argument in great detail. Our attention was drawn to a change in the language of the statute since 1857, repeated in the later statute in 1925, which was the actual form of the statute under consideration in the *Statham* case. There is an alteration in the Act of 1937 repeated in the consolidating Act of 1950; but for reasons which I need not enter into, except to say that I have noted it, it does not appear to me that that change in the language of the statute—the omission of the word "adultery" in the first paragraph—really enables the court to say that it can entertain the argument that the change in language enables the court to distinguish the decision in *Statham* v. *Statham*. This decision of the Court of Appeal cannot be treated as a decision given per incuriam, or in circumstances in which, within the principles of *Young* v. *Bristol Aeroplane Co.*,[10] the court can refuse to follow a decision of this

[9] [1929] P. 131.

[10] [1944] K.B. 718; 60 T.L.R. 536; [1944] 2 All E.R. 293.

court. The omission in the relevant statute under consideration of reference to condonation in connection with sodomy was noticed expressly by Greer L.J., who gave the second of the three judgments in *Statham's* case,[11] so there is no question of that point having been passed over per incuriam.

There is no need to pursue the question of condonation further. It was argued on the wife's behalf that, even if there were condonation, there were facts here—grave breaches of conjugal duty on the part of the husband to the wife—which would be sufficient to revive the offence of sodomy if she had established that offence. When the parties separated, the wife was complaining that notwithstanding that she had had a minor operation, and was suffering from the effects of the anaesthetic, the husband insisted on intercourse with her, and that on the night before his departure he went out with another woman, and told her a lie about it when he came back. But those matters were never investigated, and indeed it is not, I think, possible in this court in any event to arrive at the truth about that. It is, I think, significant on the whole case that it was this fact that he had behaved in this callous way towards his wife at the end of their time together when she had this small operation, telling her about going out with another woman, and lying to her about it, which was the thing that finally moved her to depart. That was the principal matter about which she was complaining in the letter which she wrote him after he went to sea, in which she said that she could not go back to him again.

But it is unnecessary for this court to express an opinion about those matters. Her letter shows quite clearly, no doubt, that he told her this lie about going out with this other woman, saying that in fact he had been out with another man; he lied to her, and he does not dispute it, but he does not admit adultery. Whatever proceedings may be open to the wife in the future, I think that this petition was rightly dismissed, and I would dismiss the appeal.

SELLERS L.J. I agree. For the reasons given by my Lord I am of the same opinion that *Statham* v. *Statham*[12] is an authority of this court which is binding upon us in the matters which have been under review here. Its finding that consent to an act of sodomy prevents a wife relying upon it as a matrimonial offence, and also its finding on the question of condonation, I think were matters which were not obiter but were the heart of that decision, particularly in respect of the consideration and decision by all the members of the court as to whether there should be a new trial or not. If *Statham* v. *Statham* is, as I believe it to be, binding on this court in these matters, it was binding on the judge. As I read his judgment, he applies it properly. Notwithstanding the argument which has been

[11] [1929] P. 131, 144.

[12] [1929] P. 131.

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addressed to us by counsel for the wife, I can find no ground for legitimate criticism of the way in which the judge dealt with the facts.

One of the strong points which Mr. Thompson advanced at several stages in the argument was that the motives of the wife were motives which might well affect a wife who felt a duty and obligation towards her husband, and a desire to retain him on some sort of matrimonial basis and to make the marriage work. Whether it be the right view to take or not that the motives might be said to be excusable or understandable, what they do clearly establish is that for reasons which the wife thought good, she did eventually consent to not one but several acts of this type of intercourse which is the very basis of her claim. I think that the facts completely negative, and indeed there is no suggestion of, any force or threat.

HARMAN L.J. I see no way out of the position already stated by my Lords that as long as the decision in *Statham* v. *Statham* stands, as it does, consent and condonation are bars to a decree of divorce on the ground of sodomy. The evidence of consent here seems to me a great deal stronger than it was in *Statham's* case; and if that be so, for this court it is an end of the matter whatever one might think if the question were res integra. In that event, I think it might be at least a tenable argument that as the statute of 1950 and its predecessors say nothing about consent or condonation in this particular connection, they should be no bar. It may well be that the whole difficulty arises out of a misreading of the statute of 1857 and of its successors, and that sodomy in the context in which it appears means sodomy with a third party, sodomy with the wife being left among acts of cruelty which can of course be condoned. If one is bound after so long a time to hold that sodomy on the body of the wife herself is a separate act justifying divorce, then I think the bars of condonation and consent are judge-made additions. For when one looks at section 4 of the Act of 1950, I cannot but think that condonation is expressly left out as a bar to this particular cause of action.

These, however, are mere speculations. We must stand by *Statham* v. *Statham*, and that is conclusive in my judgment in the present case.

Appeal dismissed with costs.
Order for costs not to be enforced without leave of Court of Appeal.
Leave to appeal to House of Lords.

Solicitors: *Booth & Blackwell for Brutton, Birkett & Walsh, Portsmouth; Amphlett & Co., for Donelly & Elliott, Gosport.*

[COURT OF CRIMINAL APPEAL.]

* PRACTICE NOTE (PRISON COMMISSIONERS' REPORT).

C. C. A.

1959
June 29.

Lord Parker C.J., Slade and Winn JJ.

Criminal Law—Practice—Report on prisoner—Prison Commissioners' report—Record of copy having been handed to prisoner—Proper time for handing of copy—Criminal Justice Act, 1948 (11 *&* 12 *Geo.* 6, *c.* 58), *ss.* 20 (8), 21 (5).

LORD PARKER C.J. The court is finding over and over again that it is impossible to tell from the transcript in any particular case whether the Prison Commissioners' report has ever been handed to the prisoner or his counsel: see sections 20 (8) and 21 (5) of the Criminal Justice Act, 1948.[1] Even when subsequent inquiries are made, it is difficult to find out what happened. The court thinks that the handing of a copy should be a routine matter, and that it should be accompanied by some oral observation, such as: "I now hand you the report," which will appear on the transcript. The proper time for doing this will be after the notices of previous convictions have been proved, and this indeed was stated to be the proper course by Lord Goddard C.J. in *Reg.* v. *Dickson.*[2]

J. D. P.

[1] Criminal Justice Act, 1948, s. 20: "(7) Before a sentence of Borstal "training is passed . . . , the court "or committee shall consider any re-"port or representations made by or on "behalf of the Prison Commissioners "on the offender's physical and "mental condition and his suitability "for the sentence; . . . (8) A copy of "any report or representations in "writing made to a court or appeal "committee by the Prison Commis-"sioners for the purposes of the last "foregoing subsection shall be given "by the court or committee to the "offender or his counsel or solicitor."

S. 21: "(4) Before sentencing any "offender to corrective training or "preventive detention, the court shall "consider any report or representa-"tions which may be made to the "court by or on behalf of the Prison "Commissioners . . . (5) A copy of "any report or representations in "writing made to the court by the "Prison Commissioners for the pur-"poses of the last foregoing subsection "shall be given by the court to the "offender or his counsel or solicitor."

[2] [1950] 1 K.B. 394; 65 T.L.R. 749; [1949] 2 All E.R. 810.

[PROBATE, ETC., DIVISION.]

* WATTS *v.* WATTS.

1959
June 3, 4.

Sachs J.

Husband and Wife—Practice—Service of petition—Service on infant personally—No service on father or guardian—Service deemed good service—Matrimonial Causes Rules, 1957 (*S.I.* 1957, *No.* 619 (*L.*4)), *r.* 66 (3).

A petition for divorce on the ground of adultery was served by post upon a woman named, who was not known by the petitioner's advisers to be an infant until application was made to expedite

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the decree absolute in view of the woman named's pregnancy. Application was accordingly made that the service be deemed good service, a course with which the infant's father, who was given leave at the hearing of the summons to enter appearance, associated himself:—

Held, that since it was in the interests of the infant that the proceedings should continue as if there had been proper service upon her in the first place, and in view of the evidence given to that effect by the father, after he had been given leave to enter appearance on her behalf, the service should be deemed good service under the proviso to rule 66 (3) of the Matrimonial Causes Rules, 1957.[1]

SUMMONS (adjourned into court).

The petition in this suit for divorce upon the ground of adultery was served on the woman named by registered post in March, 1959, and she signed and returned the acknowledgment of service. On May 12, 1959, the wife was granted a decree nisi, and by reason of the advanced pregnancy of the woman named, whom the husband wished to marry, application was made for the expedition of the decree absolute. After notice of this application had been given to the Queen's Proctor, it was learnt for the first time by the wife's advisers that the woman named was an infant. Since the normal appropriate procedure for service upon an infant had accordingly not been complied with, application was made to the court to rectify the position if possible. The father of the woman named attended court after an adjournment to enable him to do so, and after being given leave to enter an appearance as guardian ad litem was allowed to give oral evidence that he knew on the day of service that his daughter had been served, and that he wished for any irregularity to be waived.

M. P. Picard for the wife.

The infant's father as guardian ad litem (after being given leave to enter appearance at the hearing) in person.

The following cases were referred to in argument, in addition to those cited in the judgment: *Gore-Booth* v. *Gore-Booth*[2]; *Roberts* v. *Roberts*[3]; *Thatcher* v. *Thatcher*[4] (as an example of taking a proper course which would save costs). It was observed by his Lordship that *Roberts* v. *Roberts and Peters*[3] turned on the court's power to rescind a decree nisi, no application having

[1] Matrimonial Causes Rules, 1957, r. 66 (3): "Where service of any "document in a cause to which these "rules apply is required to be effec-"ted on an infant, the document "shall, unless otherwise directed, be "served on the father or guardian of "the infant or, if he has no father "or guardian, on the person with "whom he resides or under whose "care he is, and service so effected "shall be deemed good service on "the infant, so however that a "registrar may order that service "effected or to be effected on the in-"fant shall be deemed good service."

[2] [1954] P. 1; [1953] 3 W.L.R. 602; [1953] 2 All E.R. 1000.

[3] [1959] 1 W.L.R. 663; [1959] 2 All E.R. 209.

[4] [1959] 1 W.L.R. 730; [1959] 2 All E.R. 649.

been made to apply the proviso to rule 66 (3) of the Matrimonial Causes Rules, 1957.

SACHS J. In this case, by some inadvertence, the woman named (an infant) was herself served with the petition, although she was then only aged 17 and living in her father's home. The person who ought properly to have been served, under the provisions of the Matrimonial Causes Rules, 1957, r. 66 (3) was the father himself. The fact that the service had not properly been effected escaped notice until the Queen's Proctor very properly called attention to it when asked whether he had any objection to the making of the decree absolute being expedited.

Service on the woman named is mandatory (compare *Stanga* v. *Stanga* [1]), and the effect of failing to comply with the provisions of rule 66 (3) involves serious consequences, for the simple reason that the purported service on the daughter in the present case was a nullity.

Application is now made to rectify the position, and the court has been asked to do this by virtue of the concluding words of the sub-rule which I have just mentioned, which provide that service effected on the infant may be ordered to be deemed good service. Those concluding words I will refer to as the "proviso" to the sub-rule in question.

A number of authorities were helpfully cited to me by Mr. Picard, including *Levy* v. *Levy*,[2] in which both parties were infants, both were represented by counsel in court, and both asked that the proviso be applied. The Divisional Court acceded to that request in relation to the service which had been effected on the infant respondent personally, instead of on a parent or guardian ad litem.

In the interests of infants and persons of unsound mind the importance of guarding jealously the protection given by rule 66 has more than once been stressed in these courts. No less important in the interests of all concerned on questions of status is the need to ensure on the face of the court's record that the procedure followed has been such that it cannot be questioned.

It seems to me that in a case such as the present the court should ensure, if practicable, that it has appropriate evidence from a parent or other guardian ad litem that either it is agreed in the interests of the infant that the proceedings should continue as if there had been proper service in the first place, or, alternatively, that there is no valid objection to this course. Moreover, it is desirable that whoever speaks for the child should enter an appearance so as to be able to speak directly to the

[1] [1954] P. 10; [1953] 3 W.L.R. 609; [1953] 2 All E.R. 16.

[2] [1957] 1 W.L.R. 369; [1957] 1 All E.R. 478. (The ruling was made by the Divisional Court on an appeal from a magistrates' court in a case where service of the documents relating to the appeal had not been served upon the respondent husband.)

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Sachs J.

court and, as I have indicated, be on the record for that purpose. Evidence on such a point can, of course, normally be given on affidavit and, by leave, arrangements can be made for an appearance in the terms of Form 12 to be entered: such appearance may be unconditional where it is properly desired that the proceedings continue. In this way the matter can proceed in a prompt and inexpensive fashion.

In the present case, owing to doubts as to what was the correct procedure, no affidavit was filed, but the father was in court so that he could be referred to if the urgency of the matter so demanded. As it is desirable that this decree nisi should be followed by a decree absolute as soon as possible if the technicalities of the situation permit, I allowed the father's evidence to be given orally and ascertained that he had had the benefit of the advice of a solicitor. He stated, first, that he already knew that his daughter had been "served" with the petition in this cause on the day that such purported service was effected; secondly, that in his own view it was in the interests of his daughter that the cause should proceed as an undefended matter and that that had always been his opinion; and, thirdly, that if he were now served with the proceedings, he would be prepared to enter an appearance and to waive all objections to any prior absence of proper service.

In those circumstances it was arranged that he should by leave enter a general and unconditional appearance, and this has now been done. He has since then repeated that he desires any irregularity or lack of proper service in the past to be waived in so far as he is entitled so to waive it. His above unconditional appearance may well, of itself, constitute a waiver and so cure the situation, but to make things completely sure I propose to make an order in the terms of the proviso of rule 66 (3). That having been done, I further order that the decree be made absolute subject to there being any objection from the Queen's Proctor [who had been informed of the present application] within the next 24 hours, with the usual undertaking to pay the costs of the Queen's Proctor, such costs to be costs in the cause.

Order accordingly.

Solicitors: *Attwater & Liell.*

J. B. G.

[COURT OF APPEAL.]

*WAGMAN v. VARE MOTORS LTD.

C. A.

1959
July 9, 10.

Morris, Ormerod and Willmer L.JJ.

Costs—Payment into court—Exact sum awarded—Exercise of discretion—Reason for departure from "normal rule" that judge thought of awarding more—Leave to appeal refused—Jurisdiction of Court of Appeal to hear appeal—Supreme Court of Judicature (Consolidation) Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 49), *s.* 31 (1) (*h*)—*R.S.C., Ord.* 22, *r.* 6.

The plaintiff brought an action for damages for personal injuries suffered by him in a road collision. The defendants denied negligence, and on August 18, 1958, paid into court the sum of £575. Medical reports were agreed in September, and in October, after a two-hour hearing on the limited issue of damages, the judge awarded the plaintiff, by way of special and general damages, a total of £575. He was told that that was the amount paid into court and that he had a discretion as to costs under R.S.C., Ord. 22, r. 6.[1] The defendants asked for costs after the date of payment in, but the judge ordered that the plaintiff should have his costs up to the date of payment in and that thereafter there should be no order as to costs. He gave his reasons as follows: "I take into account the fact that the sum of £575 has "been paid into court; I take into account in—I am certain—my "discretion the fact that I was not at any material time giving "less than that sum and was wondering about another £25." He refused leave to the defendants to appeal against his order.

The defendants appealed, and the plaintiff cross-appealed against the amount of damages awarded. The court dismissed the plaintiff's appeal. A preliminary objection was taken on the defendants' appeal that an appeal as to costs only, without the leave of the judge, was precluded by section 31 (1) (*h*) of the Supreme Court of Judicature (Consolidation) Act, 1925[2]:—

Held, (1) that the preliminary objection failed, for it was always possible to appeal without the leave of the judge, where it could be shown that his discretion had never really been exercised.

(2) That the reason given by the judge for exercising his discretion as he did, namely, that he had thought of giving a larger sum than he had eventually awarded, was not a valid reason for any exercise of a discretion and was a purported exercise of the discretion without any materials on which it could be exercised; and, accordingly, the defendants as the successful party in this action should have their costs after the date of payment in.

[1] R.S.C., Ord. 22, r. 6: "Except "in an action to which a defence of "tender before action is pleaded or "in which a plea under the Libel "Acts, 1843 and 1845, has been filed, "no statement of the fact that money "has been paid into court under the "preceding rules of this order shall "be inserted in the pleadings and no "communication of that fact shall at "the trial of any action be made to "the judge or jury until all questions "of liability and amount of debt or "damages have been decided, but the "judge shall, in exercising his discretion as to costs, take into account "both the fact that money has been "paid into court and the amount of "such payment."

[2] Supreme Court of Judicature (Consolidation) Act, 1925 (15 & 16 Geo. 5, c. 49), s. 31 (1): "No appeal "shall lie . . . (*h*) without the leave "of the court or judge making the "order, from an order of the High "Court or any judge thereof made "with the consent of the parties or as "to costs only which by law are left "to the discretion of the court."

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Dictum of Lord Greene M.R. in *Hong* v. *A. & R. Brown* [1948] 1 K.B. 515, 517; [1948] 1 All E.R. 185; sub nom. *Hong* v. *Brown & Runcimans*, 64 T.L.R. 132; *Donald Campbell & Co. Ltd.* v. *Pollak* [1927] A.C. 732; and *Findlay* v. *Railway Executive* [1950] W.N. 570; 66 T.L.R. (Pt. 2) 836; [1950] 2 All E.R. 969 applied.

Order of Thesiger J. as to costs varied.

APPEAL from Thesiger J.

On June 8, 1956, the plaintiff, Louis Wagman, while travelling as a passenger in a motor-vehicle, suffered personal injuries as a result of a road collision with the defendants' vehicle. He brought an action by writ dated October 28, 1957, and delivered his statement of claim on December 4, 1957. The defence was delivered on January 27, 1958, and by it the defendants denied that they or their agents were guilty of the alleged or any negligence. They claimed that the collision was caused by an inevitable accident, and made no admissions as to loss, injury or damage, with a general denial in regard to the statement of claim. On the same day their professional advisers wrote a letter stating that "notwithstanding the denial of negligence "contained in our clients' defence, on the hearing of the action "the question of negligence will not be contested and therefore "the only issue which will have to be dealt with by the judge "will be that of damages." On March 28, 1958, on the order for directions, an order was made that a medical report be agreed if possible, and if not agreed, that medical evidence should be limited to three doctors for each party. On August 18, 1958, the defendants paid into court the sum of £575.

The plaintiff had been examined by doctors on many occasions and on September 30, 1958, his solicitors submitted four medical reports to the defendants' solicitors. Those were agreed on October 3, 1958. It was not in dispute that the plaintiff's principal injuries were the result of his being involved in the motor accident.

The case came on for trial before the judge on October 16, 1958. The issues being narrowed in the way set out above, the trial did not occupy the time of the court for longer than about two hours. The judge considered all the matters before him and then gave judgment. In the result he fixed the amount of general damages at £375. In regard to the special damage, the statement of claim had contained a number of quantified items which in total came to over £430. At an early stage after the trial was opened, the plaintiff abandoned two large items of special damage which together amounted to £195. That left items to a total of something over £230, and in the result the judge awarded £200, making the total damages £575.

When that figure was announced leading counsel then appearing for the plaintiff informed the judge that that amount was to a penny the amount in court. He said: "Your Lordship has "a discretion about costs," and he referred to what the judge had said in regard to parts of the physical injuries, for the judge

had divided the £375 general damages by reference to particular physical injuries.

The judge was then asked to deal with the question of costs, the defendants asking that they should have costs as from the date of the payment into court.

In the discussion which followed, the judge at first commented that he was inclined to think that the proper order would be no order as to costs as from the date of payment in, stating that rather a lot of time had been taken up in court by challenges on points which had not impressed him, but that in any case he thought that he had a discretion under R.S.C., Ord. 22, r. 6, as to costs. Finally, the judge made his order, namely, that the plaintiff should have judgment for £575 with costs down to the date of the payment into court but that there should be no order as to costs from that date—August 18. He said: "I take into "account the fact that the sum of £575 has been paid into court; "I take into account, in—I am certain—my discretion, the fact "that I was not, at any material time, giving less than that sum "and was wondering about another £25; and in all the circum-"stances I think that the proper course is to make no order as "to costs."

The defendants sought leave to appeal from that order, but the judge refused leave. The defendants thereupon appealed on the grounds that the judge, in purporting to exercise his discretion on costs (1) failed to act judicially; (2) went wrong in principle when, in purporting to exercise his discretion, he took into account the possibility that he might have awarded the plaintiff a sum greater than that which the defendants had paid into court; (3) failed to exercise his discretion at all; (4) deprived the defendants of their costs of the action after the date of payment into court, although taking into account the facts that the sum paid in was equal to the sum awarded to the plaintiff, that the defendants had admitted negligence on January 28, 1958, and that the defendants were a successful party in the action and entitled to their costs from the date of payment into court.

The plaintiff thereupon filed a cross-notice of appeal submitting that the award of the judge was much too low. The two appeals came on together for hearing, and the Court of Appeal heard and dismissed the plaintiff's appeal before hearing the defendants' appeal against the order as to costs.

The appeal on the order in regard to costs was then heard.

Martin Jukes Q.C. and *Bernard Caulfield* for the defendants.
Stephen Chapman Q.C. and *Alan de Piro* for the plaintiff.

The following cases were cited in argument: *Findlay* v. *Railway Executive*[3]; *Griggs* v. *Petts*[4]; *Civil Service Co-operative*

[3] (1950) 66 T.L.R. (Pt. 2) 836; [1950] 2 All E.R. 969.

[4] [1940] 1 K.B. 198; 56 T.L.R. 7; [1939] 4 All E.R. 39.

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Society v. *General Steam Navigation Co.*[5]; *Young* v. *Thomas*[6]; *Donald Campbell & Co. Ltd.* v. *Pollak*[7]; *Ritter* v. *Godfrey*[8]; *Hong* v. *A. & R. Brown and Runciman*[9]; *Brown* v. *New Empress Saloons Ltd.*[10]

MORRIS L.J. stated the facts as set out above and continued: When the hearing of the appeal began, Mr. Chapman submitted that it was not open to the defendants to appeal. Costs were, of course, in the discretion of the judge. It is unnecessary to read the words of section 50 of the Supreme Court of Judicature (Consolidation) Act, 1925, and the provisions of R.S.C., Ord. 65, r. 1. Mr. Chapman relied on the statutory provision contained in section 31 (1) (*h*) of the Supreme Court of Judicature (Consolidation) Act, 1925, which reads: "No appeal shall lie . . . "(*h*) without the leave of the court or judge making the order, "from an order of the High Court or any judge thereof made "with the consent of the parties or as to costs only which by law "are left to the discretion of the court." The defendants asked the judge for leave to appeal in regard to costs but the judge did not give leave. Mr. Chapman, therefore, submits that the words of section 31 (1) (*h*) are directory and preclude the prosecution of this appeal.

This topic in regard to appeals as to costs has been before the courts on many occasions and I think that I can in the first place usefully refer to the opening passage in the judgment of Lord Greene M.R. in this court in *Hong* v. *A. & R. Brown Ltd.*[1] in which in this court a preliminary objection was taken that an appeal as to costs only could not be brought, having regard to the provision of the Judicature Act, without the leave of the judge. Lord Greene began his judgment thus[2]: "This is an "appeal on a matter of costs only. Such an appeal cannot be "brought without the leave of the court or judge by reason of "section 31 (1) (*h*) of the Judicature Act, 1925. The statement "that such an appeal cannot be brought 'without the leave of "'the judge' requires this qualification; that, in as much as "the costs are in the discretion of the judge, it is always possible "to attack his order if it can be shown that the discretion has "never really been exercised. In that expression I would in-"clude two matters, each of which nullifies the purported exercise "of a judicial discretion. One matter is the failure to act as a "judge should act, that is to say a failure to act judicially; the "other is what is really a branch of the same thing, namely, "the purported exercise of the discretion without any materials "on which a judge could exercise it."

[5] [1903] 2 K.B. 756; 20 T.L.R. 10.
[6] [1892] 2 Ch. 134.
[7] [1927] A.C. 732.
[8] [1920] 2 K.B. 47; 36 T.L.R. 144.
[9] [1948] 1 K.B. 515; 64 T.L.R. 132; [1948] 1 All E.R. 185.
[10] [1937] W.N. 156; [1937] 2 All E.R. 133.
[1] [1948] 1 K.B. 515; 64 T.L.R. 132; [1948] 1 All E.R. 185.
[2] [1948] 1 K.B. 515, 517.

We were naturally referred to many passages in the speeches of their Lordships in *Donald Campbell & Co.* v. *Pollak*.[3] Lord Dunedin, for example, in his speech said[4]: "The position under "the Judicature Act of the Court of Appeal is very peculiar. "When an appeal comes to them as to costs awarded by the "discretion of a judge, they cannot exercise their discretion "instead of his unless leave to appeal from his order as to "costs has been given by him. By a long series of decisions "the Court of Appeal has held that that does not prevent them "upsetting what the judge has done if they can find that he "had no proper materials on which his discretion was exercised." Lord Sumner said[5]: "I should also like to point out, what I "think may be very important in any further proceedings, that "I do not understand your Lordships to pronounce any con-"clusion as to the validity of the practice, long as it has prevailed "in the Court of Appeal, of entertaining appeals from a judge "below, brought without his leave, against the exercise of his "discretion as to costs when sitting without a jury."

I think I need only additionally refer to a short passage in the speech of Viscount Cave L.C.[6] He quoted what Lord Sterndale M.R. had said in *Ritter* v. *Godfrey*[7]: "'This was a case "'tried without a jury before the judge alone, and therefore in "'the absence of an order by him neither party is entitled to "'any costs. It therefore differs from a case tried before a jury, "'where there is a statutory right to costs if there be no order "'to the contrary. But there is such a settled practice of the "'courts that in the absence of special circumstances a successful "'litigant should receive his costs, that it is necessary to show "'some ground for exercising a discretion by refusing an order "'which would give them to him. The discretion must be "'judicially exercised, and therefore there must be some grounds "'for its exercise, for a discretion exercised on no grounds cannot "'be judicial. If, however, there be any grounds, the question "'of whether they are sufficient is entirely for the judge at the "'trial and this court cannot interfere with his discretion. On "'the authorities as they now stand the line between cases tried "'before a jury and cases tried by a judge is very fine.'"

The Lord Chancellor went on to say this[8]: "My Lords, it "appears to me that the true view is substantially that taken "by Lord Sterndale in the above quoted passage in his judgment "in *Ritter* v. *Godfrey*,[9] although I would express it in somewhat "different language. A successful defendant in a non-jury case "has no doubt, in the absence of special circumstances, a reason-"able expectation of obtaining an order for the payment of his "costs by the plaintiff; but he has no right to costs unless and "until the court awards them to him, and the court has an

[3] [1927] A.C. 732.
[4] [1927] A.C. 732, 757.
[5] Ibid. 765.
[6] Ibid. 809.
[7] [1920] 2 K.B. 47.
[8] [1927] A.C. 732, 811.
[9] [1920] 2 K.B. 47.

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"absolute and unfettered discretion to award or not to award "them. This discretion, like any other discretion, must of course "be exercised judicially, and the judge ought not to exercise it "against the successful party except for some reason connected "with the case. Thus, if—to put a hypothesis which in our "courts would never in fact be realised—a judge were to refuse "to give a party his costs on the ground of some misconduct "wholly unconnected with the cause of action or of some pre-"judice due to his race or religion or (to quote a familiar illustra-"tion) to the colour of his hair, then a Court of Appeal might "well feel itself compelled to intervene. But when a judge, "deliberately intending to exercise his discretionary powers, has "acted on facts connected with or leading up to the litigation "which have been proved before him or which he has himself "observed during the progress of the case, then it seems to me "that a Court of Appeal, although it may deem his reasons "insufficient and may disagree with his conclusion, is prohibited "by the statute from entertaining an appeal from it."

Having regard to those various passages, it seems to me that we should follow what Lord Greene M.R. said, and the issue is whether, Mr. Martin Jukes can in this case bring his submission within those words. Mr. Chapman indicated that there might be some occasion on which somebody might wish to obtain a pronouncement in the highest tribunal, but it seems to me that we must follow what Lord Greene said.

That being so, the question arises: what was the position before the judge? He, of course, did not know about the payment into court until he had given judgment. When he was told of it, then by the provisions of R.S.C., Ord. 22, r. 6, he was required, in exercising his discretion as to costs, to take into account both the fact that money had been paid into court and the amount of such payment. There was some discussion before the judge after he was told of the payment into court. At an early stage in the discussion the judge said: "I am inclined to "think the proper order would be no order as to costs"—that meant as from the date of payment in. "Rather a lot of time "has been taken up in court by challenges on points that I have "not been impressed by, but in any case I think I have a dis-"cretion in this case, have I not?" I have referred to the position in regard to the special damage and the way in which the figure was eventually fixed. The judge was not saying that there was any improper challenge; nor does a reading of the quite short transcript suggest that there was any line taken on which adverse criticism could be made. There followed further discussion, and finally, counsel having said to him that plainly there was a discretion, the judge said: "I take into account the "fact that the sum of £575 has been paid into court; I take "into account, in—I am certain—my discretion, the fact I was "not, at any material time, giving less than that sum and was

"wondering about another £25; and in all the circumstances I "think that the proper course is to make no order as to costs."

We were referred by Mr. Chapman to *Brown* v. *New Empress Saloons Ltd.*,[10] which arose before the rule as to payment in was altered to its present form. Slesser L.J. in giving his judgment said that he agreed with the comment in the Annual Practice that the question whether liability was or was not denied when the payment in was made would still seem to be important. Lord Greene, then Greene L.J., ended his judgment in these words[11]: "I agree that, on the facts of this case, it is not "possible for us to say that, in exercising that discretion, he "omitted to take into account matters which he ought to have "taken into account, or that he exercised it on some improper "ground, or with a complete absence of ground."

A helpful authority to have in mind is a recent case in this court, *Findlay* v. *Railway Executive*.[12] The headnote is helpful: "In an action for damages, brought by the plaintiff in respect "of personal injuries which she had suffered in a railway accident, "the defendants admitted liability and paid money into court. "At the trial the plaintiff recovered a less amount than had been "paid in. The judge gave the plaintiff the costs, notwithstanding "the payment into court of a sum in excess of the amount of "damages awarded. He gave no reason for penalising the defen-"dants in costs, considering that the matter was in his absolute "discretion. On appeal, *Held*: a defendant who has paid money "into court which exceeds the sum awarded to the plaintiff is a "'successful party' within the meaning of the principle laid "down by Viscount Cave L.C. in *Donald Campbell & Co. Ltd.* "v. *Pollak*[13] and is entitled to be paid his costs as from the "date of payment in."

Somervell L.J., in his judgment, referred to the speech of the Lord Chancellor in *Donald Campbell & Co. Ltd.* v. *Pollak*[13] and his citation of *Ritter* v. *Godfrey*,[14] and then said[15]: "The "first point to be decided here is whether a defendant who has "paid money into court which has not been taken out and "exceeds the sum awarded to the plaintiff is a successful litigant "or a successful party within those two statements of the law. "I hold that he is, and that the principles there laid down apply. "The main purpose of the rules for payment into court is the "hope that further litigation will be avoided, the plaintiff being "encouraged to take out the sum paid in, if it be a reasonable "sum, whereas, if he goes on and gets a smaller sum, he will "be penalised wholly or to some extent in costs. Once, there-"fore, the money has been paid in, the lis between the parties "simply is: Is that sum sufficient to cover the damage which "has been suffered? Prima facie, therefore, the defendants in

[10] [1937] W.N. 156; [1937] 2 All E.R. 133.
[11] [1937] 2 All E.R. 133, 138.
[12] (1950) 66 T.L.R. (Pt. 2) 836; [1950] 2 All E.R. 969.
[13] [1927] A.C. 732, 809, 811.
[14] [1920] 2 K.B. 47.
[15] [1950] 2 All E.R. 969, 971.

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"the present case are entitled to be paid their costs as from "the date of payment in, but, of course, as in other cases, there "may be circumstances connected with the case which entitled "the judge to make some order other than that of giving the "successful litigant his costs, and counsel for the plaintiff sub-"mitted that there were such circumstances in this case." Then the Lord Justice referred to those submissions and he ended: "If I am right in holding that the defendants in the circum-"stances of this case are the successful litigants or parties then, "on what I have read from the opinion of Viscount Cave L.C. "in the House of Lords, the judge went wrong in principle, and "his order cannot stand, and this appeal must be allowed."

Cohen L.J. said[16]: "I am of the same opinion. Counsel "for the plaintiff urged that, on the authorities, we should not "interfere with the judge's exercise of his discretion unless either "there was no material on which he could have reached the "conclusion he did, or it was plain on the evidence and from "his judgment that he had gone wrong in principle in reaching "that conclusion."

I propose to approach this case by considering whether, within the words used by Lord Greene M.R. there was a purported exercise of the discretion without any materials on which that discretion could be exercised. It seems to me quite plain in this case that although the judge naturally did not know of the payment in, the real issue between the parties ever after August 18, 1958, was whether £575 was or was not the right sum for the plaintiff to receive. After that date the plaintiff could have had £575. The plaintiff decided to go on with the litigation in the hope of getting more. The plaintiff was unsuccessful in his endeavour, but at all times since August 18 he could have had the amount that was awarded by the judge. The defendants, therefore, were successful on the issue that was being contested before the judge.

Was there then any ground upon which the judge could exercise his discretion as he did? I have read the earlier passage in which the judge had said that he had not been impressed by some challenges in regard to the special damage. If the judge had wanted to follow up that matter it could only have meant that to some very small extent he might have made some special order. Sometimes a judge may say that the costs of a particular document are not to be allowed because it was wholly unnecessary. If the point referred to had remained within the judge's real consideration, it is conceivable that he might have said that some very very small part of the costs should be specially awarded to the plaintiff. But I do not read the transcript as denoting that that matter was operative in the judge's mind. What he said was that he took into account, in his discretion, the fact that he had never thought of giving less than £575 but that in his mind there had been times when he had thought of giving more than

[16] [1950] 2 All E.R. 969, 971.

that amount. This shows the great care that the judge devoted to the matter, but, with the utmost respect, I do not feel able to accept the view that that reason is any valid reason for the exercise of a discretion. The judge thought over the matter and he came to his conclusion, to which he adhered, that £575 was the right amount. It cannot in my judgment be a good basis for any exercise of discretion to say that possibly a larger amount might have been awarded. It seems to me, therefore, that, on any showing, such a consideration could not properly be a component element of any exercise of discretion. In this case that appears to have been the operative reason for the exercise of discretion in the way in which it was exercised. That operative reason when analysed contains no substance. I think, therefore, that Mr. Martin Jukes does bring this case within the words of Lord Greene and that here was a purported exercise of the discretion without any materials upon which it could be exercised.

We asked Mr. Chapman whether, if we were of that opinion, he would want the matter to go back to the judge for an order to be made, but Mr. Chapman said that it would be appropriate for us to deal with the matter.

For the reasons that I have given it seems to me that we must disturb the decision of the judge and that we should say that in this case the costs after the date of payment in should be the costs of the successful party, namely, the defendants.

ORMEROD L.J. I am in full agreement with the reasons which have been given by my Lord, and although we are differing from the judge, I feel there is nothing that I can usefully add in this case.

WILLMER L.J. I also agree.

Judgment for the defendants for costs from August 18, 1958, *and the costs to be set off.*
Appeal allowed with costs.
Cross-appeal dismissed with costs.

Solicitors: *Ponsford & Devenish, Tivendale & Munday; R. I. Lewis & Co.*

M. M. H.

[COURT OF APPEAL.]

1959
July 9.

Lord Evershed M.R., Sellers and Harman L.JJ.

* SPYROPOULOS *v.* McCLELLAND.

PRACTICE NOTE.

[Plaint No. 01824.]

Landlord and Tenant — Rent restriction — Costs — Court of Appeal — Jurisdiction to make order for costs—Landlord and Tenant (Temporary Provisions) Act, 1958 (6 *&* 7 *Eliz.* 2, *c.* 68), *s.* 4 (2).
Court of Appeal—County court—Appeal from—Costs—Jurisdiction—Rent restriction.

APPEAL from Judge Blagden, sitting at Westminster County Court.

A landlord of a flat, which became decontrolled by section 11 (1) of the Rent Act, 1957, offered a new tenancy agreement to the tenant under which there was a prohibition against taking in lodgers or paying guests. The tenant, an old age pensioner, had supplemented her pension by taking in student nurses as paying guests. The landlord therefore agreed to permit the tenant to take in three student nurses, but this concession or "gentlemen's agreement" was stated to be made "without "prejudice to the written agreement between the parties, that "is to say, that it will not be legally binding . . ." The tenant refused to accept the tenancy proposal. The landlord claimed possession of the flat, and the tenant applied for a suspension of execution under the provisions of the Landlord and Tenant (Temporary Provisions) Act, 1958.[1]

The judge found that the tenant had not been unreasonable in refusing to accept the original tenancy proposal, but he found that the landlord's concession had converted the proposal into a reasonable one and the tenant had then acted unreasonably in failing to accept the tenancy agreement. He, therefore, dismissed the tenant's application. The Court of Appeal held that, since the landlord's purported concession was a nullity and of no legal effect, it should be disregarded. The appeal was, accordingly, allowed and the tenant granted a suspension of execution of the order for possession for nine months from the date of the hearing in the county court.

Henry C. Pownall for the tenant.
Norman Wiggins for the landlord.

[Reported by NORMAN PRIMOST, Esq., Barrister-at-Law.]

[1] Landlord and Tenant (Temporary Provisions) Act, 1958, s. 4: "(2) "In proceedings for the recovery of "possession of a dwelling-house in "which a suspension of execution is "granted or refused under section "three of this Act (including any "application under that section aris-"ing out of the grant of such suspen-"sion) the court shall not have power "to make an order for costs . . ."

On the question of costs, the following submission was made.

Norman Wiggins. Section 4 (2) of the Act of 1958 enacts that in cases under the Act "the court shall not have power to "make an order for costs" except in special cases. That subsection precludes an order for costs being made against the unsuccessful landlord in the present case. In proceedings under this Act, a landlord has to obtain an order for possession. Therefore in the wisdom of the legislature it has been enacted that there should be no order for costs. It is a matter of trying to sort out a problem between two parties who are equally poised. In the present case, there should be no order as to costs.

LORD EVERSHED M.R. "The court" referred to in section 4 (2) of the Act of 1958 is the court of first instance, and it does not refer to the Court of Appeal. The Act is providing an exception to the general rule about costs and must be restricted to the case with which it is dealing. If the words "the court" included the Court of Appeal, we could suspend the execution of the order for possession for nine months from the date on which the appeal is allowed. But it has been undisputed that we can only allow a suspension from the date of the judge's order. Nothing in the Act of 1958 affects the powers of the Court of Appeal as to costs, and we will allow the successful tenant to have the costs of the appeal. There will be no order as to the costs below.

Appeal allowed with costs of the appeal.
No order as to the costs below.

Solicitors: *W. Timothy Donovan; Cain, Tompkins & Co.*

[PROBATE, ETC., DIVISION.]

* F. *v.* F.

1959
July 3.

Karminski J.

PRACTICE NOTE.

Husband and Wife—Custody—Child committed to care of local authority—Possibility of handing the child over to the mother later—Matrimonial Proceedings (Children) Act, 1958 (6 *&* 7 *Eliz.* 2, *c.* 40), *s.* 5—*Children Act,* 1948 (11 *&* 12 *Geo.* 6, *c.* 43), *Part II.*

SUMMONS adjourned into open court.

F. M. Drake for the wife.
The respondent in person.

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F. v. F.

Argument took place in chambers.

Karminski J. I have adjourned the matter into open court because it is one of the first applications to be made under the Matrimonial Proceedings (Children) Act, 1958, s. 5,[1] which gives this court jurisdiction, where there are exceptional circumstances, to commit the care of a child to the county council or the council of a county borough in appropriate circumstances.

I do not propose in open court to say more about the facts of this case than are strictly necessary. The petitioning wife obtained a decree nisi in this court on June 1, 1959, on the grounds of cruelty. I heard the case and I entrusted the one infant child of the marriage, a boy, to the home of a grown-up brother who was living with his wife under suitable circumstances. The reason why at that stage I did not entrust the child to the custody of the petitioner mother was no reflection on her general fitness as a person, but because she was living under conditions which in my view made it undesirable, indeed impossible, for the child to live there with her. So far as the respondent father is concerned, I thought, for reasons given in evidence, that he was not a fit and proper person to have custody of the child; though he was in fact living, and still is, in a home where the material conditions are better than those enjoyed by the petitioner.

Under the order which I made on the decree nisi the boy, who is either twelve or thirteen (there has been some debate as to his correct age), went to live at his grown-up brother's home, and he has lived there perfectly happily. That arrangement has been disturbed by the fact that the brother and his wife had to leave the premises where they are now living and are going to a new home where they will have no room for this boy. The fact that they cannot take the boy with them is, of course, no criticism of their fitness; but it is a fact which I have had to take into account. I have come to the conclusion that the circumstances of this case make it virtually impossible, and certainly undesirable, that this boy should be entrusted to the custody for the time being of either parent. It is not even suggested that there is any other member of the family who can take in the child,

[1] Matrimonial Proceedings (Children) Act, 1958, s. 5: "(1) Where "the court has jurisdiction to make "provision as to the custody of a child, "either by virtue of section 26 of the "Matrimonial Causes Act, 1950, or "of this Part of this Act [jurisdic-"tion in England and Wales] and it "appears to the court that there are "exceptional circumstances making it "impracticable or undesirable for the "child to be entrusted to either of "the parties to the marriage or to "any other individual, the court may "if it thinks fit make an order com-"mitting the care of the child to the "council of a county or county borough "(hereinafter referred to as the local "authority) and thereupon Part II of "the Children Act, 1948 (which re-"lates to the treatment of children "in the care of a local authority), "shall, subject to the provisions of "this section, apply as if the child "had been received by the local "authority into their care under sec-"tion 1 of that Act. . . ."

Reporter's note: This is the first reported case of any such direction.

so that I have had to consider the application of section 5 of the Matrimonial Proceedings (Children) Act, 1958.

I have had the advantage here not only of a very full report by the court welfare officer, but I have also had the assistance of the Senior Children's Officer of the Middlesex County Council, the county involved, and I have had assistance from their solicitors. The council have expressed their willingness, at very short notice, to take this child under their care; and in the circumstances of this case I have not the slightest doubt that that is what is best for this child under these particular circumstances for the time being. I say that advisedly because a time may come when the petitioner, the child's mother, may successfully establish a suitable home of her own, and I have no doubt if that was achieved it may well be the time to hand the child over to her.

Under those circumstances, therefore, I am exercising the power of this court under section 5 of the Matrimonial Proceedings (Children) Act, 1858; and I shall commit the care of the child to the Middlesex County Council.

Solicitor: *J. A. H. Powell.*

J. B. G.

[CHANCERY DIVISION.]

* *In re* COHEN'S WILL TRUSTS.
In re COHEN'S SETTLEMENT TRUSTS.

1959
April 16.
Danckwerts J.

[1959 C. No. 684.]

Trust and Trustee—Variation of trusts—Act of 1958—*Rearrangement of beneficial interests—Not advantageous in certain unlikely contingency—Whether provision should be made to guard against that contingency—Variation of Trusts Act,* 1958 (6 *&* 7 *Eliz.* 2, *c.* 53), *s.* 1.

In an application under section 1 of the Variation of Trusts Act, 1958, for the approval by the court of an arrangement to vary the trusts of a will and settlement of even date, it was submitted that in the unlikely event of one of the testator's children predeceasing his widow, now aged nearly 80, the arrangement would not be advantageous to the next generation—the testator's grandchildren, some of whom were infants—and that some provision might therefore be made to guard against that contingency:—

Held, that some kind of risk was inherent in applications under the Act, and this risk being one which would be reasonable for an adult to take, the court would take it on behalf of infants and approve the arrangement proposed without ordering provision to be made against such a contingency.

ADJOURNED SUMMONS.

By this summons under section 1 of the Variation of Trusts Act, 1958, the court was asked to approve an arrangement for the variation of the trusts of the will dated November 28, 1935, of

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Harold Leopold Cohen, and of a settlement made by him of the same date.

By his will the testator gave his residuary estate to his trustees on trusts for sale and conversion, and subject to payment of funeral and testamentary expenses, debts, legacies (including a specific legacy of certain chattels and of a small leasehold on trust for his widow during her widowhood) and to certain small annuities bequeathed by his will or any codicil thereto, on trust to pay the income of the trust estate to his wife for life during her widowhood, but one-third of such income upon protective trusts for life in the event of her remarriage, with a power to resort to capital should the income from the joint funds from the settlement and the trust estate ever fall below £24,000 per annum while she remained a widow. Subject to interest of the widow the testator bequeathed his residuary estate "in trust for all or "any of my children or child who shall be living at my death and "if more than one in such shares and proportions that the "shares of the sons shall be equal and the shares of the daughters "shall be equal but that the share of each son shall bear to the "share of each daughter the same proportion as three bears to "one. . . ." He then settled the shares of his children (so far as now relevant) on protective trusts for his children for life, and after the death of any child on such trusts for such issue of that child as the child might by deed or will appoint, and in default of appointment upon the usual trusts for the children of such child equally. If the trusts of the share of any child failed, it was to accrue to the shares of the other children in the same proportions as the original shares. The will also gave any child of the testator power to appoint up to a moiety of the income of his (or her) share for the benefit of any spouse who might survive him (or her) for life on protective trusts. The trusts of the settlement so far as relevant were the same as those of the will, except that under the settlement the testator's widow was only entitled to have her income made up out of income to £24,000 per annum.

The testator died on July 27, 1936, survived by his widow and four children; one son, Leslie Cohen, and three daughters, Mrs. Mary Florence Villar, Mrs. Elinor Betty Levy, and Mrs. Marjorie Bertha Leland. The widow was now nearly 80 years of age and had not remarried. The son was married and had one child, Penelope, by his first marriage who would attain 21 years of age in October, 1959. Mrs. Villar was married and had no children, and the evidence was that she could not have children. Mrs. Levy was married and had two children, both of whom were infants. Mrs. Leland having survived the testator died in 1948 and was survived by three daughters, one of whom was still an infant. The two daughters who were of age had respectively made settlements of half of their shares in 1955 and 1958.

John Pennycuick Q.C. and *J. P. Warner* for Lord Woolton, one of the trustees of the settlement. The funds subject to the

settlement and the will were settled on the most disadvantageous trusts possible, being protective trusts for the lives of the testator's children with reversion to their children and issue; the greater part of the income goes in tax, and on the death of the life tenants the greater part of the capital would go in death duty.

What, in substance, it is sought to do by this variation is to provide that the three surviving small annuitants under the will should accept covenants in favour of the trustees by the testator's surviving children as security for the payment of the annuities, the chattels and small leasehold to be enjoyed by the widow as hitherto and then to go to the son. Out of the will fund a capital sum is to be paid to the widow, who has a large income but negligible capital, and her annuity is to be reduced and charged on the settlement in exoneration of the will funds. Subject to those provisions and to provisions for the payment of small sums to future spouses of the testator's surviving children, the surviving children's shares of the settlement funds will be held exclusively for them (released from all other interests) and the will funds are to be held exclusively for the next generation—the testator's grandchildren—and the issue of such grandchildren.

The trustees consider that the infants and unborn persons would benefit by this arrangement, although in the unlikely event of one of the testator's three children predeceasing the widow, the next generation concerned, the grandchildren, would be worse off than if no such scheme had been entered into.

James Cunliffe for the widow.

B. L. Bathurst Q.C. and *Eric Griffith* for the son's daughter. Penelope is an only child by the son's first marriage, and it is possible that he might have further children. However, as a whole, this scheme is for her benefit. She is already adequately provided for from this and other sources, and in the circumstances it would not be right to ask for an insurance to be taken out to insure against her father's death in the lifetime of the widow; the matter could be left until October when she becomes 21.

Geoffrey Dearbergh for the son. Penelope's father would be prepared to give an undertaking not to cut down her shares by an exercise of his power of appointment to less than she would get in default of appointment.

R. Cozens-Hardy-Horne and *J. A. Wolfe* respectively for the testator's surviving daughters.

Geoffrey Cross Q.C. and *D. H. McMullen* for the infant children of Mrs. Levy. The Levy children are not so well off as Penelope, and there might be more children. If their mother or their aunt, Mrs. Villar, died before the widow it would result in a difference to the children, but that is a very unlikely event and on balance the scheme is for the benefit of the children. It would be merely giving money away to an insurance company to insure against that event. The mother and aunt could give an undertaking to make some provision for the children if that should

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occur; they are not very anxious to do so, but they will agree to do so if the court thinks that they should.

DANCKWERTS J. I do not see why they should. I do not think that it is fair to ask the mother and aunt to make provision for such event, it would produce a very complicated result. If people ask the court to sanction this sort of scheme, they must be prepared to take some sort of risk, and if it is a risk that an adult would be prepared to take, the court is prepared to take it on behalf of an infant.

Ralph Instone, for the children of Mrs. Leland and the trustees of the settlements made by the two eldest of them, supported the scheme. Only one of the Leland children remains an infant.

DANCKWERTS J. I am prepared to approve the arrangement on behalf of the infants and of all persons unascertained or unborn who are or may become interested under the trusts of the will or settlement.

Order accordingly; costs to be paid out of the settlement fund.

Solicitors: *Alsop, Stevens & Co.*

I. G. R. M.

[COURTS-MARTIAL APPEAL COURT.]

Cts.-M. A. C.

1959 *July* 20.

Byrne, Slade and Salmon JJ.

* REGINA *v.* CADDY.

Military Law—Court-Martial—Appeal from—Abandonment of appeal to—Application for leave to withdraw notice of abandonment—Power of court to entertain—Courts-Martial Appeal Rules, 1952, (*S.I.* 1952, *No.* 194), *r.* 5.

A corporal in the Army, whose application for leave to appeal against a conviction by district court-martial had been refused by the single judge, gave notice of abandonment of his appeal to the registrar of the Courts-Martial Appeal Court, as provided by rule 5 of the Courts-Martial Appeal Rules, 1952.[1] He subsequently, within the time prescribed by rule 8 (3), applied to have his application for leave to appeal referred to the full court, requesting that his notice of abandonment should be cancelled, on the ground that he had been advised by a legal expert that it would be unwise to submit a notice of abandonment:—

Held, that there was no reference either in the Courts-Martial (Appeals) Act, 1951, or in the Courts-Martial Appeal Rules, 1952, to the withdrawal of a notice of abandonment, and where a notice of abandonment had been served under rule 5 the court would not entertain an application for its withdrawal unless there were

[1] Courts-Martial Appeal Rules, 1952, r. 5: "An appellant may, at "any time after he has made appli- "cation for leave to appeal, abandon "his appeal by giving to the registrar "notice of abandonment thereof in "Form 3." [As set out in Sched. 1 to the rules.]

exceptional circumstances amounting to allegations of mistake or fraud which would enable the court to treat the notice of abandonment as a nullity. Here there were no such exceptional circumstances and the application would be refused.

Reg. v. *Moore* [1957] 1 W.L.R. 841; [1957] 2 All E.R. 703n.; 41 Cr.App.R. 179 applied.

APPLICATION for leave to withdraw a notice of abandonment of appeal.

The applicant, Corporal Gerald Martin William Caddy, was convicted at a district court-martial at Polemidhia, Cyprus, of three acts to the prejudice of good order and military discipline (by improperly pointing a pistol at three different men on November 16, 1958) and was sentenced to six months' detention and reduction to the ranks. The findings of the court-martial were promulgated on January 17, 1959, the detention being remitted and the reduction to the ranks confirmed. The applicant presented a petition pursuant to section 3 (2) (*a*) of the Courts-Martial (Appeals) Act, 1951, praying that his conviction should be quashed and he was notified on May 7, 1959, that his petition had been refused. He then applied to the single judge on Form 1 as prescribed in Schedule 1 to the Courts-Martial Appeal Rules, 1952, for leave to appeal against his conviction but that application was refused on June 22, 1959. Under the rules the applicant then had a period of 10 days within which he might require his application to be referred to the full court but, on June 26, 1959, he signed a notice of abandonment of his appeal (Form 3 in Schedule 1 to the rules) and that was duly signed and witnessed by an officer of his company. On June 29, 1959, which was still within the 10 days following the refusal of his application by the single judge, the applicant sent to the registrar Form 4, the appropriate form under the rules for an application for leave to appeal to the full court. On that form he asked for Form 3 to be cancelled and if Form 4 was received within the statutory time limit to be substituted therefor. He also said that he wished, if his application was accepted, "to go into the merits "of the case in addition to his present application of the manage- "ment of the case." Accompanying that form was a letter from his commanding officer to the registrar stating that the applicant had been advised by a legal expert that it would be unwise to submit a notice of abandonment.

The applicant did not appear and was not represented.

SLADE J., delivering the judgment of the court, stated the facts and continued: This court treats Form 4 as an application for leave to withdraw the notice of abandonment on Form 3.

The only reason, be it observed, for desiring to cancel the notice of abandonment is that the applicant has been advised by a legal expert that it would be unwise to submit a notice of abandonment.

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The Court of Criminal Appeal has already laid down in *Reg.* v. *Moore*[1] the practice which would be observed by that court in dealing with applications for leave to withdraw a notice of abandonment, and there are only two possible differences between an application to the Court of Criminal Appeal and an application to the Courts-Martial Appeal Court. In the first place rule 23 of the Criminal Appeal Rules, 1908, which has statutory force under the Criminal Appeal Act, 1907, provides that when a notice of abandonment of an appeal to the Court of Criminal Appeal is served, the appeal shall be deemed to have been dismissed. There is no corresponding rule in the Courts-Martial Appeal Rules, 1952. The only other possible difference is that the present Form 4, re-submitting the application for leave to appeal and asking that the notice of abandonment should be treated as cancelled, has been submitted within the time prescribed by rule 8 (3) for requiring that a refusal by the single judge under section 21 of the Courts-Martial (Appeals) Act, 1951, shall be reconsidered by the full court. Neither the Criminal Appeal Act, 1907, nor the Courts-Martial (Appeals) Act, 1951, contain any reference to withdrawals of notices of abandonment, and neither do the rules in either case, although both deal with abandonments. It is desirable to note the references to abandonment contained in the Courts-Martial Appeal Rules, 1952, which have statutory force, being made by virtue of the Act of 1951. Rule 4 (1) and (2) provides: "A person desiring to appeal to the court "against his conviction by a court-martial shall make application "for leave to appeal in Form 1 and shall answer the questions "and comply with the requirements set forth therein. (2) An "application for leave to appeal and any notice required or autho-"rised to be given to the court under these rules, other than "a notice of abandonment, shall be signed by the appellant or "by his representative. A notice of abandonment shall, subject "to the provisions of paragraph (2) of rule 5, be signed by the "appellant himself." It is to be observed from that rule that any application for leave to appeal is sufficiently signed if signed either by the appellant or his representative, but only the signature of the appellant himself will suffice for a notice of abandonment.

Rule 5 provides: "An appellant may, at any time after he "has made application for leave to appeal, abandon his appeal "by giving to the registrar notice of abandonment thereof in "Form 3." That is what this applicant did on June 26 of this year.

It is not without significance to refer to certain other rules. Rule 9 (2) provides: "After an application is finally refused or "is withdrawn or the appeal is determined or abandoned, the "proceedings of the court-martial and any petition shall, subject "to any order which the court may make, be returned by the

[1] [1957] 1 W.L.R. 841; 41 Cr.App.R. 179; [1957] 2 All E.R. 703.

"registrar to the Admiralty or to the Judge Advocate General, "as the case may be," and I emphasise the words "or aban-"doned." That, we are told, is what actually happened to the papers in this case when notice of abandonment was served.

Rule 11 is headed: "Documents and Exhibits," and paragraph 3 provides: "After an application is finally refused or is "withdrawn or the appeal is determined or abandoned, docu-"ments and exhibits shall, subject to any order which the court "may make, be returned by the registrar to the person who "produced or forwarded the same."

I conclude my reference to the Act and rules merely by reading rule 21 so that it may not be thought that it has been overlooked. That rule provides: "Non-compliance with these "rules by an appellant shall not prevent the further prosecution "of his appeal, unless the court or a judge thereof otherwise "directs. The registrar shall forthwith notify the appellant of "any directions given by the court or a judge thereof under "this rule, where the appellant was not present at the time "when such directions were given."

The practice in the Court of Criminal Appeal was laid down in *Reg.* v. *Moore.*[1] Lord Goddard C.J., after referring to rule 23 of the Criminal Appeal Rules, 1908, said[2]: "Accordingly, the "court is not going to entertain applications for the withdrawal "of notices of abandonment unless something amounting to "mistake or fraud is alleged, which, if established, would enable "the court to say that the notice of abandonment should be "regarded as a nullity." Two cases where a similar practice had been laid down were referred to, *Reg.* v. *Van Dyn*[3] and *Reg.* v. *Pitman.*[4]

The only substantial difference between applications of this nature to the Court of Criminal Appeal and one to this court is, as I have said, that there is no corresponding provision in the Courts-Martial Appeal Rules, 1952, to rule 23 in the Criminal Appeal Rules, 1908, that upon service of a notice of abandonment the appeal should be deemed to have been dismissed; but that does not seem to warrant any differentiation in the practice because the grounds upon which in exceptional circumstances the Court of Criminal Appeal will allow a notice to be withdrawn are those which will enable the court to treat the notice of abandonment itself as a nullity so that no question would then arise of the appeal being deemed to have been dismissed. The only other material circumstance is that the attempt to reinstate the present application for leave to appeal was made within the 10 days prescribed by rule 8 (3) of the Courts-Martial Appeal Rules, 1952. This court sees no sufficient ground for differentiating the procedure in the Courts-Martial Appeal Court from that prescribed by the Court of Criminal Appeal. No ground is shown in

[1] [1957] 1 W.L.R. 841.
[2] [1957] 1 W.L.R. 841, 842; [1957] 2 All E.R. 703.
[3] (1932) 23 Cr.App.R. 150.
[4] (1916) 12 Cr.App.R. 14.

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the present case even approaching the exceptional circumstances in which a similar application would be entertained by the Court of Criminal Appeal, i.e., "something amounting to mistake or "fraud . . . which, if established, would enable the court to say "that the notice of abandonment should be regarded as a "nullity." Facts which the court might treat as being sufficient to enable the notice of abandonment itself to be treated as a nullity alone will suffice; nothing short of that will do. This application, which the court treats as an application for leave to withdraw a notice of abandonment, is accordingly refused.

Application refused.

E. M. W.

[CHANCERY DIVISION.]

1959
July 7.
Danckwerts J.

* *In re* ST. MARTIN'S THEATRE. BRIGHT ENTERPRISES LTD. *v.* WILLOUGHBY DE BROKE.

[1958 B. No. 593.]

Landlord and Tenant—Business premises (security of tenure)—Landlord's intention to occupy for own purposes—Discovery—Cross-applications—Tenants' balance sheets and profit and loss accounts during tenancy—Landlord's income tax returns and pass sheets—Materiality—Theatre—Landlord and Tenant Act, 1954 (2 *&* 3 *Eliz.* 2, *c.* 56), *s.* 30 (1) (*a*) (*c*) (*g*).

Practice and Procedure—Discovery—Relevance—Landlord and tenant—Business premises—Security of tenure—Means of tenant and landlord—Landlord and Tenant Act, 1954 (2 *&* 3 *Eliz.* 2, *c.* 56), *s.* 30 (1) (*a*) (*c*) (*g*).

An application under the Landlord and Tenant Act, 1954, by tenants of a theatre for the grant of a new tenancy was opposed by the landlord, one of the grounds of the opposition being that the landlord himself intended to conduct a theatrical business on the property. The evidence was that the dilapidations under the lease amounted to some £16,000.

On cross-applications for discovery, the tenants asked for discovery and inspection of the landlord's income tax returns and pass sheets over the past three years, on the ground that they were relevant on the question whether the landlord could carry on a theatrical business himself, and the landlord asked for discovery and inspection of the tenants' balance sheets and profit and loss accounts during the period of the tenancy:—

Held, (1) that the tenants' financial position was relevant on the question whether or not a new lease should be granted, particularly in view of the evidence indicating breaches of the covenants to repair, and the landlord's application should be granted.

(2) That the landlord's past financial position had little relevance to the question whether he could, in the future, carry on a theatrical business on his own property, and to give the tenants'

advisers a roving commission to go through the landlord's affairs was gross interference therewith which had no real bearing on the issues arising on the summons under the Act. The tenants' application would be dismissed.

Procedure summonses.

Bright Enterprises Ltd., tenants of St. Martin's Theatre, West Street, London, of which the landlord was Lord Willoughby de Broke, applied under the Landlord and Tenant Act, 1954, for the grant of a new lease. The landlord opposed the application on the grounds set out in section 30 (1) (*a*), (*c*) and (*g*) of the Act.[1] The ground stated in paragraph (*f*), namely, that the landlord intended to rebuild and reconstruct the property had also been relied on originally but was now abandoned.

On a report by an official referee it was shown that the dilapidations owing by the tenants amounted to some £16,000.

By two summonses dated July 1, 1959, the tenants asked for discovery and inspection of the landlord's income tax returns during the past three years, his bank pass sheets and any other relevant documents relating to his financial position. By a summons of the same date the landlord asked for the discovery of a further list of documents, namely, the balance sheets and profit and loss accounts of the tenants during the period they had been the lessees of St. Martin's Theatre.

G. N. Eyre for the tenants.
Norman Tapp for the landlord.

The following cases were cited in argument: *Betty's Cafés Ltd.* v. *Phillips Furnishing Stores Ltd.*[2]; *In re Borthwick*[3]; *Hope* v. *Brash*[4]; *Reohorn* v. *Barry Corporation*[5]; *Lyons* v. *Central Commercial Properties (London) Ltd.*[6]; *Espresso Coffee Machine Co. Ltd.* v. *Guardian Assurance.*[7]

Danckwerts J. stated the facts and continued: The discovery asked for on behalf of the landlord is of the tenants' balance

[1] Landlord and Tenant Act, 1954, s. 30 (1): "The grounds on which a "landlord may oppose an application "under . . . this Act are such of the "following grounds as may be stated "in the landlord's notice . . . (*a*) "where under the current tenancy the "tenant has any obligations as "respects the repair and maintenance "of the holding, that the tenant ought "not to be granted a new tenancy in "view of the state of repair of the "holding, being a state resulting from "the tenant's failure to comply with "the said obligations; . . . (*c*) that "the tenant ought not to be granted "a new tenancy in view of other sub-"stantial breaches by him of his obli-"gations under the current tenancy, "or for any other reason connected "with the tenant's use or manage-"ment of the holding; . . . (*g*) sub-"ject as hereinafter provided, that "on the termination of the current "tenancy the landlord intends to "occupy the holding for the purposes, "or partly for the purposes, of a busi-"ness to be carried on by him therein, "or as his residence."

[2] [1959] A.C. 20; [1958] 2 W.L.R. 513; [1958] 1 All E.R. 607.

[3] [1948] Ch. 645; 64 T.L.R. 471.

[4] [1897] 2 Q.B. 188; 13 T.L.R. 478.

[5] [1956] 1 W.L.R. 845; [1956] 2 All E.R. 742.

[6] [1958] 1 W.L.R. 869; [1958] 2 All E.R. 767.

[7] [1958] 1 W.L.R. 900; [1958] 2 All E.R. 692.

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St. Martin's Theatre, *In re.*

Danckwerts J.

sheets and profit and loss accounts during the period they have been the lessees of St. Martin's Theatre. The question of lack of repair and of similar matters has been referred to one of the official referees, whose report shows dilapidations amounting to some £16,000. I understand that the tenants contend that the present value of those dilapidations should be reduced below that figure. However that may be, it does indicate that there are breaches of covenant under this lease.

The documents of which discovery is sought must, it seems to me, be relevant and, indeed, of considerable importance on the question of the grant of a new lease to the tenants. The financial position of a tenant who asks for a lease of property is always of the greatest materiality to the landlord, who as a rule is not prepared to let his property without being able to place some reliance upon the financial stability of the prospective tenant so that he will be likely to pay the rent and perform the covenants in the lease. That is particularly so in the case of a limited company, which must be relied upon to perform its covenants simply by the financial situation of the company in question. The only way in which the financial situation of a limited company can be established is by means of its balance sheets and profit and loss accounts which show what assets the company has for the purpose of carrying on its business. I have, therefore, no doubt whatever that the tenants should disclose these documents.

The counter-application on behalf of the tenants requires the disclosure to and inspection by the tenants of the landlord's income tax returns for the past three years, his bank pass sheets and any other relevant documents relating to his financial position. Normally, when there is going to be a transaction between landlord and tenant, the financial situation of the landlord is not a material issue in the matter at all. Therefore, prima facie these documents are quite irrelevant on the question whether the company should have a new lease or not.

The only relevance, if at all, must be under paragraph (*g*) of section 30 (1) of the Landlord and Tenant Act, 1954, on the ground that it is material to know whether a landlord who says he intends to occupy his own premises and carry on business is in a financial position to carry on business of the kind which he says that he proposes to carry on. No doubt the court has some discretion to require an answer from a landlord in those terms, but it seems to me to be a very limited one; as it is the landlord's own property, it must be rather unusual for it to be necessary to consider the landlord's financial abilities at all. The only thing the court has to determine is whether the landlord genuinely intends to occupy the property and carry on there the business to which he refers.

To some extent I think that a misleading element was introduced into this case by a statement in the landlord's affidavit that he had sufficient funds available to him for carrying out the

works to which he referred in the affidavit. But that statement referred in regard to a ground for opposition which he relied on under the terms of paragraph (*f*) of section 30 (1). That ground has been abandoned and, consequently, that statement in the affidavit no longer has any relevance at all.

I have considerable doubt whether the documents for which the tenants are asking have any relevance to the questions for decision on this summons at all, but even if there is any possible relevance to be deduced in respect of the documents in question, the request made on behalf of the tenants is grossly oppressive. It is not a case where the documents must be relevant and therefore the question whether any oppression is involved or not does not matter; it is very doubtful if there is any relevance in them at all. For one thing, the past income tax returns and pass books of the landlord do not have much to do with his future ability to carry on a business on his own property, and to give the tenants' advisers a roving commission to go through the income tax returns and the bank pass books of this landlord is a gross interference with the affairs of the landlord, which has no real bearing upon the issues in the originating summons or any possible issue, and ought not, therefore, in the discretion of the court to be allowed.

I propose to dismiss the tenants' two summonses.

Landlord's application granted; tenants' application dismissed; the landlord's costs being allowed on all applications. Tenants' application for leave to appeal to the Court of Appeal refused.

[On July 8, 1959, the Court of Appeal dismissed an application by the tenants for leave to appeal.]

Solicitors: *Bartlett & Gluckstein; Boodle, Hatfield & Co.*

I. G. R. M.

[HOUSE OF LORDS.]

* HINTON (INSPECTOR OF TAXES) . . APPELLANT;

AND

MADEN AND IRELAND LTD. . . . . RESPONDENTS.

H. L. (E.)†

1959
June 23, 24, 25; *July* 16.

Revenue—Income tax—Investment allowance—Shoe and slipper manufacturers—Replacement of knives and lasts—Whether "plant"—Whether expenditure on replacement of capital expenditure—Income Tax Act, 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 10), *ss.* 137, 279, 280, 330—*Finance Act,* 1954 (2 *&* 3 *Eliz.* 2, *c.* 44), *s.* 16.

† *Present*: LORD REID, LORD TUCKER, LORD KEITH OF AVONHOLM, LORD DENNING and LORD JENKINS.

H. L. (E.)

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HINTON (INSPECTOR OF TAXES) v. MADEN AND IRELAND LTD.

The respondent company was assessed to income tax for the year of assessment 1955/56 in respect of its profits as shoe and slipper manufacturers in the sum of £8,290, less capital allowances of £4,836. On appeal by the company this amount was reduced by the special commissioners to £8,290 less capital allowances of £5,148, on the ground that certain expenditure incurred by the company on knives and lasts in the material period qualified for an investment allowance under section 16 (3) of the Finance Act, 1954,[1] albeit that the company had already been allowed deductions in respect of expenditure on the same assets under section 137 (*d*) of the Income Tax Act, 1952.[1] The average life of the knives was one year or three years according to type, and that of the lasts, three years, the knives costing about £1 1s. each and the lasts about £1 2s. a pair, and the company spent approximately £6,000 a year in renewing them.

On appeal by the Crown:—

[1] Income Tax Act, 1952, s. 137: "Subject to the provisions of this Act, in computing the amount of the profits or gains to be charged under Case I or Case II of Schedule D, no sums shall be deducted in respect of . . . (*d*) any sum expended for repairs of premises occupied, or for the supply, repairs or alterations of any implements, utensils or articles employed, for the purposes of the trade, profession or vocation, beyond the sum actually expended for those purposes; . . . (*f*) any capital withdrawn from, or any sum employed or intended to be employed as capital in, such trade, profession or vocation. . . ."

S. 279: "(1) Subject to the provisions of this Act . . . where a person carrying on a trade incurs capital expenditure on the provision of machinery or plant for the purposes of the trade, there shall be made to him, for the year of assessment in the basis period for which the expenditure is incurred, an allowance (in this chapter referred to as 'an initial allowance') equal to two-fifths of the expenditure. . . ."

S. 280: "Subject to the provisions of this Act, where the person carrying on a trade in any year of assessment has incurred capital expenditure on the provision of machinery or plant for the purposes of the trade, an allowance (in this chapter referred to as 'an annual allowance') shall be made to him for that year of assessment on account of the wear and tear of any of the machinery or plant which belongs to him and is in use for the purposes of the trade at the end of the basis period for that year of assessment."

S. 330: "(1) References in this Part of this Act to capital expenditure and capital sums—(*a*) in relation to the person incurring any expenditure or paying the sums, do not include any expenditure or sum which is allowed to be deducted in computing, for the purposes of income tax, the profits or gains of a trade, profession, office, employment or vocation carried on or held by him; . . ."

Finance Act, 1954, s. 16: "(1) In the cases provided for by this section, an allowance (in this Act referred to as an 'investment allowance') shall be made in respect of capital expenditure on new assets incurred after April 6, 1954 . . . (3) An investment allowance equal to one-fifth of the expenditure shall be made instead of an initial allowance under Chapter II of the said Part X in respect of expenditure on the provision of new machinery or plant, and any provision of the Income Tax Acts applicable to initial allowances under that Chapter, so far as it is applicable in relation to allowances for new assets, shall apply also to investment allowances under this subsection, except that . . . (*c*) where the expenditure on new machinery or plant is allowed to be deducted in computing profits or gains for the purposes of income tax, it shall nevertheless be treated as capital expenditure for the purposes of this subsection, if it would be so treated for the purposes of the said Chapter II but for the deduction."

[NOTE. S. 16 of the Act of 1954 was suspended in respect of expenditure incurred after February 17, 1956, with the exception of certain special classes of expenditure, by the Finance Act, 1956, s. 15.]

Held, (1) that the knives and lasts were "plant" within the meaning of section 16 (3) of the Finance Act, 1954.

Dictum of Lindley L.J. in *Yarmouth* v. *France & Co.* (1887) 19 Q.B.D. 647, 658; 4 T.L.R. 1 applied.

(2) (Lord Keith of Avonholm and Lord Denning dissenting) that the expenditure in question was of a capital nature in view of the provisions of section 16 (3) (*c*) of the Act of 1954, and that the company was entitled to an investment allowance notwithstanding that deductions had already been made in respect of the assets in question under section 137 (*d*) of the Income Tax Act, 1952.

Per Lord Tucker: The joint effect of section 330 of the Income Tax Act, 1952, and section 16 (3) of the Finance Act, 1954, is to remove the disqualification for inclusion in capital expenditure attaching to sums which have been allowed by way of deduction for income tax in computing the profits or gains of a trade, etc. This leaves the expenditure in question to be judged free from any consideration of how it has or should be dealt with under section 137 of the Income Tax Act, 1952. The fact that under that section it has been allowed as a deduction is not to prejudice it in qualifying for treatment as capital expenditure for the purposes of section 16 of the Finance Act, 1954.

Per Lord Keith of Avonholm and Lord Denning: The sums annually expended by the company in replacing or renewing the knives and lasts should be considered as revenue expenditure.

Decision of the Court of Appeal affirmed.

APPEAL from the Court of Appeal (Lord Evershed M.R., Sellers and Pearce L.JJ.).

This was an appeal from an order of the Court of Appeal (Lord Evershed M.R., Sellers and Pearce L.JJ.) dated October 9, 1958, allowing an appeal by the respondents, Maden & Ireland Ltd., from an order of Vaisey J. dated February 28, 1958, whereby an appeal by the appellant, Reginald William Charles Hinton (H.M. Inspector of Taxes) upon a case stated by the Commissioners for the Special Purposes of the Income Tax Acts was allowed and the determination of those commissioners was reversed.

The appeal related to an assessment to income tax for the year of assessment 1955/56 made on the respondents, in respect of their profits as shoe and slipper manufacturers, in the sum of £8,290 less capital allowances of £4,836, which assessment was reduced by the special commissioners to £8,290 less capital allowances of £5,148 on the ground that certain expenditure incurred by the respondents on knives and lasts in the material period qualified for an investment allowance under the provisions of section 16 (3) of the Finance Act, 1954. The sole question in dispute in the appeal was whether the said expenditure did so qualify and this question involved the following issues, namely:

(i) whether the knives and lasts constituted machinery or plant for the purposes of section 16 (3) of the Act of 1954; and if so

(ii) whether the expenditure incurred thereon by the respondents was of a capital or a revenue nature.

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The case stated on the appeal from the commissioners, so far as material, was as follows:

1. At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts held on April 2 and 3, 1957, the respondents appealed against an assessment made upon them for the year 1955/56 in the sum of £8,290 less capital allowances £4,836 in respect of their profits as shoe and slipper manufacturers. The sole question for our determination was whether certain expenditure incurred by the respondents on knives and lasts in the material period qualified for an investment allowance under the provisions of section 16 (3), Finance Act, 1954. . . .

3. The respondents use a number of machines in the course of carrying on their business of shoe and slipper manufacturers:

(i) An "Ideal Clicking Press" for cutting upper components, fittings, etc., from leather, plastic, fabric or other materials. The cost of this machine at the material time was £423, exclusive of the cost of any knives. Its sole function is to cut the leather or other fabric to the size required for shoes or slippers and it can only function when provided with knives of the shape required for the several parts of the particular shoe. Different knives are required for uppers from those used for cutting soles, and different sets of knives are required for right and left shoes. The respondents also use a "Revolution Press" performing similar functions, the cost of which at the material time was £1,096 if worked from a line shaft, or £1,164 if used with its own motor. More upper knives are required than sole knives. But different sole knives would be needed according to the type of upper knife and material used, and also according to the type of soling material used and soling design and finish required. At any given time hundreds of knives were used in the respondents' factories, and though readily detachable they are an essential and indispensable part of the cutting machines, to the extent that the machine without the knife is useless and conversely without the machine the knife is useless. Furthermore, apart altogether from the normal process of wear and tear the respondents constantly bought new knives whenever a new line of shoes came on the market. Some such lines, particularly in fancy shoes, involve a number of very intricately patterned knives.

(ii) After the cutting and machining together (closing) of the uppers they are transferred to a "Pulling-Over Machine." This process requires an upper to be placed over the last and to be presented to the machine, which pulls the upper over the last and clenches it with six tacks. The cost of a pair of making lasts at the material time was £1 2s. In this process similarly, the machine is useless without the last and conversely without the machine the last is useless.

(iii) The shoe then passes to a consol "Lasting Machine" for final lasting. In this machine, as in that described in sub-paragraph (ii) above, a last, though readily detachable, is an essential and indispensable part of the machine.

(iv) The next process is the "Pounding Machine" which, simulating the cobbler's action of hammering the leather flat, performs this function on the back lasted shoe, which must be secured during the process on a last of the required size and pattern.

(v) The next process, that of attaching the prepared soles by chain stitching (Blake Sewing), requires no last, but in all the operations up to this stage the machines could not be used without either knives or "making lasts."

(vi) After chain stitching (Blake Sewing), the stitching channels on the sole are closed and the sole is levelled to the correct shape on a levelling machine. On this machine metal feet and forms being exact replicas of the shape of the making last are used in conjunction with the hydraulic pressure of the machine to mould the sole to the correct shape. The shoe then goes to the finishing room, where the heel is attached on a finishing last inserted. The sole and heel edges are pared and then set. If such an operation were performed without a last the shoe would lose its shape. So the different type of last, known as a "finishing last" is used in conjunction with the machines, e.g., an "Edge Trimming Machine."

(vii) The next processes of edge setting and heel burnishing, are performed on a machine, and as good pressure is required a last to hold the shoe steady is still essential.

(viii) The shoe bottom is then scoured, painted and polished, on machines and the shoe remains on the last for these processes, only leaving it after the final finishing processes.

(ix) The lasts described above thus fall into two classes, the making and the finishing lasts, the former having a metal base to enable tacks to be clenched over. Lasts are made of maple, beech or hornbeam. The respondents attempt to use their lasts as long as possible, but fashions change and every change of fashion involves a change of last.

(x) Summarising the processes employed by the respondents in carrying out its trade it can be broadly stated that the respondents utilise either knives or lasts (the latter, making or finishing) in 90 per cent. of their manufacturing and finishing processes and that the machines that they use can only function when furnished with the knives or lasts appropriate to the particular process. At the material time the respondents in one of their factories had approximately twelve thousand pairs of making lasts and twenty-four thousand pairs of finishing lasts for a production of 1,200 dozen pairs of shoes per week. No such estimate of the number of knives in use was available to us in evidence, but one shoe might require as many as fourteen knives per half pair.

(xi) The average life of upper knives is twelve months, but sole knives, subject to a 10 per cent. loss due to careless handling, have a life equal to that of the corresponding last. The average life of making lasts is three years and that of finishing lasts

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similar, except that the latter can sometimes be used apart from the making lasts, and they might then be used for four to five years. A greater float of lasts must be kept because the shoe stays on it for a number of processes, whereas a knife is used once only for each pair of shoes.

4. Owing to the large number of lasts and knives employed in the respondents' business no physical stock taking at the half yearly dates to which their accounts are made up was possible. The respondents therefore charged all expenditure on new knives and lasts to capital and charged against profits one-quarter of the total cost in the four succeeding half yearly accounts on the view that an average life of two years for the combined total expenditure on knives and lasts was a fair estimate. The actual expenditure on new knives and lasts and the amount so charged against profits in the two half years' accounts ending respectively on April 3 and October 2, 1954, forming the basis of the material year 1955/56 are set out under the headings of the five manufacturing units of the respondents' business. Thus the figure of £8,022 5s. appearing in the balance sheet at October 2, 1954, is the balance after crediting total additions in the half year of £1,856 8s. 5d. and after debiting to profit and loss account a sum of £3,542 19s. 1d., being the writing off at 25 per cent. of expenditure on knives and lasts in the preceding four half years.

5. The expenditure on knives and lasts during the basis year and the six years immediately preceding the basis year were as follows:

Half	Year	to	March,	1948	£2,075
,,	,,	,,	September,	1948	£1,451
,,	,,	,,	March,	1949	£3,706
,,	,,	,,	September,	1949	£3,868
,,	,,	,,	March,	1950	£4,659
,,	,,	,,	September,	1950	£1,151
,,	,,	,,	March,	1951	£3,527
,,	,,	,,	September,	1951	£1,026
,,	,,	,,	March,	1952	£5,195
,,	,,	,,	October,	1952	£1,404
,,	,,	,,	March,	1953	£5,131
,,	,,	,,	October,	1953	£3,476
,,	,,	,,	April,	1954	£4,160
,,	,,	,,	October,	1954	£1,856

No dissection of the figures of expenditure between knives and lasts had been attempted by the respondents, and we were satisfied that such a dissection, if not actually impossible, was not reasonably practicable.

6. The Revenue had taken the view that for income tax purposes the respondents' estimate of the life of knives and lasts was too conservative, but had agreed that an average life of

three years instead of two years was reasonable. The respondents had accepted the Revenue's contention for income tax purposes, and in the result a sum equal to one-sixth of the total expenditure on knives and lasts has been, for a number of years, allowed as a deduction in the following six half-years, as such accounts came into the computation of the respondents' profits for income tax purposes. This deduction was regarded by the Revenue as the nearest practicable and just estimate of the sum expended by the respondents "for the supply, repairs "or alteration of any implements, utensils or articles employed "for the purposes of the respondents' trade," within the meaning of section 137 (*d*), Income Tax Act, 1952. It was common ground between the parties in this appeal that the amount so allowed for income tax purposes was not the sum "actually expended" since (i) it related to expenditure incurred in the preceding six half-yearly periods and (ii) it was the result of a "straight line writing down" on the basis of the Revenue's contention of an estimated three years' life. For the reasons hereinafter set out in paragraph 10 below, we do not consider that either the method adopted by the respondents in making up their accounts, or the variation of that method adopted by the Revenue and accepted by the respondents for income tax purposes, affects the issue on which we were called upon to give our determination.

7. The question for our determination was whether knives and lasts, or in the alternative whether either knives or lasts, were on the evidence before us machinery or plant within the meaning of sections 279 and 280, Income Tax Act, 1952, and section 16 (3), Finance Act, 1954. No issue arose before us with regard to the annual allowances "on account of the wear "and tear of the machinery or plant which belonged to the "respondents and was used for the purposes of the respondents' "trade," for, whether the expenditure on knives or lasts was properly described as expenditure on plant and machinery or not, the Revenue had allowed and the company had accepted deductions in computing their profits arrived at by the method described in paragraph 6 above, so that in any event any claim for annual allowances would be excluded by section 330 (1) (*a*) of the Income Tax Act, 1952. The sole issue before us was whether in addition to the said deductions the respondents were entitled for the said year 1955/56 to an investment allowance under the provisions of section 16 (3), Finance Act, 1954, equal to one-fifth of the expenditure on knives and lasts, on the view that such expenditure was "for the provision of new "machinery or plant."

8. It was contended on behalf of the appellant—

(i) that the expenditure on knives and lasts incurred by the respondents in carrying on their trade was not expenditure on capital account but on revenue account;

(ii) that on the evidence the said knives and lasts were not

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parts of the machines which operated them, but were separate chattels;

(iii) that on the evidence the said knives and lasts were implements, utensils or articles employed for the purposes of the respondents' trade within the meaning of section 137 (*d*), Income Tax Act, 1952;

(iv) that the said knives and lasts being implements or utensils employed for the purposes of the respondents' trade were not plant or machinery eligible for an investment allowance within the meaning of section 16 (3) (*c*), Finance Act, 1954.

9. It was contended on behalf of the respondents—

(i) that on the true construction of sections 137, 279 and 280, Income Tax Act, 1952, and of section 16, Finance Act, 1954, the words "implements, utensils and articles" and "plant or "machinery" were not mutually exclusive, but to some extent overlapping;

(ii) that on the evidence in this case the knives and lasts employed for the purposes of the respondents' trade were both "implements or utensils" within section 137 (*d*) and "plant or "machinery" within sections 279 and 280, Income Tax Act, 1952, and section 16 (3) (*c*), Finance Act, 1954;

(iii) that on the evidence in this case the expenditure on knives and lasts, although they had a short life, was expenditure none the less on capital account in respect of fixed assets and not on revenue account in respect of circulating capital;

(iv) that the said expenditure on knives and lasts was, on the evidence, expenditure on the provision of new machinery or plant within the meaning of section 16 (3), Finance Act, 1954, and although notionally allowed to be deducted in computing profits and gains for the purpose of income tax was nevertheless by virtue of subsection (3) (*c*) of section 16, Finance Act, 1954, to be treated as capital expenditure for the purposes of that section;

(v) that the respondents were accordingly entitled to an investment allowance in respect of the said expenditure on knives and lasts for the said year 1955/56.

The commissioners who heard the appeal, decided to allow it in the following terms:

"10.—(i) We held that the words 'machinery or plant' as used "in sections 279 and 280, Income Tax Act, 1952, and section "16 (3), Finance Act, 1954, were not words of art, but on a "proper construction of the sections were to be given their "ordinary meaning. So directing ourselves, we did not doubt "that there might be trades employing knives and lasts in cir-"cumstances which would make it inappropriate to describe "them as machinery or plant. But in the case before us we "thought we should give weight to the facts (1) that the knives "and lasts performed an indispensable function in the process "of manufacture, (2) that in performing that function they were "used (and could only be used) in conjunction with machines, "which themselves could perform no useful function in the said

"process unless used in conjunction with the lasts and knives, "and (3) that (as was not disputed) the said machines them-"selves were machinery or plant within the meaning of the "relevant sections.

"(ii) We found as a fact on the evidence that the knives and "lasts were machinery or plant within the meaning of the said "sections and we held that the [respondents were] entitled to the "investment allowance claimed.

"(iii) In coming to this conclusion we did not consider it "material to decide whether the knives and lasts were 'imple-"'ments, utensils or articles' within section 137 (*d*), Income "Tax Act, 1952, or whether the allowances referred to in para-"graph 6 of this case were or were not made under and by "virtue of that section. In our view, even if the said allowances "were made, and properly made, by virtue of section 137 (*d*), "nevertheless, having regard to the decision in *Inland Revenue "Commissioners* v. *Great Wigston Gas Co.*[2] and to the provisions "of section 16 (3) (*c*), Finance Act, 1954, that did not prevent "our coming to the conclusion set out in sub-paragraph (ii) "hereof.

"(iv) Accordingly, we determined the assessment for the "said year 1955/56 in the sum of £8,290 less £5,148 capital "allowances, these being the figures agreed by the parties follow-"ing our decision in principle."

Viscount Bledisloe Q.C. and *Alan Orr* for the Crown.

F. Heyworth Talbot Q.C. and *G. B. Graham* for the respondents.

The following cases, in addition to those referred to in their Lordships' opinions, were cited in argument: *Edwards (Inspector of Taxes)* v. *Bairstow*[3]; *Daphne* v. *Shaw*[4]; *Dumbarton Harbour Board* v. *Cox (Surveyor of Taxes)*[5]; *Watts* v. *Enfield Rolling Mills (Aluminium) Ltd.*[6]; *Atherton* v. *British Insulated and Helsby Cables Ltd.*[7]; *John Smith & Son* v. *Moore*[8]; *Ducker* v. *Rees Roturbo Development Syndicate Ltd.*[9]; *Mallett (Inspector of Taxes)* v. *Staveley Coal and Iron Co. Ltd.*[10]; *Associated Portland Cement Manufacturers Ltd.* v. *Kerr.*[11]

Their Lordships took time for consideration.

[2] (1946) 62 T.L.R. 623; 29 T.C. 197.

[3] [1956] A.C. 14; [1955] 3 W.L.R. 410; [1955] 3 All E.R. 48; 36 T.C. 207, 220.

[4] (1926) 43 T.L.R. 45; 11 T.C. 256.

[5] 1919 S.C. 162; 7 T.C. 147.

[6] [1952] 1 T.L.R. 733; [1952] 1 All E.R. 1013.

[7] [1925] 1 K.B. 421; 41 T.L.R. 55; 10 T.C. 155.

[8] [1921] 2 A.C. 13; 37 T.L.R. 613; 12 T.C. 266.

[9] [1928] A.C. 132; 44 T.L.R. 307; 13 T.C. 366, 378.

[10] [1928] 2 K.B. 405; 13 T.C. 772.

[11] (1946) 62 T.L.R. 115; [1946] 1 All E.R. 68; 27 T.C. 103, 114.

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July 16, 1959. LORD REID. My Lords, the respondents are shoe and slipper manufacturers. They were assessed to income tax for the years 1955–56 in respect of profits of £8,290 less capital allowances of £4,836. The question in this case is whether the capital allowances should be increased to £5,148 because of expenditure which the respondents maintain qualified for investment allowance under section 16 of the Finance Act, 1954. The special commissioners decided in favour of the respondents. Their decision was reversed by Vaisey J. but restored by the Court of Appeal.

The respondents' method of manufacture is described in the case stated by the commissioners. There are at least nine stages in the manufacture of a shoe, each performed by a different machine in conjunction with the knives and lasts which are the subject of this appeal. The first stage is cutting out from large pieces of different kinds of leather pieces of the correct shapes for the uppers, soles and other parts of the shoes. In the course of the argument it appeared that the description of this stage in the case is somewhat misleading and no objection was taken to our being given further information about it. Pieces of the correct shape are cut out by pressing a knife on to the leather. The machine which does this is a press: the lower part of it is a flat table on which the sheet of leather is laid. Each piece is cut out by a single knife: in the case of an upper the cutting edge is heart-shaped, in the case of a sole the cutting edge is the shape of the sole. The cutting edge is the lower part of a ring of metal of the same shape. A number of these knives are arranged by hand on the sheet of leather so that as little as possible of the leather shall be wasted. Then the upper part of the machine is pressed down on them and the leather is thus cut. The knives are not parts of the machine: each knife is a separate tool or implement designed to be used in conjunction with the machine. It is stated in the case that as many as fourteen different knives may be used in producing the pieces of leather to be made up into one shoe. As different knives are required for right and left shoes and each size and type of shoe may require a different set of knives, it is obvious that the respondents must have available a very large assortment of knives. It appears that each knife costs about £1. Two types of machine are used: one costs over £400 and the other over £1,000.

In most of the further stages of manufacture lasts are used. These cost about £1 2s. per pair. For the earlier stages making lasts are used, and for the later stages finishing lasts. These lasts, too, are not parts of the machines. For each process a last with the pieces of leather which go to make the shoe is fed into the appropriate machine. Again, not only are different lasts necessary for right and left shoes and for different sizes, but different types of shoes require different lasts. It is stated in the case that every change of fashion involves a change of last. It appears that about

12,000 pairs of making lasts and 24,000 pairs of finishing lasts are required for a production of 1,200 dozen pairs of shoes a week.

The life of each last is about three years, though some may be used for four or five years; it is not stated whether they mostly wear out or become obsolete through change of fashion. The life of the sole knives is about the same, but upper knives only have a life of about a year.

The facts set out in the case with regard to the respondents' expenditure in buying knives and lasts, and the way in which that expenditure has been treated for income tax purposes, are as follows. [His Lordship read paragraphs 4, 5 and 6 of the case and continued:] In addition to this deduction from their profits the respondents claim an investment allowance equal to one-fifth of their expenditure on knives and lasts under the provisions of section 16 of the Finance Act, 1954. [His Lordship read section 16 (1) and (3) and continued:] Under subsection (1) an investment allowance can only be made in respect of capital expenditure on new assets. It is not disputed that these knives and lasts were new assets: the word "new" is used in contrast to second-hand. The contention of the appellants is that the cost of acquiring these assets was not capital expenditure. Subsection (3) contains a further limitation: the new assets must be new machinery or plant. It is not said that the knives and lasts are machinery or parts of machinery. The appellants say that they are plant and that is denied by the respondents. According to the contentions set out in the case both these points were taken by the respondents before the commissioners. But in their decision the commissioners do not even mention the question whether this was capital expenditure. They only deal with the question whether the knives and lasts are plant. They say: "(ii) We found as a fact on the evidence that the knives and "lasts were machinery or plant within the meaning of the said "section, and we held that the [respondents were] entitled to "the investment allowance claimed." We do not know whether they thought that the expenditure being capital expenditure was so clear as not to require special mention or whether they omitted to mention it owing to some oversight. But before reaching their decision I think they must have decided in their own minds that this was capital expenditure: I find it difficult to suppose that they could have entirely overlooked the leading requirement of the section after the point had been argued.

It is unfortunate that we do not have the commissioners' reasons for deciding that this was capital expenditure. It is not argued that this expression is used in the Act as a term of art with some technical meaning, and I accept the position that this expression "capital expenditure" must be considered as an ordinary expression in untechnical English. So treating it, my first inquiry would be: What would a reasonable business man understand by the expression, and would he regard this expenditure as capital expenditure or not? On that question the decision

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of the commissioners would be most important. But we must do our best to interpret these words without expert assistance.

I am certainly not going to attempt a definition of capital expenditure on the one hand or of revenue expenditure on the other. Like most ordinary English words or expressions they are probably incapable of exact definition, and I must look at the whole circumstances and determine as a matter of construction into which class this expenditure falls. As the first step I would ask what is the practical difference between treating an item of expenditure as capital or as revenue expenditure. I claim no expert knowledge of accountancy or of business methods, and the only practical difference that occurs to me—and none other was suggested in argument—is that if you treat a sum as capital expenditure you do not write it all off in one year or set it all against the income of one year, whereas if you treat it as revenue expenditure the whole of it is set off against the revenue of the year when it is expended. If the money had been expended on stock-in-trade and the thing bought is still there at the end of the year, you carry forward the value of the stock-in-trade at the end of the year. But these knives and lasts were not stock-in-trade and I do not know how their value at the end of the year could be carried forward in a profit and loss account if they are plant, and the cost of them has been treated as revenue expenditure.

I would suppose that accounts are intended to have as close a relation as is reasonably practicable to reality. If you buy plant which still has a substantial value at the end of the year I would suppose that that value ought to be reflected somewhere in the accounts. If the cost is treated as capital expenditure there seems to be no difficulty in writing off that cost year by year as the plant wears out or becomes obsolete, but if the cost is treated as revenue expenditure I do not know what item in the next year's accounts would reflect the continuing value of the plant. I do not suggest that this distinction is or should be an inflexible rule. There may, for all I know, be good reasons for not following it in particular cases, but in the absence of any indication of any specialty in this case I am inclined to approach this case in that way.

If that is a correct approach, then the salient facts in this case are that on the average these implements have a life of several years, that their cost has been treated by the respondents as capital expenditure to be written off in two years, and that the Revenue has acted on the view that their average life is three years, and in allowing deduction for income tax purposes has spread the expenditure in each year over a period of three years.

The case is complicated by the fact that deductions in respect of this expenditure have been made under section 137 (*d*) of the Income Tax Act, 1952. This is a provision which, primarily at least, applies to revenue expenditure, and it would appear to be applicable to this expenditure because these knives and lasts were, I think, implements or articles supplied for the purposes of the

respondents' trade. But I do not think that this is at all conclusive, for three reasons. First, it is not at all clear that this provision was intended only to be available in the case of revenue expenditure. Secondly, section 16 (3) (*c*) appears to recognise at least the possibility of this provision being used in the case of capital expenditure. And thirdly, on one reading of section 137 (*d*) its provisions were not correctly followed in making deductions in respect of this expenditure. I take these three points in turn.

At first sight, section 137 (*f*) may appear to prohibit deductions under this section in respect of capital expenditure, for it prohibits any deduction in respect of "any sum employed or "intended to be employed as capital in such trade." But "any "sum employed as capital" may mean new capital put into the business and is not a very happy equivalent of "any capital "expenditure," and I think that it is legitimate to look at the history of this provision. Similarly worded provisions were included in the old rule 3, which goes back at least as far as 1842. Before 1878 there was nothing in the Income Tax Acts corresponding to the modern wear and tear allowance or annual allowance in respect of capital expenditure, and unless rule 3 applied when there was capital expenditure to replace worn out machinery or plant, there was no way of getting any deduction for income tax purposes in respect of such expenditure. It is not disputed that in fact it was the custom to allow deductions under rule 3 in respect of capital expenditure: an example given was the allowance of such a deduction in respect of expenditure in replacing worn out railway engines by new ones. I find it hard to believe that such a custom could have existed if rule 3 clearly excluded all capital expenditure. Moreover, it is not disputed that this custom continued after 1878 notwithstanding the fact that thereafter capital expenditure could be the subject of an appropriate wear and tear allowance. Indeed, it is noteworthy, that in the recent case of *Inland Revenue Commissioners* v. *Great Wigston Gas Co.*[1] it was still said that there was an option to receive deductions under rule 3 or a wear and tear allowance. Of course, the taxpayer could not have both.

Then I take section 16 (3) (*c*) of the Act of 1954. It was not disputed, and I think that it is clear, that this provision deals with cases where there has been capital expenditure qualifying for an investment allowance, but nevertheless deductions have been allowed in respect of it under section 137 (*d*) of the Act of 1952. This appears to me to be a statutory recognition of the practice of allowing deductions under section 137 (*d*) in respect of capital expenditure, and to entitle the respondents to an investment allowance if this was capital expenditure on plant notwithstanding the fact that they have already received deductions under section 137 (*d*). The result of getting an investment allowance is that the taxpayer gets by means of allowances or

[1] (1946) 62 T.L.R. 623; 29 T.C. 197.

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deductions more than 100 per cent. of such capital expenditure as qualifies under section 16. In the normal case he gets investment allowance in addition to the usual allowances in respect of capital expenditure. It appears to me that the meaning and effect of subsection (3) (*c*) is to entitle and enable him to get more than 100 per cent. if he receives deductions under section 137 (*d*) instead of the usual allowances.

My third reason is, I think, less important. Section 137 (*d*) prohibits the deduction of any sum expended for the purposes mentioned "beyond the sum actually expended for those pur-"poses." If this means actually expended during the accounting year, then the method adopted in this case was not in accord with the provisions of the section, because the sums deducted were arrived at by taking into account expenditure in three consecutive years—in effect, by writing off each year's expenditure over a period of three years, which is an appropriate method for capital expenditure. I do not in the least criticise this procedure. It was convenient, it could not cause loss to the Revenue, and it was unlikely to cause loss to the taxpayer. But it does emphasise the fact that neither party saw fit to treat this expenditure in the way in which revenue expenditure is normally treated, and it appears to me to go far to remove any presumption that expenditure in respect of which section 137 (*d*) has been applied is revenue expenditure.

There appears to be no clear authority on this matter. The authority most strongly founded on by the appellant was the opinion of Lord President Clyde in *Hyam* v. *Inland Revenue Commissioners*.[2] There, shop fittings were scrapped and new fittings were purchased, and a claim for a deduction under rule 3 of the Rules applicable to Cases I and II of Schedule D was disallowed. Before the rule was amended in 1927 deduction was prohibited "beyond the sum usually expended for those purposes "according to an average of three years preceding the year of "assessment," and the Lord President really based his opinion on the fact that expenditure of this kind was not a usual expense recurring annually. It had been admitted that the shop fittings were "implements, utensils or articles" within the meaning of the rule, but the Lord President doubted this. The passage founded on is[3]: "the propriety and the practice of charging the "cost of supplying 'implements, utensils or articles employed "'for the purposes of the trade' to revenue must vary according "to the character of the trade, and partly perhaps according to "the financial circumstances of the trade. Trading implements, "utensils and similar articles—taking these descriptions in their "ordinary connotation—have to be supplied, repaired and altered "from time to time in order to enable the trade to be carried on "and profits to be earned; and in many businesses expenditure on "these things is a usual incident of their conduct, and properly

[2] 1929 S.C. 384; 14 T.C. 479. [3] 1929 S.C. 384, 390, 391.

"recurs in every year, or at least in most ordinary years, as a "debt against revenue account. Take the case of an hotel or "restaurant business—much table furniture, linen, crockery, pots "and pans, have to be provided and the supply of such things is "a usual incident of the trade. Accordingly, I think that in a "business of the kind supposed, the costs of such supply are a "proper charge against revenue in the books, and a proper deduc-"tion from gross profits in terms of subhead (*d*) of rule 3 for "purposes of income tax. But—since such relatively permanent "things as shop fittings must be taken to form a species of the "genus 'implements, utensils or articles employed for the pur-"'poses of the trade'—it is plain that there are some kinds of "'implements, utensils or articles' the supply of which is not a "usual incident (one year with another) of the conduct of the "business, and in respect of which there is no sum which can be "said to be 'usually expended.'"

As there is no longer any reference in section 137 to sums usually expended, the Lord President's precise ground of judgment is no longer applicable, but this is a decision that certain expenditure (apparently capital expenditure) which does not recur annually should not be allowed as a deduction under this provision. But I cannot regard this reasoning as a satisfactory criterion of whether expenditure is or is not capital expenditure. Let me suppose that a large business has 20 machines each of which lasts 20 years, and that it buys a new one annually to replace one worn out, and let me suppose a small business with only one such machine: it buys a new one once in 20 years. It may be that it is proper for the large business to save a lot of calculation by treating its annual purchase as revenue expenditure and claiming under section 137, whereas that would not be proper for the small business. But it would seem to me odd, and indeed absurd, that the Revenue should be able to say that the buying of a new machine by the large business is not capital expenditure and carries no investment allowance, whereas the buying of a similar machine by the small business is capital expenditure carrying a right to an investment allowance. I cannot accept the view that the regularity with which a particular type of expense recurs in a particular business throws much or any light on whether it is really capital or revenue expenditure. On the material available I am of opinion that the respondents have made out their case that this expenditure was capital expenditure, and I turn to consider whether the knives and lasts were plant within the meaning of the section.

It is not disputed that plant is also used in the Act as an ordinary English word. It is not altogether an easy word to construe: it may have a more or less extensive meaning according to its context. As a general statement of its meaning I would adopt the words of Lindley L.J. in *Yarmouth* v. *France*[4]: "in

[4] (1887) 19 Q.B.D. 647, 658; 4 T.L.R. 1.

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"its ordinary sense it includes whatever apparatus is used by a "business man for carrying on his business—not his stock-in-"trade which he buys or makes for sale; but all goods and "chattels, fixed or movable, live or dead, which he keeps for "permanent employment in his business." I would also refer to the judgment of Uthwatt J. in *J. Lyons & Co. Ltd.* v. *Attorney-"General*[5]: "I do not think that the use throughout section 24 "of the Act [Rating and Valuation Act, 1925] of the word "'plant' as part of the phrases 'plant or machinery' and "'machinery and plant' has the effect of confining the meaning "of the word to such plant as is used for mechanical operations or "processes. Next I find it unnecessary for the purposes of a "decision in this case to enter on the question whether any "particular limitation should be placed on the general sense borne "by the word 'plant' by reason that the Act in which it appears "is a rating Act. I propose to assume that no such limitation "should be placed . . . Confining my attention to trade plant I "am content to accept the general description in *Yarmouth* v. "*France*[6] that plant includes whatever apparatus or instruments "are used by a business man in carrying on his business. The "term does not include stock-in-trade nor does it include the "place in which the business is carried on. Whether any par-"ticular article more properly falls within 'plant' as thus under-"stood, or in some other category, depends on all the circum-"stances of the case."

Subject to one point, I have no doubt that these knives and lasts are plant in the ordinary sense of the word. It is true that they are numerous, small and cheap. But one trader may have to use a few large articles while another may have to use a large number of small articles, and I see no good ground for distinguishing between them as regards investment allowance. The one point is the durability of these articles. When Lindley L.J. used the phrase "permanent employment in the business" he was using it in contrast to stock-in-trade which comes and goes, and I do not think that he meant that only very long-lasting articles should be regarded as plant. But the word does, I think, connote some degree of durability and I would find it difficult to include articles which are quickly consumed or worn out in the course of a few operations. There may well be many borderline cases, but these articles have an average life of three years, and if their cost can fairly be called capital expenditure I cannot refuse to them the description of "plant" unless the Act discloses some special reason for doing so. The word "investment" may indicate a rather longer duration than what might be sufficient in other cases, but it seems to me that machinery could not be disqualified for investment allowance because it only had a life of three years, and I see no reason why a stricter test as to durability should be applied to plant than to machinery when the Act appears to treat

[5] [1944] Ch. 281, 286; 60 T.L.R. 313; [1944] 1 All E.R. 477.

[6] 19 Q.B.D. 647.

them on an equal footing. I am therefore of opinion that the respondents are entitled to investment allowance and that this appeal should be dismissed.

LORD TUCKER. My Lords, it is common ground that in order to justify the investment allowance claimed by the respondents it was necessary for them to prove (1) that the knives and lasts used in their business constituted machinery or plant for the purposes of section 16 (3) of the Finance Act, 1954, and (2) that the expenditure incurred in the purchase thereof was of a capital nature.

The special commissioners in allowing the respondents' appeal, expressly found that the knives and lasts were machinery or plant, and must inferentially have held the expenditure to have been of a capital nature.

Vaisey J., in allowing the Crown's appeal, held that the knives and lasts were not machinery or plant, so that the second question did not arise.

The Court of Appeal agreed with the finding of the special commissioners on the basis that the knives and lasts were plant and held the expenditure to be of a capital nature.

I understand that all your Lordships agree with the first finding of the Court of Appeal. I am of the same opinion, for the reasons which have been stated by my noble and learned friend, Lord Reid, and do not desire to add anything thereto.

The second question, upon which your Lordships are, I understand, divided in opinion, is, I think, much more difficult.

In this connection section 330 of the Income Tax Act, 1952, requires consideration in relation to section 16 (3) of the Finance Act, 1954.

Section 330 (1) of the former Act is, so far as material, as follows:

"References in this Part of this Act to capital expenditure "and capital sums—

"(*a*) in relation to the person incurring the expenditure or "paying the sums, do not include any expenditure or sum which "is allowed to be deducted in computing, for the purposes of "income tax, the profits or gains of a trade, profession, office, "employment or vocation carried on or held by him. . . ."

Section 16 (3) of the Act of 1954 has already been set out in the opinion of my noble and learned friend, Lord Reid, and I need not repeat it.

The facts material for this part of the case are to be found in paragraphs 4–6 of the case stated and have also already been set out.

The joint effect of section 330 of the Income Tax Act, 1952, and section 16 (3) of the Finance Act, 1954, is, I think, to remove the disqualification for inclusion in capital expenditure attaching to sums which have been allowed by way of deduction for income tax in computing the profits or gains of a trade, etc.

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This leaves the expenditure in question to be judged free from any consideration of how it has or should be dealt with under section 137 of the Income Tax Act, 1952. The fact that under that section it has been allowed as a deduction is not to prejudice it in qualifying for treatment as capital expenditure for the purposes of section 16 of the Finance Act, 1954.

My Lords, there is, as previously stated, no express finding by the special commissioners, but the contrary view was urged by the Crown in the first of their contentions set out in paragraph 13 of the case stated and it is, I think, implicit in their decision that they must have regarded it as capital expenditure.

The manner in which the taxpayer keeps his accounts is, of course, often quite irrelevant to the question how a particular item should be treated for tax purposes, but when we find, as in this case, that both the taxpayer and the Inland Revenue authorities have treated this expenditure in the manner set out in paragraphs 4 and 6 of the stated case, namely, by crediting the expenditure to capital account in the balance sheet and writing it off over a period of years by debiting the profit and loss account, and when no evidence is called by the Crown to say that this is not in accordance with good accountancy practice, and bearing in mind the nature and average life of the assets in question, I am of opinion that the tacit assumption of the special commissioners that this was an expenditure of a capital nature was fully justified, and that the appeal should accordingly be dismissed.

LORD KEITH OF AVONHOLM. My Lords, the point in this appeal is a short one. It is whether certain knives and lasts used by the respondents (whom I shall call "the company") in their trade of shoe and slipper manufacturers are machinery or plant and whether the cost of providing them falls to be treated as capital expenditure. The statutory provisions in the context of which this question has to be considered have already been explained and I do not repeat them. In the Court of Appeal and in this House the question has been dissected and examined in two parts: the nature of the assets and whether they fall to be charged against capital or revenue. To some extent this separation is inevitable, but I doubt whether it is helpful, for this reason. If at the inception of the business certain assets can properly be regarded as plant or machinery it would seem to be difficult to say that they cease to be plant or machinery when replaced or renewed. But it does not follow that the expenditure on their provision, if capital expenditure at the outset, is likewise capital expenditure on replacement.

Little, if any, attention seems to have been given to the accountancy aspect of the case before the commissioners, apart from production of the company's accounts, nor do the special commissioners expressly deal with the matter. What has been called sound accounting and commercial practice has frequently

been made the basis of decision by the courts, but the treatment by a company or individual of a particular item of expenditure in its accounts may not conform to such practice and there are cases where the courts have found that it does not do so. In any case, as is well known, accounts for trading purposes do not necessarily correspond to accounts for income tax purposes. In this case, while the views of accountants might be interesting, I doubt whether they could be conclusive, for the matter must, I think, be determined on a consideration of the statutory provisions in relation to the nature of the operations carried on by the company.

We had a display of a sample of the knives and lasts and a demonstration of how they operated, without objection from the appellant's counsel or challenge of the accuracy of the demonstration. From this it seems that some error or misunderstanding must have crept into the findings of the commissioners. The knives and lasts would not seem to be attached to any machine so as to be "readily detachable." The machines perform the cutting, stretching, stitching and hammering functions which might be carried out by a cobbler by hand. They in fact are just mechanical cobblers and the knives and lasts are the implements which they use, the knives being hollowed metal shapes with sharp cutting edges. It would be perfectly accurate to describe them as "implements" or "articles" employed for the purposes of the trade within the meaning of section 137 (*d*) of the Income Tax Act, 1952. That may not dispose of the question whether they are "machinery or plant" within the meaning of section 279 of the same Act or section 16 (3) of the Finance Act, 1954. The view of the commissioners was that on a proper construction of these sections the words "machinery or plant" were to be given their ordinary meaning. "So directing ourselves," they say, "we did not doubt that "there might be trades employing knives and lasts in circum-"stances which would make it inappropriate to describe them "as machinery or plant. But in the case before us we thought "we should give weight to the facts (1) that the knives and "lasts performed an indispensable function in the process of "manufacture, (2) that in performing that function they were "used (and could only be used) in conjunction with machines, "which themselves could perform no useful function in the said "process unless used in conjunction with the lasts and knives, "and (3) that (as was not disputed) the said machines them-"selves were machinery or plant within the meaning of the "relevant sections." They accordingly found as a fact on the evidence that the knives and lasts were machinery or plant within the meaning of the sections. They seem to have considered, although they did not think it necessary to decide the fact, that the knives and lasts might also be "implements, "utensils or articles" within section 137 (*d*).

Even allowing for some error in the commissioners' findings

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as to the way in which the knives and lasts functioned, I should not be prepared to say that the reasons which moved the commissioners to find that they were "machinery or plant" were not equally applicable to knives and lasts functioning as described to your Lordships. They would, I think, quite properly be described as among the plant to be provided for a similar business set up for the first time and their replacements must, I think, continue to be plant. At the same time they are, I consider, implements or articles "employed for the purposes of "the trade," expenditure on which, in the course of trade, can properly be chargeable as a deduction in computing profits and gains, and that, in my opinion, is of some importance in considering whether the money spent in replacing them is capital or revenue expenditure.

I have come to the view that in this case the expenditure on replacement should properly be treated as revenue expenditure. More upper knives are required than sole knives and we are told that the average life of an upper knife is 12 months. The limit of life for sole knives and lasts would appear, with possible exceptions, to average three years. The company itself in its own accounts treated its whole stock of knives and lasts as having a life of only two years and wrote off the total cost in two years. In my opinion it is quite unreal to regard constantly recurring expenditure on such articles, having so short a life, as capital expenditure. It can hardly be said to be expenditure on assets of an enduring nature. This, to my mind, is a typical case of the type referred to by Lord President Clyde in *Hyam* v. *Inland Revenue Commissioners*,[7] where he said: "The propriety, and the practice, of charging the cost of supply-"ing 'implements, utensils, or articles employed for the pur-"'poses of the trade' to revenue must vary according to the "character of the trade, and—partly perhaps—according to the "financial circumstances of the trader. Trading implements, "utensils, and similar articles—taking these descriptions in their "ordinary connotation—have to be supplied, repaired and altered "from time to time, in order to enable the trade to be carried "on and profits to be earned; and in many businesses, expendi-"ture on these things is a usual incident of their conduct and "properly recurs in every year, or at least in most ordinary "years, as a debt against revenue account. Take the case of "an hotel or restaurant business—much table-furniture, linen, "crockery, pots and pans have to be provided and the supply "of such things is a usual incident of the trade. Accordingly, "I think that, in a business of the kind supposed, the costs of "such supply are a proper charge against revenue in the books, "and a proper deduction from gross profits in terms of sub-"head (d) of rule 3 for purposes of income tax." Lord Sands, in the same case,[8] took the test of considering whether the

[7] 1929 S.C. 384, 390. [8] Ibid. 392.

expenditure was "extraordinary in relation to the ordinary expenditure of the year." It is impossible to say here that the expenditure is "extraordinary" on any view. It is just part of the ordinary expenditure incurred year after year and required for earning the profits of the business. To this may be added that the cost of the individual knives and lasts may be reckoned in shillings rather than in pounds. No doubt they have to be bought in quantity running annually into some thousands of pounds. But, strictly speaking, it is each knife or last that has to be considered (see *Charente Steamship Co. Ltd.* v. *Wilmot* [9]), and it is somewhat fantastic to regard the expenditure of some shillings on a knife or last as capital expenditure or to suppose that when a large quantity has to be bought at one time the multiplication of what would be a revenue expense results in a capital expenditure. For the same reasons I find difficulty in supposing that Parliament intended the machinery of initial, or investment, allowances and annual allowances to be applied to such articles. The detailed and somewhat complex procedure prescribed by sections 281 and 282 of the Income Tax Act, 1952, would seem quite inappropriate to such a case.

It is equally unreal to look at the matter from the purely annual point of view. The year is no doubt a convenient period and in some cases a statutory period for the making up of accounts, but there is no reason in principle why expenditure exhausted in a year should alone be treated as revenue expenditure. There must be many occasions on which it is prudent and sound commercial policy to lay in supplies of things, other than raw material of manufacture, used in a manufacturing process in quantities sufficient to last for longer than a year and other cases where expenditure on single items which are going to endure for perhaps many years is accepted and properly accepted as revenue expenditure. Expenditure on all consumable or quickly expendable things used in industry would seem naturally to be chargeable against revenue. Nor is it always necessary to stop there. Repairs to premises or machinery may last for many years and, so long as these do not fall to be classed as improvements, are, so far as I am aware, always a charge against revenue, as is recognised indeed in section 137 (*d*) of the Income Tax Act, 1952. Replacements generally may be said, I think, to fall into this category and that is what the knives and lasts are here. The company has in reality charged them against revenue. Initially charging them against capital it writes them off in two years. It may be said it charges half of them against revenue in the first year and the other half against revenue in the second year. The company and the Revenue have reached an agreement on the amounts to be allowed as a renewals charge each year. But that does not, in my opinion, affect the question. It is merely a working

[9] [1942] 1 K.B. 210; 58 T.L.R. 89; [1942] 1 All E.R. 85; 24 T.C. 97.

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compromise, or formula, to determine for the purposes of section 137 (*d*) the actual sum expended on these renewals in any year. For my part I can see no reason why the whole sum expended in any year should not have been allowed although not exhausted in that particular year, just as I understand would be done in the case of repairs of premises, or machinery. I feel at some loss because the commissioners have not dealt with the accounting aspect of the matter, but on the evidence before your Lordships I consider that the expenditure here falls to be treated as revenue expenditure.

I would allow the appeal.

LORD DENNING. My Lords, in order to understand this case, it is as well to have in mind the way in which a cobbler makes shoes. He cuts the leather with a knife, then shapes it round a last (which is, of course, a wooden model of a foot), and then hammers in the tacks. In this case, instead of a cobbler working by hand, you must envisage a series of machines which are in effect mechanical cobblers, each doing a part of the work. One mechanical cobbler is given a knife and leather. It presses down the knife and cuts the leather into the required shapes. Another mechanical cobbler is given a wooden last with the leather shaped around it. It hammers down the tacks. And so forth.

These machines are undoubtedly plant. They are plant used by the manufacturers in the factory. Each of the machines—each mechanical cobbler—is part of the plant. The knives and lasts, too, are part of the plant. When the manufacturers buy new machines, with the knives and lasts to go with them, they undoubtedly incur capital expenditure on the provision of new plant.

But what is the position when the knives and lasts fall to be renewed? The manufacturers use hundreds of knives and thousands of lasts. These have a short life. They are continually having to be renewed as they wear out or fashions change. Some knives have an average life of one year. Others three years. The lasts have an average life of three years. They are quite cheap. The knives cost about £1 1s. each. The lasts cost about £1 2s. a pair. The manufacturers spend about £6,000 a year on renewing them, year in and year out. What is the nature of this expenditure? Is it "capital expenditure on the "provision of new plant" so as to qualify for an investment allowance?

The special commissioners said nothing in particular on this point. Nor did Vaisey J. The Court of Appeal found it difficult. Your Lordships are, I believe, divided in opinion.

My Lords, I cannot think that this £6,000 a year is the sort of expenditure which should qualify for an investment allowance. It is a running expense which is incurred, year in and year out, in the course of the ordinary conduct of the business. The sum actually expended can clearly be deducted in computing the

profits of the business: because it is a sum expended for the supply of "implements, utensils or articles employed for the "purposes of the trade" within section 137 (*d*) of the Act of 1952. So that the manufacturers can no doubt get 100 per cent. allowance on account of it. But I do not see that they should get an additional 20 per cent. on the ground that it is capital expenditure.

Test it this way: If this £6,000 a year were capital expenditure, the manufacturers would be entitled, not only to an investment allowance on this expenditure, but also to an annual allowance for wear and tear. But in order to get the annual allowance, each knife and each last would have to be treated as a separate item. Its value would have to be written down each year on a percentage basis, gradually getting less from year to year during its life, see section 281 of the Act of 1952: or alternatively, its value would have to be written down uniformly on a straight-line basis spread over its estimated life; but this would only be allowed if the commissioners were satisfied that proper records would be kept about it, see section 282 of the Act of 1952. Neither of those methods could in practice be applied to these knives and lasts. They are too numerous, too small, too cheap and too often renewed.

Test it another way: Suppose that the manufacturers made these knives and lasts themselves. They might well have a workshop for the purpose and employ men to do the work. The cost of wages and materials would clearly be revenue expenditure which could be deducted in computing the profits of the business. There could be no suggestion that it was capital expenditure. Why should it be different because they buy them instead of making them?

Test it finally by taking some simple instances. Suppose a haulage firm has a fleet of lorries. The initial cost of the fleet is clearly capital expenditure. But the cost of renewing the tyres is revenue expenditure. Or take an hotel business. The initial cost of crockery, pots and pans and so forth is capital expenditure. But breakages run at a uniform level. The cost of replacements is revenue expenditure. Suppose a firm of builders has a carpenter's shop fitted with woodworking machines but also hand saws and chisels for the men to use. The initial cost of the machines and the tools is capital expenditure. The machines have a long life and the cost of renewing them is a capital expenditure. But the tools have a short life and the cost of renewing them is revenue expenditure.

I do not think that much guidance is to be obtained from the way the accounts were kept in the past. Accepting that the actual cost in each year of the knives and lasts is a revenue expense and can properly be deducted from the profits for the year, nevertheless it might well be convenient to even it out by averaging the cost over the last three years. Alternatively, if the cost was to be regarded as capital expenditure, it might well

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be convenient to make an annual allowance on the basis of a "straight-line writing down" on an estimated three years' life. The only thing that is perhaps significant is that there was never any claim made for an initial allowance.

My Lords, I am of opinion that the expenditure of the company on renewing knives and lasts was not a capital expenditure so as to qualify for an investment allowance and I would allow the appeal.

LORD JENKINS. My Lords, I agree with my noble and learned friends, Lord Reid and Lord Tucker, in their conclusion that the respondent company is entitled under section 16 (3) of the Finance Act, 1954, to an investment allowance in respect of its expenditure on knives and lasts during the period relevant to its assessment to income tax for the year 1955–56.

In order to make good its claim to this allowance the company had to show that the expenditure in question was "capital "expenditure on new assets" within section 16 (1), and also that it was "expenditure on the provision of new machinery or plant" within section 16 (3). The knives and lasts were clearly new assets (see section 16 (10), which defines "new" in relation to machinery and plant as meaning "unused and not second-"hand"), and clearly also were not "machinery."

Two questions, therefore, arise in this appeal, viz.: (i) whether the knives and lasts were "plant"; and (ii) if so, whether the expenditure on the provision of them was capital expenditure.

I have no doubt that the knives and lasts were "plant." On this point I am, for the present purpose, content to accept as a sufficient statement of the ordinary meaning of the expression "plant" the words of Lindley L.J. in *Yarmouth* v. *France* [10]: "There is no definition of plant in the Act" (the Employers' Liability Act, 1880) "but, in its ordinary sense, it includes what-"ever apparatus is used by a business man for carrying on his "business—not his stock-in-trade which he buys or makes for "sale; but all goods and chattels, fixed or movable, live or dead, "which he keeps for permanent employment in his business. . . ." The reference to "permanent employment" in the business demands some degree of durability. This, I think, is satisfied in the present case by the life of three years attributed to making and finishing lasts, sometimes extended to four or five years in the case of the latter, and to sole knives. The upper knives are given a life of only twelve months, but the intention no doubt is to keep and use them for so long as they are serviceable, and I cannot regard the circumstance that they wear out in that relatively short period as investing them with so transitory a character as to take them out of the category of plant to which they would otherwise belong.

The second question (namely, whether the expenditure on the

[10] 19 Q.B.D. 647, 658.

provision of the lasts and knives was capital expenditure) presents more difficulty, but broadly speaking I think that subject to the requisite degree of permanence an appliance which satisfies Lindley L.J.'s definition of plant is well on its way to attaining the status of a capital asset, the cost of providing which may be properly regarded as capital expenditure. Mr. Heyworth Talbot in his argument for the company submitted that all expenditure on the acquisition of assets to be retained by a manufacturer for use again and again in his manufacturing operations is capital expenditure; and that this holds good whether the assets in question are acquired by way of addition to or in replacement of existing stocks.

It will be seen that the definition of "capital assets" implicit in Mr. Heyworth Talbot's submission is closely akin to Lindley L.J.'s definition of "plant." Both postulate that the assets in question should possess some degree of permanence. Lindley L.J. speaks of goods and chattels kept by the business man for permanent employment in his business, while Mr. Heyworth Talbot speaks of assets retained by a manufacturer for use again and again in his manufacturing operations. But neither of them attempts to define the degree of permanence required, and, indeed, it would, as I think, be impossible to do so.

I accept Mr. Heyworth Talbot's submission, not as embodying a hard-and-fast rule of universal application, but as providing so far as it goes a reasonably adequate guide to the solution in the present case of the question whether the expenditure on the assets here concerned, that is to say, the knives and lasts, was capital expenditure for the purposes of section 16.

The company does not deal in knives and lasts. It acquires knives and lasts for retention and use as part of its means of manufacturing shoes and slippers. In point of function the knives and lasts resemble the machines in conjunction with which they are used, in the sense that they are not themselves a subject of the company's trade but are kept and used until such time as they become unserviceable or obsolete, and by their use contribute to the production of the shoes and slippers in which the company does trade. So far, therefore, they may be said to be assets producing income as distinct from assets representing income, and, to that extent at least, to be of a capital nature.

The machines in conjunction with which the knives and lasts are used are admittedly capital assets. For the present purpose I see no ground for distinguishing the former from the latter in this respect, apart from the small cost and relatively short life of the knives and lasts as compared with the machines.

As to the cost, if the knives and lasts had an unlimited life, the fact that they cost only a matter of £1 each would not, so far as I can see, afford any ground for denying them the character of capital assets.

As to length of life, if such knife or last was worn out by one day's work, it would lack the element of permanence which is

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undoubtedly essential to the conception of a capital asset. The knives and lasts worn out by each day's work would on this supposition have no better claim to rank as capital than would be possessed by the coal consumed daily in firing the boilers in a factory where the machines were worked by steam.

On the other hand, I repeat that if each knife or last endured for ever, I can see no ground for holding that it would not be a capital asset.

The case therefore appears to me to turn in the end on the question of permanence, which is largely a question of degree. I think the element of permanence looms larger in the conception of a capital asset than it does in the conception of plant. Nevertheless, I see no reason for holding that the average life of three years possessed by sole knives and making and finishing lasts is too short to justify their acceptance as capital assets. The average life of only 12 months possessed by upper knives seems to me to be near the line, but no attempt has been made to separate these knives and the other appliances, and I do not know whether it would have been practicable to do so. In point of function there is no distinction, so far as I can see, between the upper knives and the rest. I would therefore give the upper knives the benefit of the doubt and for the present purpose treat them as possessing the requisite degree of longevity. This accords with the arrangements between the Revenue and the company referred to in paragraph 6 of the case, which allowed all the knives and lasts an average life of three years.

So far as the question is one of fact and degree, I think the special commissioners must be taken to have held by implication that the expenditure here in question was capital expenditure, and I see no sufficient reason for differing from that view.

I would accordingly dismiss this appeal.

Appeal dismissed.

Solicitors: *Solicitor, Inland Revenue; Bracewell & Leaver.*

J. A. G.

[CHANCERY DIVISION.]

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May 8, 11.
Upjohn J.

* TRUSTEES OF TOLLEMACHE SETTLED ESTATES *v.* COUGHTRIE (INSPECTOR OF TAXES).

Revenue—Income tax—Excess rents—Land—Royalties of sand-pit—Whether actual or notional receipts taken in making assessment—Whether royalties part of rent—Income Tax Act, 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 10), *ss.* 82, *Sch. A, para.* 2, 175 (1) (*a*).

By a lease dated December 17, 1946, a sand-pit was let for a term of 21 years from March 25, 1946, at an annual surface rent of

[Reported by MARGARET THOMAS, Barrister-at-Law.]

£10 and a royalty of 6d. for all sand worked. In 1946–47 the royalties payable under the lease were just under £100, but they mounted steadily and in 1955–56 were £850, an average of about £390 a year. At first the sand-pit was not separately assessed to Schedule A, but for the year 1953–54, following the decision in *Russell* v. *Scott* [1948] A.C. 422; 64 T.L.R. 297; [1948] 2 All E.R. 1; 30 T.C. 375, it was assessed to Schedule A tax in the sum of £3 5s. and assessments of £5 and £1,000 in respect of excess rents and royalties respectively were made under Schedule D. On appeal the General Commissioners held that the royalties were within section 175 of the Income Tax Act, 1952,[1] and should be treated as excess rents under Schedule D, and they altered the assessment to £35 in respect of the dead rent and £646 in respect of the actual royalties received in that year, less the Schedule A assessment, the net figure after amendment being £577. The lessors appealed:—

Held, (1) that by virtue of section 175 of the Income Tax Act, 1952, the rents and royalties were assessable to tax under Case VI of Schedule D.

(2) That under section 175 the assessment should be on Schedule A principles but that actual receipts of royalties should not be taken, and a notional computation should be made, either by treating the rent and royalties as a rack rent and averaging them out (applying *Inland Revenue Commissioners* v. *Dickson's Executors*, 1928 S.C. 69; (1928) 14 T.C. 69), or by determining the proper rack rent over the term of 21 years under section 82, Schedule A, para. 2 (*b*)[1] from a consideration of the terms of the lease.

[1] Income Tax Act, 1952, s. 82: "The Schedule referred to in this Act "as Schedule A is as follows— "Schedule A: 1. Tax under this "Schedule shall be charged in respect "of the property in all lands, tene- "ments, hereditaments and heritages "in the United Kingdom . . . for "every twenty shillings of the annual "value thereof, . . . Provided that "tax in respect of certain lands, "tenements, hereditaments or herit- "ages in the United Kingdom, that "is to say, in the case of the follow- "ing concerns, namely—(*a*) quarries "of stone, slate, limestone or chalk; "and (*b*) mines of coal, tin, lead, "copper, mundic, iron and other "mines; and (*c*) ironworks, gasworks, "salt springs or works, alum mines "or works . . . and other concerns of "the like nature having profits from "or arising out of any lands, tene- "ments, hereditaments or heritages, "shall not be charged under this "Schedule, but the profits . . . shall "be charged to tax under Case I of "Schedule D . . . 2. The annual "value for the purposes of this "Schedule shall, in the case of all "lands, tenements, hereditaments or "heritages, of whatever nature and "for whatever purpose occupied or "enjoyed, and of whatever value, be "understood to be—(*a*) if they are let "at a rack rent and the amount of "that rent has been fixed by agree- "ment commencing within the period "of seven years preceding the fifth "day of April next before the time of "making the assessment, the amount "of the rent by the year at which "they are let; or (*b*) if they are not "let at a rack rent so fixed, then the "rack rent at which they are worth to "be let by the year. . . ."

S. 175: "(1) If, as respects any "year of assessment, the immediate "lessor of a unit of assessment is "entitled in respect of the unit to "any rent payable under a lease or "leases to which this section applies, "he shall be chargeable to tax under "Case VI of Schedule D in respect "of the excess, if any, of the amount "which would have been the amount "of the assessment of the unit for the "purposes of Schedule A, as reduced "for the purpose of collection, if the "annual value of the unit had been "determined (in accordance, in what- "ever part of the United Kingdom "the unit is situated, with the pro- "visions of Part III of this Act) by "reference to that rent and the other "terms of the lease or leases, over "whichever is the greater of—(*a*) the "actual amount of the assessment of "the unit for the purposes of Schedule "A, as reduced for the purpose of "collection; or (*b*) the amount of "any rent payable by the immediate "lessor in respect of the unit under "any short lease or short leases. . . .

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(3) That the royalties were to be treated as part of the rent for the above purposes.

Rex v. *Westbrook* (1847) 10 Q.B. 178 applied.

APPEAL from the Commissioners for the General Purposes of the Income Tax.

On October 8, 1957, the trustees of the Tollemache settled estates, the appellants, appealed to the General Commissioners against an assessment to income tax made upon them under Schedule D of the Income Tax Act, 1952, for the year 1953–54 in the sum of £5 in respect of excess rents and of £1,000 in respect of royalties.

The case stated that the following were among the facts admitted or proved before the commissioners: By a lease dated December 17, 1946, made between the then trustees of the Tollemache settled estates and three persons trading together in partnership as the Tarvin Supply Co., "the tenants," the trustees demised to the tenants for a term of 21 years from March 25, 1946, a sand-pit at Beeston, Cheshire, on the Peckforton estate forming part of the Tollemache settled estates.

So far as material, clause 2 of the lease provided as follows: "In consideration of the rents and royalties hereinafter "reserved and of the covenants, conditions and agreements "hereinafter contained and by the tenants to be paid observed "and performed the lessors hereby demise unto the tenants the "following liberties:—(*a*) liberty for the tenants to enter upon "and occupy the said land; (*b*) liberty for the tenants and their "servants and workmen . . . to dig raise and get by open "surface workings in and from the said land the demised sand."

Clause 6 of the lease provided that the tenants should pay a surface rent of £10 per annum and a royalty of 6d. per ton for all sand worked and gotten from the demised land and that the said rent and royalties should be due and payable quarterly.

The area originally demised to the tenants was an area of approximately 2 acres and 9 perches. Clause 10 of the lease provided that if and when the tenants should have worked and removed from the demised land all the demised sand or so much thereof as could reasonably be worked, they should be entitled from time to time during the term to occupy and work and to remove sand from certain additional land adjoining the land originally demised; clause 10 further provided that as from the date of such occupation the tenants should pay to the trustees

"(4) A lease shall be deemed to be a "lease to which this section applies "if, and only if, the following condi-"tions are fulfilled with respect to "it—(*a*) that it is a short lease; "and (*b*) that the land comprised in "it is or forms part of a single unit "of assessment; and (*c*) that the rent "under it is payable to the immedi-"ate lessor of that unit; and (*d*) that "the estate or interest of the imme-"diate lessor of that unit is not, as "respects any part of that unit, sub-"ject to any short lease which com-"prises also land not wholly within "that unit, being a lease the rent "under which is payable to that "immediate lessor."

in addition to the surface rent and royalty referred to in clause 6 a yearly surface rent at the rate of £5 per acre in respect of all additional land from time to time occupied. In accordance with the provisions of clause 10, the tenants occupied an additional 5 acres from September 29, 1953.

In previous years the Beeston sand-pit was not separately assessed to Schedule A, but for the year 1953–54 an assessment under Schedule A in respect of the sand-pit was made upon the tenants as follows:

Gross annual value	£3	15	0
Repairs allowance		10	0
Net annual value	£3	5	0.

This assessment was made by reference to the original area of the sand-pit, the additional 5 acres taken over by the tenants in September, 1953, being covered by the separate assessment on a farm of which the land originally formed part.

[Particulars were given of the sand extracted and the royalties paid from the commencement of the term to March 31, 1956, showing that in the year 1946–47 the royalties payable were just under £100, and that they mounted steadily until in 1955–56 they were £850, an average of about £390 per annum.]

Evidence was given on behalf of the appellants, by a chartered surveyor and chartered land agent, to the effect that in his opinion a reasonable fixed rent for the original area of the sand-pit, together with the additional five acres taken over in September, 1953, for a 21 years' lease from March 25, 1946, would have been £292 per annum; this calculation was based on what a tenant taking a 21 year lease in 1946 might have been prepared to pay by way of rent on an estimated tonnage of sand available in the area of 446,000 tons. Evidence was given on behalf of the respondent by the Superintending Valuer (Minerals) in the Inland Revenue Valuation Office, that his estimate of what a tenant might have been expected to pay by way of fixed rent for a 21 year lease in 1948 was £500 per annum. That calculation was based on an estimated tonnage of sand available in the area of 462,825 tons. Both witnesses were of the opinion that a sand-pit would rarely be let at a fixed rack rent for a term of 21 years. The only terms of letting satisfactory to both landlord and tenant were those adopted in the present case, whereby the tenant paid a small fixed rent and a royalty per ton of sand extracted.

The Commissioners did not find it necessary to decide the question what rent a tenant might have been prepared to pay for the area covered by the assessment under appeal if offered a lease for 21 years in 1946.

As to the alternative approach put forward on behalf of the respondent (see paragraph 6 (3) below) the witnesses said that if asked to estimate at the beginning of a year, a fair annual

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value for occupation of the sand-pit over the coming year, they would have to consider all the circumstances, including the results of the previous year's working and the likely commercial demand for sand in the coming year. In the absence of any significant change of circumstances, their valuation would not differ greatly from that shown by the previous year's working.

On behalf of the appellants it was contended: (1) that in so far as the assessment under appeal purported to be an assessment in respect of royalties there was no provision of the Income Tax Act, 1952, under which such an assessment could be made; (2) that in so far as the assessment under appeal purported to be an assessment in respect of excess rent under section 175 of the Income Tax Act, 1952, the only rent to which the appellants, as immediate lessors, were entitled within the meaning of that section was the surface rent payable under clause 6 (i) of the said lease and any additional surface rent payable under clause 10; (3) that section 175 did not justify an assessment being made after the end of the year of assessment by reference to the royalties actually paid by the tenants in the year of assessment; section 175 could only operate where the immediate lessor was entitled to rent payable under a lease the amount of which could be quantified at the beginning of the year of assessment; (4) that if section 175 was applicable the section required a notional Schedule A assessment to be made in accordance with the provisions of paragraph (2) of section 82; any such notional Schedule A assessment should be made on the footing that the rack rent at which the land in question was worth to be let by the year did not exceed £292; and (5) that the appeal should be allowed and the assessments reduced.

On behalf of the respondent it was contended: (1) that the royalties payable under the lease dated December 17, 1946, were "rent" for the purposes of section 175; (2) that an assessment fell to be made under section 175 for the year 1953–54 by reference to the rent, including royalties, paid in that year and the other terms of the lease; (3) alternatively, that if, contrary to the respondent's contentions, the value of the lessors' rights had to be ascertained before the beginning of the year, it should be estimated afresh at the beginning of each year in the light of the facts then known; and (4) in the further alternative, that, if an annual value over the whole term of the lease had to be ascertained, that value in this case should be £500.

The commissioners gave their decision as follows: "1. We "have decided that in this case royalties are covered by section "175 of the Income Tax Act, 1952, and should be taxed as "excess rents under Case VI of Schedule D. 2. The assess- "ment for tax will be the excess received above the Schedule A "assessment, and this figure is the dead rent received, namely, "£35, plus the actual royalties received during the current tax "year, £646, less the Schedule A assessment."

The commissioners were subsequently informed that for the year 1953–54 a further assessment had been raised on the sand-pit under Schedule A, which took account of the increased area of occupation from September 29, 1953, and that the parties had agreed a figure of £577 to give effect to the decision and they accordingly reduced the assessment to £577.

The appellants required the commissioners to state a case pursuant to section 64 of the Income Tax Act, 1952, the point of law for the opinion of the High Court being whether, on the facts found, their decision was correct in law.

H. H. Monroe for the appellants.

R. O. Wilberforce Q.C. and *A. S. Orr* for the respondent.

The following cases, in addition to those referred to in the judgments, were cited in argument: *Moray Estates Development Co.* v. *Inland Revenue Commissioners* [2]; *Davies* v. *Abbot* [3]; *Gwyther* v. *Boslymon Collieries Ltd.* [4]

UPJOHN J. stated the facts and continued: It is admitted that the lease is a lease to which section 175 of the Income Tax Act, 1952, is applicable; it became applicable when the separate assessment was made in respect of the year 1953–54, and the question in this case is whether an assessment can be made under that section on the rent and royalties which the appellants received under the demise. Before dealing with that question I think it will be convenient to say one or two words about the relevant legislative history. Until the decision of the House of Lords in 1948 in *Russell* v. *Scott* [1] it was generally thought that the profits from licences or leases of sand and gravel and other minerals of that sort were assessable to tax under the provisions of Schedule D, since (if I may for convenience refer to the Income Tax Act, 1952, which replaced the relevant provisions of earlier Acts) by section 82 [of the Act of 1952] tax is to be charged under Schedule A "in respect "of the property in all lands, tenements, hereditaments and "heritages in the United Kingdom, . . ." provided that "tax "in respect of certain lands, tenements, hereditaments or heri-"tages in the United Kingdom, that is to say, in the case of "the following concerns"—and then followed a list which did not include sand-pits—shall be charged to tax not under Schedule A but under Case I of Schedule D. It was thought that in the case of sand leases the profits were taxable by virtue of the proviso under Schedule D, and until 1948 profits were so taxed. In *Russell* v. *Scott* [2] the House of Lords held that that was the wrong view to take and accordingly the assessment under

[2] (1951) 32 T.C. 317.
[3] (1927) 11 T.C. 575.
[4] [1950] 2 K.B. 59; 66 T.L.R. (Pt. 1) 323; [1950] 1 All E.R. 384.

[1] [1948] A.C. 422; 64 T.L.R. 297; [1948] 2 All E.R. 1; 30 T.C. 375.
[2] [1948] A.C. 422.

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Schedule D ceased and nothing was done about Schedule A until 1953–54 in the case before me.

The reason for section 175, which was formerly section 15 of the Finance Act, 1940, and which admittedly, whether by chance or mistake, hits the appellants, is set out in the speech of Lord Asquith in *Barron* v. *Littmann*,[3] where he said: "The "activity on which the respondent was engaged was that of "acquiring property—freehold or leasehold—with the design of "letting, or reletting it at a commercial profit to himself. "Under *Fry* v. *Salisbury House Estate Ltd.*[4] it had been estab- "lished that profit resulting from a transaction of this kind "and consisting of the difference between net outlay and net "return, could not be taxed as such under Schedule D, and "that the only income tax liability which could attach in such "a case was one on the annual value of the property under "Schedule A. This was held to exhaust the tax gatherer's "rights. The system worked fairly, so long as Schedule A "value was frequently revised and so kept in step with com- "mercial value. But when, during the war, quinquennial re- "valuations under this Schedule were suspended, an increasing "disparity declared itself between the old Schedule A values "and the rents which the premises in fact commanded in the "market, and therewith an increasing tax-free commercial profit "lodged in the hands of the entrepreneur."

Pausing there, no one thought that section 175 had any application to the case of a lease such as I have before me, for the simple reason that it was thought that such a lease would be subject to tax under Schedule D, as I have already explained. Lord Asquith continued[5]: "Section 15 of the Act "of 1940 was clearly designed to 'catch' this profit. It might "have provided—I leave aside, for the sake of simplicity, free- "holds—that in the case of property acquired on lease and "relet, the subject-matter of tax should be simply and in all "cases the difference between rent payable and rent receivable, "less expenses. It did not in fact so provide. The new, and "the only new, subject-matter of tax was what may be called "for short 'excess rents': a figure arrived at by the application "of an arbitrary formula laid down in the section. Excess rent "(again leaving freeholds for simplicity out of account) would "very frequently be the excess of the rent at which the premises "were relet, over the Schedule A value, a figure which might "be almost unrelated to actual commercial profits. (The word- "ing of the section is complex but I do not think this statement "is a dangerous over-simplification of its gist, at least on the "facts of this case.) The section provided that 'excess rent,' "computed according to this formula, should be 'chargeable "'under Case VI of Schedule D.' Case VI deals, and deals

[3] [1953] A.C. 96, 121; [1952] 2 T.L.R. 445; [1952] 2 All E.R. 548; 33 T.C. 373.

[4] [1930] A.C. 432; 46 T.L.R. 336; 15 T.C. 266.

[5] [1953] A.C. 96, 122.

"solely, with 'profits or gains' in the income tax sense of those "terms; and it is impossible to suppose that the section would "have operated differently if it had provided in terms that "excess rents should be 'deemed to be "profits or gains" "'within Case VI' and chargeable as such."

The respective contentions may, I think, be summarised in this way. Counsel for the appellants says first that rent in section 175 includes only the fixed rent. From his point of view, whether that is so or not is not of prime importance because he admits that section 175 directs one to look at the rent and other terms of the lease, and one of the other terms which one has in mind is the fact of large royalty payments. However, he submits, first, that the assessment has to be an assessment only upon the flat rent and, alternatively, on the flat rent and royalties. He submits that in order to achieve that result one must apply Schedule A principles.

I must turn, therefore, to Schedule A, which is now section 82 of the Income Tax Act, 1952. [His Lordship read paragraph 2 (*a*) and (*b*) of section 82, and continued:] Counsel for the appellants submits that section 175 works in the following way: that admittedly it creates a charge under Case VI of Schedule D, but that for the purpose of computing the amount of that charge Schedule A principles must be applied, and in a case such as this, if one includes royalty as rent, it is not a letting at a rack-rent but it is a paragraph 2 (*b*) case, namely, "the rack rent at which "they are worth to be let by the year," and, therefore, it is the duty of the commissioners to look at the terms of the lease and nothing else, and hear evidence upon the matter and fix a rent at which the properties are worth to be let by the year. Such evidence was, in fact, given before the commissioners. On behalf of the appellants it was stated that such a rent was £292 a year, and on behalf of the Crown it was stated that the value was £500 per annum. Whatever the quantitative result, he submits that that is the proper computation to be made. One then deducts the amount of the Schedule A and upon the balance an assessment is made under Case VI of Schedule D.

The Crown's case is that an assessment must be made year by year on the basis of the actual receipts because the charge is admittedly under Case VI of Schedule D. The section makes that abundantly plain and it was, indeed, pointed out in all the speeches in the House of Lords in *Barron* v. *Littmann*.[6] Therefore, the Crown submits that one takes each year the actual receipts by way of royalty. There is a small additional point, the question as to whether one should take it at the beginning of the year and make an estimate of royalties likely to be received for the year, or whether one should wait until the end of the year and take the actual figures, but that is only a minor point; but the actual receipts or prospective receipts should be taken and

[6] [1953] A.C. 96.

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treated as the rent. Then, it is said, that figure is inserted in the Schedule A machinery and one-eighth is deducted under the general provisions applicable to Schedule A cases; there may be maintenance payments to be allowed, and a figure is obtained from which is deducted the amount of the actual Schedule A, but the whole basis of the Crown's claim is that the figures of the royalties year by year are taken.

The question is which of those arguments is right? As I have already pointed out, it is very difficult to make the section fit this case, because it was never directed to fit such a case. It is very reasonable to talk of Schedule A when dealing with a case such as that before the House of Lords, of *Barron* v. *Litmann*,[7] but it is difficult to make it fit the present case. However, it is not an unfamiliar task in these courts to make sections of revenue Acts fit circumstances that they were never designed to meet.

I turn back, therefore, to section 175. It is perfectly true that it starts off, "If, as respects any year of assessment, the imme-"diate lessor of a unit of assessment is entitled in respect of the "unit to any rent payable under a lease . . ." That, it is said, indicates, especially as the assessment is to be under Schedule D, that there is to be an annual assessment, and it is said that the rent and royalties for that year are taken. It was submitted that the word "entitled" really meant no more than "receive" or "receivable." I do not feel able to accept that view, which is contrary to the view expressed by Vaisey J. in *Strick* v. *Longsdon*.[8] If the word "entitled" meant receive, so that one took actual profits, it is clear that that case must have been decided in another way, but it seems to me that these introductory words do no more than provide the background necessary to establish a liability to taxation. There must be an immediate lessor who is entitled to gain under some lease; there is nothing in the section that I can see which entitles you to take the amount of that rent and use it as the basis, as it has been expressed, for feeding it into Schedule A machinery. Indeed, the words of Lord Asquith that I have quoted seem to make it difficult to do so and go some way, at all events, to negativing that view. If the lessors are entitled to rent, they are chargeable to tax under Case VI of Schedule D. That imposes, quite plainly, a liability upon them, but the computation to reach the amount of the liability is this, and I will leave out words in section 175 which are immaterial. It is "the "excess, if any, of the amount which would have been the "amount of the assessment of the unit for the purposes of "Schedule A . . . if the annual value of the unit had been deter-"mined . . . by reference to that rent and the other terms of the "lease or leases, over whichever is the greater of . . ." Schedule A. I leave out the words "as reduced for the purpose of collec-"tion"; they only refer to repairs, allowances and so forth, and I leave out the words in brackets, although, in fact, I know that

[7] [1953] A.C. 96. [8] (1953) 34 T.C. 528.

Part III is the part which deals with the machinery of Schedule A and B, and not with Schedule D. However, the court directs the commissioners to find out what would have been the amount of the assessment of the unit for the purpose of Schedule A by references to the rent and the other terms of the lease, and that is a notional figure. That is quite plain from the speeches in *Barron* v. *Littmann*,[9] but it seems to drive the person having to make the computation straight into Schedule A, and I cannot see how there can be any justification for taking the actual rent and then making Schedule A computations. The figure for computation purposes has to be assessed by Schedule A principles and one must therefore turn to Schedule A and see whether it is a paragraph 2 (1) (*a*) or a 2 (1) (*b*) case.

In this particular case I do not know that there will be very much difference, but it seems to me that the essence of the matter is that one must make a computation either by treating this variable rent as a rack-rent and averaging it, as was done in *Inland Revenue Commissioners* v. *Dickson's Executors*,[10] or by treating it as a paragraph 2 (1) (*b*) case, looking at all the terms of the lease and finding out over the term of 21 years what would be the proper rack-rent. I am not going into the question of whether that process can be repeated every year and different results reached. I say nothing about that, but the essence of the matter is to make a computation of a notional figure of rent and that is the process through which the commissioners should have gone. However, they did not do that. They accepted the view of the Crown that they should take the royalties in each year. In my judgment that was wrong and the case must be remitted to them to go through the process I have mentioned.

They will, of course, desire to have a direction, although I do not think that it will make very much difference, on the question of the meaning of the word "rent," and it seems to me that that matter was really determined over one hundred years ago in *Reg.* v. *Westbrook*,[11] when Lord Denman dealt with the question of royalties very fully, and came to the conclusion that, at any rate in a rating Act, they should be treated as part of the rent, and that seems to me to be applicable in this case. In coming to that conclusion, Lord Denman followed his own earlier decision in *Daniel* v. *Gracie*,[12] and that case covers the present one and therefore, for the purpose of rent, royalties must be included.

Accordingly, for those reasons the matter must be remitted to the commissioners to assess the proper rent at which the demised property should be held.

Again, by way of giving directions which I hope will be of assistance, the commissioners must look at the matter as at the moment of assessment, that is, in the year 1953–1954, and

[9] [1953] A.C. 96.
[10] (1928) 14 T.C. 69.
[11] (1847) 10 Q.B. 178.
[12] (1844) 6 Q.B. 145.

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they can look at the royalties which had been received. They can then look into the future and aided, no doubt, by expert evidence they will come to a conclusion as to what the royalties are likely to be in the future, and then make some assessment as to the rent.

Appeal allowed. Case remitted. Crown to pay costs of appeal.

Solicitors: *Peake & Co.; Solicitor of Inland Revenue.*

[CHANCERY DIVISION.]

1959
April 14.

Roxburgh J.

* JOHN MILLER (SHIPPING) LTD. *v.* PORT OF LONDON AUTHORITY.

[1958 J. No. 3888.]

PRACTICE NOTE.

Landlord and Tenant — Business premises (security of tenure) — Discovery—Landlord's intention to occupy for own purposes—Fixity of intention — Undertaking by landlord — Whether tenant entitled to discovery — Whether special circumstances — Landlord and Tenant Act, 1954 (2 *&* 3 *Eliz.* 2, *c.* 56), *s.* 30 (1) (*g*).

Practice and Procedure—Discovery—Originating summons—Landlord and tenant—Application for new lease—Affidavit evidence—Application by tenant for discovery—Principles applicable.

PROCEDURE SUMMONS.

Tenants of business premises applied by originating summons for a new lease of business premises under the Landlord and Tenant Act, 1954. The landlord opposed the application on the ground that on the termination of the current tenancy it intended to occupy the holding for the purposes of its business. The tenant applied for discovery with a view to disputing the fixed and settled intention of the landlord to occupy the premises, but no special circumstances for the granting of discovery were alleged. The landlord's estate officer offered, on its behalf, an undertaking that immediately vacant possession of the premises was obtained by the landlord they would be occupied by the landlord for the purposes of its business.

C. B. Priday for the tenant.
Michael Albery Q.C. and *Oliver Lodge* for the landlord.

No cases, other than those referred to in the judgment, were cited in argument.

[Reported by MISS V. A. MOXON, Barrister-at-Law.]

ROXBURGH J. stated the facts and continued: This is an application for discovery. It is not supported by an affidavit alleging special circumstances; but, whether or not it ought to have been, my judgment will not turn upon that point. It is admittedly an application for discovery with a view to disputing, if possible, the fixed and settled intention of the landlord to occupy the premises for the purposes of its business.

It was suggested when I began this hearing that I was called upon to lay down some general practice; but that has been done by the Court of Appeal a long time ago. It is a practice, therefore, which is binding upon every puisne judge and upon every master. It is stated by Lord Greene M.R. in *In re Borthwick* [1]; and it is clearly of binding effect. Lord Greene said [2]: "In the "procedure by originating summons where the issues are not "defined in the way in which they are defined in pleadings, "where there are in general affidavits in which the relevant "evidence appears, affidavits which can, if necessary, be cross-"examined to, there is really no room for the application of the "ordinary rather strict rules relating to discovery which takes "place in ordinary actions conducted with pleadings. The view "that Roxburgh J. took, and, I think, rightly took, was that "discovery in proceedings in the Chancery Division by originating "summons ought only to be ordered in very special cases where "the facts are such as to justify such an order being made. "The application which was made to Roxburgh J. was not an "application made under the code contained in Ord. 54F, but "an application for discovery under the general jurisdiction of "the court. The judge had no hesitation in saying, and, in my "opinion, rightly saying, that there is in this case no absolute "right or almost absolute right to discovery, such as is con-"ferred by the Rules of the Supreme Court in relation to cases "or matters conducted by pleadings. He took the view further "that an application for a special order for discovery in pro-"ceedings of this kind brought on originating summons ought "to be by a specific application and that it should be supported "by a special affidavit setting out the reasons why it is said "discovery should be granted."

That is the general practice and has been, at any rate, ever since 1948, and I believe long before that. That is binding on every master. The question is, therefore: Are there special circumstances in this case? In my view, there are; but they are entirely against the granting of this discretionary order. The landlord, through its estate officer, offers the undertaking that I have read. I cannot imagine any better evidence of a fixed and settled intention than that offer when made by a body who is in a position to sustain the penal consequences of a breach of the undertaking. I was prepared to say that without calling on

[1] [1948] Ch. 645, 649; 64 T.L.R. 471; [1948] 2 All E.R. 635.

[2] [1948] Ch. 645, 649.

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Mr. Albery; but I am very glad that I did call on him, because as a result of what he showed me, I find that I have been anticipated in that view by the Court of Appeal.

The point is dealt with in *Espresso Coffee Machine Co. Ltd.* v. *Guardian Assurance Co. Ltd.*[3] After dealing with the other evidence of a fixed and settled intention, Romer L.J. said[4]: "When one adds to that the fact that counsel was authorised "to offer, and did offer, to the court the undertaking in the "form which my Lord has read," and that was substantially in the same form as in the present affidavit "the matter really "seems to be put beyond any doubt. Some undertakings, of "course, are unacceptable. There was a case—one of the cases "to which Harman J. referred [*Lennox* v. *Bell*[5]]—where the "court was offered an undertaking which it knew perfectly well "the person who offered it was incapable of carrying out. When "one gets a responsible body like one has here, no such criti-"cism can be levelled. It was an undertaking which the judge "was prepared to accept, and which he did accept; and in regard "to such an undertaking I would only quote a passage from a "judgment of Danckwerts J. to which Mr. Megarry referred us, "in the second *Betty's Cafés* case,[6] in which he said[7]: 'The "'undertaking seems to me to compel fixity of intention.'" May I respectfully adopt that phrase, which is very concise and clear. Romer L.J. goes on: "I know of no better way of de-"scribing it than that description that Danckwerts J. gave; and "it appears to me that, that undertaking having been given and "accepted, it is perfectly decisive of the fixity of intention which "I agree is a requisite element."

Counsel has suggested that, as I am not the trial judge, this is not an offer to me which I can immediately accept, because I am not trying the case. I think that it is an offer to me, because, although this is not the final hearing, it is an interlocutory application in this very case, and any order which I make will be in this very case. On the other hand, I agree that it would not be convenient or in accordance with practice that I should accept that undertaking at this stage in advance of the trial; but that makes no difference to my view of the present application. I have no doubt that, before the final order, the court might allow the landlord to resile from that offer on proper terms, but, if it did, the court would make quite certain that that change of policy, ex hypothesi taken at a very late stage in the case, should not prejudice the tenant; and the court would then be willing to consider anew an application for discovery upon the footing that the undertaking had been withdrawn. Therefore, that point, which is the only point which

[3] [1959] 1 W.L.R. 250; [1958] 2 All E.R. 692.

[4] [1959] 1 W.L.R. 250, 257.

[5] May 31, 1957 (unreported).

[6] [1957] 1 W.L.R. 799; [1957] 2 All E.R. 223n.

[7] [1957] 1 W.L.R. 799, 802.

counsel has made which seems to me to be maintainable, is disposed of in that way. I accordingly dismiss this application.

Application dismissed with costs.

Solicitors: *Harold Benjamin & Collins; G. D. G. Perkins.*

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[COURT OF APPEAL.]

* BOLTON'S (HOUSE FURNISHERS) LTD. *v.* OPPENHEIM.

[1958 B. No. 3685.]

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Hodson and Harman L.JJ.

Landlord and Tenant—Business premises (Security of tenure)—Notice to quit — Form — Notice of intention to demolish premises — No reference to requirement of possession in notice — Application to court for new tenancy—Sufficiency of notice—Landlord and Tenant Act, 1954 (2 *&* 3 *Eliz.* 2, *c.* 56), *ss.* 25 (1), 30 (1) (*f*).

Practice and Procedure—Originating summons—Preliminary point of law arising—Issue of pro forma summons.

In a notice under section 25 (1) of the Landlord and Tenant Act, 1954, terminating the tenancy of business premises the landlord stated: "I [the landlord] would oppose an application to the "court under Part II of the Act for the grant of a new tenancy "on the ground that on the termination of the current tenancy I "intend to demolish the premises comprised in the holding and "thereafter to carry out substantial work of construction on the "holding. . . ."

The tenants applied to the court by originating summons for an order under Part II of the Act for the grant of a new tenancy and at the hearing it was contended as a preliminary point of law that the notice did not comply sufficiently with paragraph (*f*) of section 30 (1) of the Act [1] since it did not state that the landlord required possession of the premises in order to carry out the work:—

Held, (1) that preliminary points on the validity of notices under the Act of 1954 should be raised specifically in the originating summons.

(2) That the landlord's notice had sufficiently indicated the ground of his opposition to the grant of a new tenancy to comply with the requirements of the Act of 1954.

[Reported by NORMAN PRIMOST, Esq., Barrister-at-Law.]

[1] Landlord and Tenant Act, 1954, s. 30: "(1) The grounds on which a "landlord may oppose an application "[for a new tenancy] under subsec-"tion (1) of section 24 of this Act "are such of the following grounds "as may be stated in the landlord's "notice under section 25 of this Act "or, as the case may be, under sub-"section (6) of section 26 thereof, "that is to say:— . . . (*f*) that on the "termination of the current tenancy "the landlord intends to demolish or "reconstruct the premises comprised "in the holding or a substantial part "of those premises or to carry out "substantial work of construction on "the holding or part thereof and "that he could not reasonably do so "without obtaining possession of the "holding."

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Biles v. *Caesar* [1957] 1 W.L.R. 156; [1957] 1 All E.R. 151 applied.

Decision of Danckwerts J. [1959] 1 W.L.R. 685; [1959] 2 All E.R. 473 affirmed.

Appeal from Danckwerts J.

By a notice dated July 15, 1958, under section 25 (1) of the Landlord and Tenant Act, 1954, a landlord, Abraham Louis Oppenheim, gave notice to his tenants, Bolton's (House Furnishers) Ltd., terminating their tenancy of business premises situate at 395, Brixton Road, London, S.W., on March 25, 1959. The notice stated: "I [the landlord] would oppose an application "to the court under Part II of the Act for the grant of a new "tenancy on the ground that on the termination of the current "tenancy I intend to demolish the premises comprised in the "holding and thereafter to carry out substantial work of construc-"tion on the holding. . . ." The notice did not state that the landlord required possession of the premises for the purpose of carrying out the work of demolition.

The tenants took out an originating summons asking for an order for the grant pursuant to Part II of the Act of 1954 of a new tenancy. When the summons came on for hearing, the tenants took the preliminary point that the landlord's notice was invalid. The judge then directed that a pro forma summons be taken out for a declaration as to that question. The judge held that the notice was valid. The tenants appealed.

R. E. Megarry Q.C., *Ronald Bernstein* and *C. B. Priday* for the tenants.

L. A. Blundell Q.C. for the landlord.

The following cases were cited in argument, in addition to those referred to in the judgments: *In re Hawkins* [2]; *Bathavon Rural District Council* v. *Carlile* [3]; *Doe* d. *Armstrong* v. *Wilkinson* [4]; *Betty's Cafés Ltd.* v. *Phillips Furnishing Stores Ltd.* [5]

Hodson L.J. This is an appeal from an order of Danckwerts J. on a summons issued in proceedings started by the tenants under the Landlord and Tenant Act, 1954. The landlord has served on the tenants a notice of termination under section 25 of the Act giving the tenants notice to quit on March 25, 1959. He has opposed the grant of a new tenancy and, as required by section 30 (1) of the Act, has purported to state the grounds. The question is whether he has effectively done so, for if he has not the notice is invalid. The originating summons asked for the following relief, namely, an order pursuant to the Act for the

[2] [1943] Ch. 67; 59 T.L.R. 105; [1943] 1 All E.R. 39.

[3] [1958] 1 Q.B. 461; [1958] 2 W.L.R. 545; [1958] 1 All E.R. 801.

[4] (1840) 12 A. & E. 743.

[5] [1959] A.C. 20; [1958] 2 W.L.R. 513; [1958] 1 All E.R. 607.

grant of a new tenancy of the premises in question and for such further and other relief as might be just.

This matter comes before the court upon a pro forma summons issued by direction of the judge for consideration of the preliminary question whether the notice is bad. I see no reason why, if the tenants wish to take a point of that kind, they should not include it in the originating summons, that is to say, include a prayer for a declaration to that effect. That seems to me to be a procedure which would save costs.

[His Lordship read section 30 (1) of the Act of 1954 and continued:] There is a prescribed form of notice prescribed by regulations made by the Lord Chancellor by statutory instrument. No assistance is to be gained by looking at the prescribed form because the question to be determined upon these proceedings is not assisted by reference to the form itself. The notice given is to the tenants at 395, Brixton Road, London, by the landlord giving notice terminating the tenancy on March 25, 1959, and stating that the landlord will "oppose an application to the court "(note 3) under Part II of the Act for the grant of a new tenancy "on the ground (note 4) that on the termination of the current "tenancy I intend to demolish the premises comprised in the "holding and thereafter to carry out substantial work of con-"struction on the holding." Note 4 on the front of the notice refers to the back of the form which sets out in full, although not exactly in the words of the statute, the grounds upon which the landlord can rely as showing that the tenant had, if he looked, full opportunity of seeing the whole effect of the relevant section without looking at the Act of Parliament itself.

Thus the landlord has set out his intention. There are in fact six alternative intentions which the landlord can have, and he has set out with sufficiency his intention but he has not added the concluding words of sub-paragraph (*f*) "that he could not "reasonably do so without obtaining possession of the holding." It is upon that that the tenants submit that the notice is defective.

As the judge pointed out, the concluding words contain an essential condition of the grounds. If the landlord failed to prove at the hearing—and that is the material time—that he could not reasonably carry out his intention without obtaining possession of the holding, he would fail, or, to put it in another way, as Harman L.J. did in the course of the argument, the last part of the sub-paragraph is in effect a proviso which would prevent the landlord from relying on the intention described in the section, if he could reasonably carry out his intention without obtaining possession of the holding. The concluding words apply, of course, to all the six alternative intentions. Does the omission of the concluding words invalidate the notice? The judge, bearing in mind that a notice like an ordinary notice to quit is a unilateral notice which must be strictly construed against the landlord under the general law, would, I think, have decided the

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case against the landlord had he not had before him the decision of this court in *Biles* v. *Caesar*.[1] In that case the question was different. There the landlords had given notice "to demolish "and reconstruct the whole of the premises comprised in your "holding." The landlord only intended to demolish a substantial part, and not the whole of the premises comprised in the holding, and this court held that the notice was good. Mr. Megarry has sought to distinguish that case, since there the greater included the less, and he accepts the decision on that basis. He, however, argues that the decision in *Biles* v. *Caesar*[1] is not conclusive against him, since the language used by the court went further than was necessary to cover that situation, and he said that that language ought not to control the position where there is, as he says, a vital omission in the notice.

I accept the contention that there is a distinction. Nevertheless, I think the court did in *Biles* v. *Caesar*[1] and also in *McMullen* v. *Great Southern Cemetery and Crematorium Co. Ltd.*[2] use language which strongly supports the landlord's contention that the court should take a similar view in the present case.

In *Biles* v. *Caesar* Denning L.J. said[3]: "In my judgment, "the tenant's argument on this point is not correct. It is "sufficient for the landlords in their notice of opposition to "specify the particular paragraph—(*a*), (*b*), (*c*), (*d*), (*e*), (*f*) or (*g*) "of section 30 (1) upon which they rely. It is not necessary for "them to specify any of the subsidiary portions of a paragraph, "so long as they make clear which is the paragraph on which "they rely. It seems to me quite plain that the landlords here "in their notice and in their answer were relying on ground (*f*)." Then he went on to point out that the landlord did not prove the full extent of the notice. I made observations[4] which I think are to the same effect.

McMullen v. *Great Southern Cemetery and Crematorium Co. Ltd.*[5] was heard by the Court of Appeal on November 19, 1958, the court being presided over by Lord Evershed M.R. The notice there was under sub-paragraph (*g*) and it was said to be defective because the word "building" was used instead of the word "holding." It is to be noted that "building" is a word of lesser content than "holding" and the question of the greater including the less would not excuse the error if it required excuse. I think I need only read two sentences of Lord Evershed M.R.'s judgment. He said: "If it were necessary that the terms of "this notice should precisely and exactly cover the Parlia-"mentary language, there might be some substance in this "objection," and he added at the end of the paragraph: "The "obligation, therefore, is (as I conceive) to indicate, with

[1] [1957] 1 W.L.R. 156; [1957] 1 All E.R. 151.
[2] C.A., November 19, 1958 (unreported).
[3] [1957] 1 W.L.R. 156, 158.
[4] Ibid. 159, 160.
[5] Unreported.

" sufficient clarity to be understood, on what grounds he will " seek, when the time comes, to oppose the tenant's application."

Mr. Megarry has argued that to treat the landlord's notice as valid does not give effect to the word " stated " in section 30 (1) of the Act. He says that if the last words are omitted, it follows that the ground cannot be said to be stated. The word " stated " is not, however, a term of art, and of course in view of the decision of this court Mr. Megarry cannot contend that the landlord must slavishly copy out every word of the relevant sub-paragraph of his notice.

Some cases have been referred to which are useful, at any rate for comparison. In *Budge* v. *Hicks* [6] the question under consideration was a notice to quit given by the landlord to his tenant under the Agricultural Holdings Act, 1948. It was held that the notice, not having to be in any particular form, must state the reason why the landlord required possession. The word " stated " is used in the relevant subsection (section 24 (2)) of the Agricultural Holdings Act, 1948, a number of times, and there again the effect of that decision is, I think, that it does not follow from the use of that word, that the word " state " is to be treated as if it meant that the exact words of a statute or statutory provision were to be followed.

I also refer for comparison to *Sidney Bolsom Investment Trust Ltd.* v. *E. Karmios & Co. (London) Ltd.*,[7] where the statutory provision under consideration was the Landlord and Tenant Act, 1954, s. 26 (3): " A tenant's request for a new tenancy " shall not have effect unless it is made by notice in the " prescribed form given to the landlord and sets out the tenant's " proposals as to the property to be comprised in the new " tenancy (being either the whole or part of the property com- " prised in the current tenancy), as to the rent to be payable " under the new tenancy and as to the other terms of the new " tenancy." The tenant in the *Bolsom* case [8] had not set out the terms in full but left one to be inferred. This the court was able to do by reference to the current tenancy.

In my judgment, the concluding words need not be set out in the notice. The ground of the opposition is set out sufficiently by setting out the intention as required by the statute. It is true that the landlord will not succeed in his opposition unless he qualifies under the concluding words which state a condition precedent which must be satisfied by him, but the essential requirement, that the tenant must be informed of the intention with sufficient precision, has been complied with. There is nothing misleading to the tenant in the notice, in my judgment, and nothing in the notice to quit cases which point to a contrary conclusion. There is nothing positively wrong in the statement, such as a wrong date in the notice to quit, which cannot be cured,

[6] [1951] 2 K.B. 335; [1951] 2 T.L.R. 349; [1951] 2 All E.R. 245.

[7] [1956] 1 Q.B. 529; [1956] 2 W.L.R. 625; [1956] 1 All E.R. 536.

[8] [1956] 1 Q.B. 529.

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whether the tenant is misled or not. Compare the decision of this court in *Hankey* v. *Clavering*,[9] following the old case of *Cadby* v. *Martinez*,[10] where Lord Greene M.R.[11] treated the matter as very clear that, where there was a mistake in the date, obviously due to a slip on the part of the landlord, it could not be cured by acceptance of service by solicitors for the tenant. In other respects, notices to quit have been liberally construed following the maxim ut res magis valeat quam pereat.

There is one case to which we were referred which is an illustration of that, *Doe d. Rodd* v. *Archer*.[12] The marginal note reads: "Where a farm was leased for 21 years at a "rent of £180 per annum consisting, as described in the lease, "of the Town Barton, and its several parcels described by "name, at the rent of £83, other closes named, at other rents "of £5, £5 and £1; the Shippen Barton, and its several "parcels described by name, at £86: with a power reserved to "either party to determine the lease at the end of 14 years, "on giving two years' previous notice: held that a notice by "the landlord to his tenant to quit 'Town Barton, &c. agreeably "'to the terms of the covenant between us on the expiration of "'the 14th year of your term,' given in due time was sufficient." Lord Ellenborough C.J. said[13]: "The landlord must have "intended to give such a notice to quit as the lease reserved to "him the liberty of giving, and not a void notice to quit a part "only: and so the notice in question must have been understood "by the tenant." The other members of the court agreed and Bayley J. said[14]: "We are to construe the notice to quit in such "a way ut res magis valeat quam pereat."

The landlord's statement, in my judgment, gives the right information to the tenants in order that they may be able to deal with the ground stated in opposition to their application for a new tenancy, and I would, therefore, dismiss the appeal.

Harman L.J. The Landlord and Tenant Act, 1954, is one more instance of a process, which began in the year 1915 with the Increase of Rent and Mortgage Interest (War Restrictions) Act, 1915, of helping tenants to retain their holdings notwithstanding that their contract with the landlord has run out. There has come into being, not unnaturally over this long period of time, a kind of theory that the landlord is an ogre and the tenant his victim in need of and entitled to every safeguard and protection which the law and the courts can devise in his favour. Whether that represents the reality of the situation in the middle of this century may perhaps be doubted, but that is how the matter stands. The Act of 1954 does something for

[9] [1942] 2 K.B. 326; [1942] 2 All E.R. 311.
[10] (1840) 11 A. & E. 720.
[11] [1942] 2 K.B. 326, 330.
[12] (1811) 14 East 245.
[13] Ibid. 248.
[14] Ibid. 248.

tenants of business premises going far beyond anything done before, though something was attempted by the Act of 1927.

The tenancy here was one where the estate, created by the bargain constituted by a lease, expired one day before Lady Day 1959; on that day the landlord would have been entitled to possession but for section 24 of the Act of 1954, which enacted that the term should be continued. Section 25 of the Act nevertheless gave the landlord a right under certain conditions to terminate, and he gave a notice so to do on Lady Day of 1959, which was the earliest day for which the statute allowed. The tenants would not accept the notice of termination and demanded a new lease. The landlord opposed that application and section 30 tells us on what grounds that opposition may be raised.

An originating summons was issued to try the question whether any, and if so what, new lease should be granted, and upon that a preliminary point was raised, namely, whether the landlord had ever served a proper notice upon the tenants so as to give them the position of being allowed to debate the question whether a new lease should be granted. This matter came on before Danckwerts J. as a preliminary point, therefore, and the judge felt himself constrained to direct a summons to be issued in the originating summons proceedings to raise the point which does not appear on the face of the originating summons at all. I agree entirely with Hodson L.J. that it would obviously be a convenient practice where, as not infrequently, points arise on the form of a notice on one side or the other, that the court should be asked in the originating summons to exercise its jurisdiction of construing documents and to construe the notice before hearing the originating summons on the merits. It may often save a great deal of evidence being filed uselessly. I add to that the fact that these sections have been made use of by tenants here and there to prolong their tenancies, being tenancies at a great under value. So long as the tenant can think of an expedient for agitating the courts on these matters, he is by the transitional provisions of the Act allowed to remain in possession paying the old and almost inevitably lower rent. Any procedure which speeds up this kind of proceedings and takes away from the obstructor his chances of obstruction is to be encouraged.

The landlord served the proper notice on the tenants giving the reasons why he should be entitled to oppose the tenants' application. I say "the proper notice" because there is a statutory form prescribed by the Lord Chancellor and he used the statutory form, but when he came to indicate which of the six reasons he was going to rely on, he did not, as my Lord said, copy out the whole of section 30 (1) (*f*), but left out the words at the end that he could not reasonably carry out the work without obtaining possession of the holding. It is said, therefore, that he has not "stated the ground" of his opposition and his notice

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is bad. I incline to the view that on the true construction of that subsection the words "that he could not reasonably do "so without obtaining possession of the holding" are not a "ground" at all. They are a proviso which prevents the landlord from succeeding on ground (*f*) unless he can show that it is impracticable for him to carry out his proposal without having possession. That does not seem to me to be a ground; if so, it need not be stated; but whether that is so or not, I think the last words are in fact "stated" in the notice, and for two reasons. First of all the notice refers the recipient to the back of the form, and if he looks on the back of the form he will find these words or their equivalent plainly set out. The reason why notices of this sort are so elaborate is again tenderness for the tenant. The tenant is supposed to be a person who is either almost illiterate or so poor that he cannot get advice and, therefore, he is to be shown very carefully everything which may help him to resist the landlord's demands to get his own property back. He has only to look at note 4 on the back, and there he will find this bit about not being able reasonably to do so. That again gives him the chance, if he wishes to take it, to set about to prove that the landlord could do the proposed work without obtaining possession. If the tenant can prove that, the landlord is bound to fail. There is no discretion in the court.

The second reason why I think by necessary implication those words are to be read in is this. Any notice under sub-paragraph (*f*) must necessarily mean that the landlord alleges that he cannot do the work without obtaining possession. If he alleged the contrary, he must necessarily allege himself out of court because (*f*) could not possibly avail him. Therefore, anybody reading that he intends to demolish and rebuild and so forth must necessarily know that he is also saying that he requires possession for that purpose because otherwise the notice would be perfectly futile. Therefore, there arises a necessary implication, rather like that in the old case which my Lord cited about a notice to quit where Lord Ellenborough C.J. said you must suppose the notice to quit was a notice which he could give; so here you must suppose the notice to be a notice which in itself involves the essential condition.

It was urged upon us by Mr. Megarry that although the utmost strictness was to be observed against the landlord under section 30, the same was not true of a tenant's notice under section 26 (3), under which a tenant requesting a new tenancy has to set out the tenant's proposals as to the property to be comprised in the new tenancy. That is exactly the Roland for the Oliver of section 30, and it seems to me the two ought to be construed in exactly the same way. They are both in pari materia, not quite the same words are used, but it seems to me what is good law for the landlord is good law for the tenant and each must give such a notice to the other as will indicate

with sufficient clarity what it is that is proposed. That test is amply passed here, as my Lord has already said.

I agree with my Lord, therefore, in dismissing this appeal.

Appeal dismissed with costs. Leave to appeal to House of Lords refused.

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Solicitors: *Harold Benjamin & Collins; Harris Chetham & Co.*

[CHANCERY DIVISION.]

* *In re* S., AN INFANT.

[1959 S. No. 1323.]

1959
June 19.
Roxburgh J.

PRACTICE NOTE.

Adoption—Appeal from adoption order—Guardian ad litem for purposes of appeal—Application for leave to appeal out of time—Service of notice on guardian ad litem—Adoption Act, 1958 (7 *Eliz.* 2, *c.* 5), *s.* 10; *R.S.C., Ord.* 55A, *r.* 6.

MOTION.

Applicants sought leave to appeal out of time under section 10 of the Adoption Act, 1958,[1] against an order, dated April 9, 1959, made by Lancashire justices sitting at Blackpool Juvenile Court.

John Franklin Willmer for the applicants, referred to *Practice Direction* (*Appeals from Justices Under the Guardianship of Infants Acts*).[2]

The respondent did not appear and was not represented.

ROXBURGH J., during the course of the argument, gave the following ruling: I am prepared to give a formal ruling that, in the case of an appeal from a magistrates' court, the guardian ad litem appointed in that court under this Act, and, in the

[1] Adoption Act, 1958, s. 9 (7): "For the purpose of any application "in England for an adoption order, "the court shall, subject to Adop- "tion Rules, appoint some person to "act as guardian ad litem of the "infant upon the hearing of the "application with the duty of safe- "guarding the interests of the infant "before the court."

S. 10 (1): "Where, on an applica- "tion made in England to a magis- "trates' court, the court makes or "refuses to make an adoption order, "an appeal shall lie to the High "Court."

R.S.C., Ord. 55A, r. 6: "(2) The "notice of motion shall be served . . . "within twenty-one days from the "date of the order complained of. "(3) The notice of motion shall be "served on all parties directly affected "by the appeal and on the registrar "or clerk of the court from which the "appeal is brought."

[2] [1955] 1 W.L.R. 1239; [1955] 3 All E.R. 591.

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case of an appeal from a county court, the guardian ad litem appointed in that court for the purposes of this Act, is the guardian ad litem for the purpose of any appeal from either of those courts. I am sure that that must be the intention.

His Lordship, giving leave to appeal out of time, said that normally the notice of motion should have been served on the guardian ad litem; but in this case he would dispense with that, because it was the first time the matter had arisen and it was not dealt with at all by the Adoption Rules, 1959. [S.I. 1959, No. 504.]

Solicitors: *Corbin, Greener & Cook* for *Charles Ingham, Clegg & Crowther, Blackpool.*

J. F. L.

[COURT OF APPEAL.]

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June 25, 26.

Lord Evershed M.R., Romer and Pearce L.JJ.

* *In re* WRAGG, Decd.
HOLLINGSWORTH and Another *v.* WRAGG and Others.

[Plaint No. 1958 W. 1528.]

Will—Construction—Annuity—Surplus income—Gift of residue "after "death of" annuitant—Question of destination of surplus income during lifetime of annuitant.

A testator, by his will, directed his trustees to hold the estate on trust to pay a weekly sum to his widow and another weekly sum to his brother, and "after the death of" the widow, and setting aside a sufficient part of the estate to pay his brother's annuity, to divide "the residuary estate" into seven equal parts. The wife and the brother both survived the testator and the question arose as to the disposal of surplus income during the widow's lifetime:—

Held, that on the true construction of the will, and giving the language of the definition of the residuary estate "after the death "of the widow" and weekly provision for the brother's annuity its ordinary and natural meaning, the ultimate beneficiaries were precluded from taking anything until the widow had died. Accordingly, the surplus income was undisposed of by the will and passed to the widow.

Weatherall v. *Thornburgh* (1878) 8 Ch.D. 261; *Berry* v. *Geen* [1938] A.C. 575; *sub nom. In re Blake, Berry* v. *Geen*, 54 T.L.R. 703; [1938] 2 All E.R. 362; *In re Robb* [1953] Ch. 459; [1953] 2 W.L.R. 819; [1953] 1 All E.R. 920; and *In re Gillett* [1950] Ch. 102; 65 T.L.R. 627; [1949] 2 All E.R. 893 applied.

In re Shuckburgh's Settlement [1901] 2 Ch. 794 and *In re Burden* [1948] Ch. 160; [1948] 1 All E.R. 31 distinguished.

Observation of Romer L.J. in *In re Edwards* [1906] 1 Ch. 570 at 574 applied.

Decision of Danckwerts J. reversed.

Appeal from Danckwerts J.

Stephen Wragg, hereinafter called "the testator," by clauses 1 to 3 inclusive of his will dated October 24, 1949, after appointing executors and trustees, and making a specific bequest to his wife of all his household furniture and household goods absolutely, desired and bequeathed his residuary estate on the usual trusts for sale and conversion. By clause 4 he directed his trustees to permit his wife to occupy his house, 34 Burns Lane, Warsop, "during her lifetime and after her death . . . "Annie Reast . . . widow and Elizabeth Wragg . . . spinster "to occupy the said house during their joint lives and the "survivor thereof to occupy the said house during her lifetime "and until the death of such survivor no sale shall be effected "of the said house." By clause 5 he directed his trustees to hold the net proceeds of the sale and conversion and ready money, after payment of debts, funeral and testamentary expenses and a direction to invest the residue and "to stand "possessed of such investments and all parts of my estate for "the time being unsold (hereinafter called 'my residuary "'estate'). . . . (*c*) Upon trust to pay my wife during her life a "weekly payment of such sum as after deduction of income tax "will leave in the hands of my said wife the clear weekly sum "of three pounds ten shillings my trustees being empowered to "resort to both capital and income to pay the said weekly sum. "(*d*) Upon trust to pay to my brother Ernest Wragg of 58 "Booth Street, Cleckheaton, during his life a weekly payment "of such sum as after deduction of income tax will leave in the "hands of my said brother the clear weekly sum of ten shillings "my trustees being empowered to resort to both capital and "income to pay the said weekly sum. (*e*) After the death of "my wife and after setting aside a sufficient part of my estate "to pay the said weekly payment of ten shillings to my brother "Ernest Wragg during his life Upon trust to divide my resi-"duary estate into seven equal parts and to hold each such "equal seven parts upon the following trusts respectively": and then the testator named seven individuals each of whom would take one-seventh part of the residuary estate upon its division. That was followed by a proviso as to the substitution of issue of any of the seven named beneficiaries who might die during the testator's lifetime.

By sub-clause (*f*): "Upon the death of the survivor of my "wife and the said Annie Reast and Elizabeth Wragg and "after the sale of my house, 34 Burns Lane, Warsop, aforesaid "my trustees shall hold the proceeds thereof on the same trusts "as those declared in clause 5 (*e*) hereof"; and (*g*): "Upon "the death of my brother Ernest Wragg my trustees shall hold "that part of my estate set aside to pay to him the weekly "sum of ten shillings during his life upon the same trusts as "those declared in clause 5 (*e*) hereof."

The testator died on September 14, 1957, leaving a net estate of about £10,000, of which approximately £2,000 represented the

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value of the house referred to in clause 4 and the remainder consisted of investments. After payment of the two weekly sums bequeathed to the testator's widow and his brother, both of whom survived the testator, there was a surplus of income. The plaintiffs, as executors and trustees of the will, took out a summons asking for a declaration as to the destination of the surplus income during the remainder of the life of the testator's widow, in particular whether it was payable to the seven remaindermen entitled under clause 5 (*e*) of the will (who were the second to eighth defendants inclusive to the summons) or as on an intestacy. The testator's statutory next-of-kin were his widow, his brother Ernest, his sisters Annie Reast and Elizabeth Wragg (who were also entitled under clause 5 (*e*)), and the children of a deceased brother and sister.

Danckwerts J. decided in favour of the remaindermen taking under clause 5 (*e*) and the widow appealed, contending that the surplus income was undisposed of during her lifetime.

H. E. Francis for the first defendant, the widow.

A. C. Sparrow for the plaintiffs, executors and trustees of the will.

G. M. Parbury for the seven other defendants, remaindermen.

In addition to the cases referred to in the judgment, the following case was cited in argument: *Maddison* v. *Chapman*.*

LORD EVERSHED M.R. I will ask Romer L.J. to deliver the first judgment.

ROMER L.J. This appeal has been very well argued by counsel on both sides, by Mr. Francis for the first defendant and Mr. Parbury for the plaintiff. It is an appeal from a decision of Danckwerts J. on a question of construction of a nature which frequently comes before the court. [His Lordship stated the facts, substantially as set out above, and read the following note taken by counsel of the judgment of Danckwerts J.] "Now the position is that there is no express gift of "income after providing for the annuities. The question is a "familiar one. Is there an intestacy, or does the surplus income "go with the final gift? There are authorities, such as *Berry* "v. *Geen*,[1] in which the court has come to the conclusion that "there is no gift of the surplus income until the death. That "rule probably defeats the intention of the testator. There is "another line of cases, such as *In re Shuckburgh's Settlement*[2] "and *In re Burden*,[3] in which the words can be read as 'subject "'to' the prior interests. The line between them is very fine. "Prima facie, when a testator makes a will he means to make

* (1858) 4 K. & J. 709.

[1] [1938] A.C. 575; 54 T.L.R. 703; [1938] 2 All E.R. 362.

[2] [1901] 2 Ch. 794.

[3] [1948] Ch. 160; [1948] 1 All E.R. 31.

"an effective will and does not mean to leave an intestacy. It "would be odd in this case if the wife took the whole income. "The courts have allowed small indications to support a con- "struction which avoids an intestacy. Here, I think, there are "sufficient indications in clause 5, sub-clauses (*e*), (*f*) and (*g*), to "show that the testator intended the trusts of that clause to "take effect subject to the earlier provisions of the will." [His Lordship continued:] It appears to me that this question is essentially one of construction to be decided on the terms of this particular will. Prima facie, a gift to B "after the death of A" must take effect according to its terms and cannot operate so long as A is still alive. Accordingly, in the present case, clause 5, sub-clause (*e*)—which on the face of it is a gift in equal shares to seven named persons of the capital of the estate and of that alone—does not become effective until the death of the testator's widow, and the seven ultimate beneficiaries can take nothing during her lifetime. However, these beneficiaries claim the surplus income on the footing that it is income of the residuary estate and that the words "After the death of my wife" mean no more than "subject to my wife's interest"—videlicet, subject to her weekly sum of £3 10s. tax-free.

This interpretation has undoubtedly been put on similar words in some of the reported cases, of which perhaps the best known example is *In re Shuckburgh's Settlement*,[4] which is one of the cases to which the judge referred in his judgment. Mr. Parbury submitted that the words in clause 5 (*e*) "After the death of "my wife" ought to receive that interpretation, so as (in effect) to accelerate the interests of the ultimate beneficiaries so far as the surplus income is concerned.

For my part, taking the will as a whole, I can see no sufficient reason why the words "After the death of my wife" should not receive their ordinary and natural meaning. But apart from that, it seems to me that it is impossible to substitute "subject "to my wife's interest" for the words which in fact appear. The reason for that is that after the relevant words at the beginning of clause 5 (*e*) there follow the words "and after "setting aside a sufficient part of my estate to pay the said "weekly payment of ten shillings to my brother Ernest"; and as a question of construction it seems quite clear to me that that direction to set aside was to take effect on the death of the wife and not before. If that view is right, it is impossible to fit in with the substitution contended for, because the substitution would leave the point of time for setting aside the relevant part of the fund in the air and undefined.

Mr. Parbury says that that does not follow, because under the directions in the will the trustees could set aside that part of the fund in the widow's lifetime as well as after her death. I cannot, however, accept this. Under clause 5 (*e*) the trustees

[4] [1901] 2 Ch. 794.

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are empowered to resort to both capital and income of the residuary estate to pay the brother's weekly sum, and they could do that during the widow's lifetime. But that is quite a different thing from setting aside a part of the estate to pay the weekly sum, and was a step which the trustees were only directed to take after the widow's death. In my judgment this is the irresistible result of reading sub-clauses (*d*) and (*e*) in conjunction with each other; and if the direction to set aside a part of the estate was intended to operate while the widow was still alive, it is difficult to see why the direction was not included together with the power in sub-clause (*d*) rather than inserted separately in sub-clause (*e*).

The next point which Mr. Parbury took was that the trust declared by sub-clause (*e*) in favour of the capital beneficiaries was what he described as the "master" trust. He pointed out that emphasis, or great significance, was attributed by the testator to that conception by the introduction of such clauses as (*f*) and (*g*). Under sub-clause (*f*) he directed (although there was in fact no need for such a direction) that, on the death of the three persons to whom he had given residential rights in relation to his house and after the sale of his house, the trustees should hold the proceeds thereof on the same trusts as those declared in clause 5 (*e*). Mr. Parbury said that that was quite an unnecessary direction, and he rightly said so, but he used it as an indication that the testator did regard sub-clause (*e*) as the principal trust declared by his will and as an indication that he intended everything that he had not expressly disposed of to go in accordance with the terms of clause 5 (*e*).

Mr. Parbury referred similarly, and for the same purpose, to sub-clause (*g*), which deals with the ultimate destination of the part of the estate which he had directed to be set aside for the benefit of his brother Ernest. While appreciating the force of what Mr. Parbury said on that point, I do not think it carries him very far on his path. It is true that both those provisions were unnecessary, but I do not find in them any indication which would lead me to the conclusion that "After the "death of my wife," in sub-clause (*e*), should be read as "subject to my wife's interest."

Further and finally, Mr. Parbury said that if in fact, on the true construction of this will, there is a partial intestacy—namely, a partial intestacy in respect of the surplus income during the widow's lifetime—it would be odd that that should go to a person, namely, the widow, as an augmentation of a weekly sum which has already been expressly given to her, that is to say her weekly sum of £3 10s. free of tax. That point I agree has some little substance in it, and as a matter of construction, if the testator did in fact intend his wife to have any surplus income arising during her lifetime, it was a very oblique way of giving it to her: it would have been very easy for him, in sub-clause (*c*), to have given her not only the weekly sum of £3 10s.

but also any surplus income arising during her lifetime from the estate as well.

But it may very well be, I think, that the testator never applied his mind to this surplus income at all, which would not amount and does not amount to any very considerable sum; and, alternatively, he may have thought that as it would be quite small he was quite content to leave its destination to the law, whether his widow or anybody else should thereby become entitled to it.

It appears from the notes of the judge's judgment which I have read that he thought there were sufficient indications in sub-clauses (*e*), (*f*) and (*g*) of clause 5 to show that the testator intended the surplus income to go to the ultimate beneficiaries. But, with great respect, I am unable to reach that conclusion myself. As to sub-clause (*e*), this appears to me to be simply a trust for the distribution of corpus after the widow's death, and there is no reference anywhere at all in it as to income. Sub-clause (*f*) does not seem to affect the matter one way or the other. As Mr. Parbury pointed out, it was superfluous. But I think myself that it was designed to direct expressly the destination of the proceeds of the house after the last of the residential beneficiaries had died. Sub-clause (*g*) is also colourless, on the view which I have already expressed that the trustees were only to set aside a part of the estate for the brother's benefit after the widow's death. On that view, sub-clause (*g*) was based on the assumption that the brother would survive the widow and the setting aside of a part of the estate, and was saying (though quite unnecessarily) that on the brother's death the part so set aside should be dealt with in accordance with sub-clause (*e*) and become divisible, along with the rest of the capital of the estate, among the seven beneficiaries.

As I say, it appears to me that this is wholly a question of the construction of this particular will, and on the true construction of this will it does appear to me that during the widow's lifetime this surplus income is undisposed of and does not go to the seven beneficiaries named in sub-clause (*e*) but does go to the wife, she being entitled as on an intestacy.

We were, however, quite rightly, referred to certain authorities on this matter; and on the point that normally words such as "after the death of A." should receive their ordinary and natural meaning, we were referred to *Weatherall* v. *Thornburgh*[5]; *Berry* v. *Geen*[6]; *In re Robb*[7]; and *In re Gillett*.[8] In all those cases, as I say, the ordinary meaning was given to such words as those which arise in this case. I do not propose to refer to any of those authorities except to a passage in the judgment of Roxburgh J. in *In re Gillett*.[8] The relevant

[5] (1877) 8 Ch.D. 261.
[6] [1938] A.C. 575.
[7] [1953] Ch. 459; [1953] 2 W.L.R. 819; [1953] 1 All E.R. 920.
[8] [1950] Ch. 102; 65 T.L.R. 627; [1949] 2 All E.R. 893.

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part of the headnote in that case is as follows: "A testator "who died on December 24, 1942, by his will bequeathed "annuities to four persons for their respective lives. He directed "'that in order to meet the said annuities my trustees shall "'. . . have power to utilise and employ capital or income or "'both. . . . And as to any balance remaining of my residuary "'trust funds after the provision and payment of all the afore-"'said annuities my trustees shall stand possessed thereof . . . "'in trust on the decease of the survivor of the above first-named "'four annuitants . . . ' in varying specified proportions for 17 "named persons absolutely, but liable to be divested by certain "substitutional gifts. He made no disposition of any surplus in-"come there might be from the residuary trust funds pending "the death of the survivor of the four annuitants; and after "the death of two of them there was such a surplus."

The judge held that the surplus income was undisposed of by the will. There were other points arising in the case as well, but he dealt with that particular point in his judgment as follows[9]: "It may be straining language and logic to treat a "contingent gift as an immediate gift to take effect only upon "a certain event, and this is not the way in which the rule "is stated in *Bective* v. *Hodgson.*[10] However this may be, it "would be impossible (in the absence of a special context) to "construe a gift timed to take effect on the happening of an "event which must happen sooner or later as a gift of anything "before that time, because such a construction is excluded by "necessary implication, and accordingly a deferred or future "gift could not carry intermediate income unless there were a "rule of law that intermediate income not otherwise disposed "of passed with the principal as accessory thereto. *Berry* v. "*Geen*[11] shows that no such rule is applicable to future or "deferred gifts which are indefeasible."

After referring to a certain argument by Mr. Lindner, he continued[12]: "Undoubtedly words may be found in a will which "would be apt to attach intermediate income to a future gift "whether defeasible or indefeasible, and Mr. Lindner submitted "that apt words are to be found in this case. The gift is of "any balance remaining of the residuary trust fund after pro-"viding for annuities out of capital or income or both, and at "one time I was inclined to hold that such a gift extended to "the balance of a mixed fund of capital and past income not "required to answer the annuities. But Mr. Rink has con-"vinced me that, as the residuary trust fund is expressly defined "in such a manner as to exclude income, I must construe the "balance of that fund as meaning so much of the capital thereof "as has not been required to answer the annuities."

Mr. Francis, not unnaturally, fastened on those words of the judge—"as the residuary trust fund is expressly defined in such

[9] [1950] Ch. 102, 110.
[10] (1864) 10 H.L.C. 656.
[11] [1938] A.C. 575.
[12] [1950] Ch. 102, 111.

"a manner as to exclude income"—and said that that is precisely what is to be found in clause 5, subclause (*e*), of the testator's will in the present case.

Three cases were cited to us in which language such as "after "the death of so-and-so" was interpreted as meaning "subject to "the interest of" the named person; and those cases were *In re Shuckburgh's Settlement* [13] (to which I have already referred); *In re Jobson*,[14]; and *In re Burden*.[15] But I will not refer to them because each of them contained some special context which enabled the court to depart from the strict meaning of the phrase "after the death of A.," and I need only say that in my judgment no comparable context appears in the will now before us.

In conclusion, I would only add that the court should not in all cases lean too heavily against a construction which involves a partial intestacy, as was pointed out by Sir Robert Romer L.J. in *In re Edwards*,[16] for the reasons which the Lord Justice there indicated.

For the reasons which I have attempted to explain, I would allow this appeal.

PEARCE L.J. I agree.

LORD EVERSHED M.R. I also agree; and only add a few words because upon a matter of construction we are differing from Danckwerts J. Let me say at once that I associate myself fully with my brother Romer in thinking that reference to cases is of limited assistance; since decisions must in these cases always depend upon the particular instruments there under review.

I feel, if I may say so, some sympathy for the judge's view, since when a will has been (as this obviously was) professionally prepared, there is a natural inclination against a result that means that the draftsman left a lacuna in his draft. Still, as Romer L.J. has pointed out, the court should not, I think, on that ground alone, lean too heavily against a construction that produces an intestacy; and certainly cannot, in order to avoid that result, misconstrue the language of the instrument. I may perhaps also add that in these matters naturally the Court of Appeal may have to take a rather stricter view than a judge of first instance.

The words that we have to construe are perfectly simple English words—"After the death of my wife." It is no doubt true that in certain contexts (and the two cases referred to by Danckwerts J. of *In re Shuckburgh's Settlement* [17] and *In re Burden* [18] are illustrations of this result) the court may conclude that, by a formula such as "after the death of A.," the testator meant no more and no less than "subject to what has gone "before." But is there here a context which requires a departure from the ordinary meaning of the words in favour of such a view?

[13] [1901] 2 Ch. 794.
[14] (1889) 44 Ch.D. 154.
[15] [1948] Ch. 160.
[16] [1906] 1 Ch. 570.
[17] [1901] 2 Ch. 794.
[18] [1948] Ch. 160.

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For the reasons which my brother has given, and which I fully share, I think the answer is "No." Particularly, as I think, the opening words of subclause (*e*) of clause 5 of the will, to which Romer L.J. has alluded, seem to negative such a conclusion; for (as my brother has pointed out) the formula "After the death "of my wife and after setting aside," etc., seems inevitably to direct attention to one point of time which the testator has had in mind as being the relevant point of time for the coming into operation of that which follows; and I think (if I may say so) that that consideration is the best answer to Mr. Parbury's argument which he called the argument of the "master" trust.

If one looks at the will as a whole, one finds indeed that there is some inelegance in preparation; because the will starts with a general devise and bequest of all the property on trust for sale, and then the trusts of the proceeds of sale are separated from the initial devise and bequest by the intrusion of provisions about the testator's house which, in part, may be responsible for the present difficulty. The judge was of opinion that the view which was contrary to that which commended itself to him would probably defeat the intention of the testator. I venture respectfully rather to doubt that. If one had asked the testator the general question: "Do you intend to die partially intestate?" he might well have said "No." But the question is, what did he intend to do with any surplus income? My reading of the paragraphs of clause 5 indicates that he may well have doubted whether there would be any surplus; for he made express direction that the two annuities should be paid if necessary out of capital. My own strong impression, I confess, on reading this will, is that he had not applied his mind at all to the question what would happen to any surplus income in any year if there was such surplus; and if he did not apply his mind to it, I find it difficult to suppose that he had any intention in regard to it. I am not, for my part, satisfied on this will that he intended that, if there was a small surplus, it should be divided into sevenths amongst the persons later mentioned.

For these reasons, in addition to those which my brother has stated, I have come myself, I confess, to a clear conclusion that there is nothing in the context of this will which would justify interpreting the simple words "After the death of my wife" so as to give them any other than their ordinary meaning; and I would, therefore, allow the appeal.

Appeal allowed. Costs of all parties, as between solicitor and client, to be paid out of corpus of estate.

Solicitors: *Peacock & Goddard for Elliott Smith & Co., Mansfield; Sharpe, Pritchard & Co. for Harrop, White, Vallance & Dawson, Mansfield.*

E. D.

[COURT OF CRIMINAL APPEAL.]

* REGINA *v.* BISHOP.

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Lord Parker C.J., Slade and Winn JJ.

Criminal Law—Sentence—Supervision order—Breach—Failure to notify address of residence—"Address"—Criminal Justice Act, 1948 (11 *&* 12 *Geo.* 6, *c.* 58), *s.* 22 (1)—*Prison Act,* 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 52), *s.* 29 (1) (2) *and Sch. I.*

Criminal Law—Sentence—Conviction at quarter sessions—Maximum sentence providing for summary conviction only—Prison Act, 1952, *Sch. I, para.* 2 (1).

The appellant was sentenced to 18 months' imprisonment and a supervision order was made under section 22 of the Criminal Justice Act, 1948. On his release from prison he was told by the governor to inform the appointed society of his address as required by section 29 (1) of the Prison Act, 1952,[1] but he failed to do so and the society informed the Commissioner of Police. In due course he was found by the police at Southsea and was charged with having failed without reasonable excuse to register the address of

[1] Prison Act, 1952, s. 29: "(1) "Where an order has been made "under section 22 of the Criminal "Justice Act, 1948 (which, as "amended by this Act, requires a "court in certain circumstances to "order that a person shall for a "period of 12 months be subject to "the provisions of this section)— "(*a*) the offender shall, on his next "discharge from prison and there-"after from time to time, inform the "appointed society of his address in "accordance with such instructions "as may be given to him by or on "behalf of the society; (*b*) if the "offender fails to comply to the "satisfaction of the appointed society "with the aforesaid requirement to "notify his address on his discharge, "the society shall, and if he subse-"quently fails to keep the society in-"formed of his address to their satis-"faction the society may, give notice "by registered post of the failure to "the Commissioner of Police of the "Metropolis, and shall use their best "endeavours to inform the offender "that the notice has been given; "and as from the date on which any "such notice has been given as afore-"said, the provisions of the First "Schedule to this Act shall apply to "the offender. (2) It shall be the "duty of the governor of a prison on "the discharge from prison of an "offender against whom an order has "been made under the said section 22 "to serve upon him a notice stating "the effect of the order."

Sch. I: "1.—(1) Any person to "whom this Schedule applies shall— "(*a*) register at an appointed police "station in any police area in which "he is from time to time residing the "address of his residence; (*b*) report "once in each month, on such day "as may be directed by or on behalf "of the chief officer of police, at the "police station at which his address "for the time being is registered. "(2) Where any person to whom "this Schedule applies changes his "residence, he shall, on registering "his new address under this para-"graph, state the address which was "last registered by him thereunder. . . .

"2.—(1) If any person fails with-"out reasonable excuse to comply "with any of the requirements of the "preceding paragraph, he shall be "guilty of an offence and liable on "summary conviction thereof to "imprisonment for a term not "exceeding six months: Provided "that—(*a*) in proceedings for a "failure to register an address it "shall be a defence for the defen-"dant to prove either that—(i) being "on a journey to a particular destina-"tion he remained no longer in the "place in which he failed to register "his address than was reasonably "necessary for the purposes of that "journey; or (ii) his absence from "his registered address was tem-"porary and that he kept the officer "in charge of the police station at "which that address was registered "sufficiently informed of his where-"abouts; . . .

"4.—(1) For the purposes of this "Schedule, a person shall be deemed "to reside at any house or other "place of whatever description at "which he spends a night."

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his residence at the police station under the First Schedule to the Act of 1952. He elected to be tried at quarter sessions and in evidence said that he had no fixed abode and spent the two nights that he was in the area wandering about. He was convicted and sentenced to nine months' imprisonment. He appealed against conviction and sentence:—

Held, (1) that "address" in section 29 (1) and the First Schedule did not necessarily mean a postal address, but included any place of whatever description at which the appellant spent the night and he was under an obligation to give a reasonable identification to such a place; accordingly, in the circumstances, the appellant had no reasonable excuse for failing to comply with the requirements of the First Schedule and was properly convicted.

(2) That the provision in paragraph 2 (1) of the First Schedule limiting the sentence on summary conviction to six months referred to proceedings initiated in a court of summary jurisdiction; accordingly, notwithstanding that the appellant was convicted by quarter sessions the maximum sentence was six months.

Per curiam. It is the duty of the governor under section 29 (2) to serve on the prisoner a notice which not merely tells him that he must inform the appointed society of his address, but explains to him the consequences of failure to give that information and, in particular, that he will then become subject to the First Schedule.

APPEAL against conviction and sentence.

The appellant, Edwin Francis Bishop, was sentenced on September 23, 1957, at Blackpool Quarter Sessions, to 18 months' imprisonment for shopbreaking and larceny and a supervision order was made under section 22 of the Criminal Justice Act, 1948. On October 25, 1958, the appellant was released from prison after serving that sentence and he failed to register with the appointed society. As a result the society notified the Commissioner of Police of the Metropolis and on February 20, 1959, the appellant was found at Southsea by the police and was charged with having failed to register his address pursuant to the First Schedule to the Prison Act, 1952. Before the magistrates the appellant elected to go for trial at Portsmouth City Sessions, where on April 1, 1959, he was convicted and sentenced by the recorder to nine months' imprisonment. By leave of the court the appellant appealed against both his conviction and his sentence on the ground that he had no address to register and that, being ignorant of his obligation to register he had "reasonable excuse" under paragraph 2 (1) of the Schedule for his failure. He further appealed against the sentence for an offence for which the maximum sentence on summary conviction was six months' imprisonment.

R. S. J. Brock for the appellant.
J. B. S. Edwards for the Crown.

The following cases were cited in argument: *Simmons* v. *Woodward*[2] and *Pickup* v. *Dental Board of the United Kingdom.*[3]

[2] [1892] A.C. 100; 8 T.L.R. 395.

[3] [1928] 2 K.B. 459; 44 T.L.R. 544.

LORD PARKER C.J., delivering the judgment of the court, stated the facts and continued: The case raises an interesting question which, as far as the court knows, has never arisen before, as to the true interpretation of the Prison Act, 1952, and, in particular, the First Schedule to that Act. [His Lordship read section 29 (1) of the Act of 1952 and continued:] Pausing there, it is provided by paragraph 3 (3) of the First Schedule to that Act: "A certificate purporting to be signed by or on behalf "of the Commissioner of Police of the Metropolis and certifying "that he has received a notice given pursuant to paragraph (*b*) "of subsection (1) of section 29 of this Act to the effect that a "person has failed to comply with any requirement under that "subsection shall, in any such proceedings as aforesaid, be "evidence of the notice having been duly given and of the con-"tents of the notice." In the present case there was such a certificate and, accordingly, there was evidence which was uncontroverted, that not only had the appointed society notified the Commissioner of Police of the Metropolis of a failure by the prisoner to inform the society of his address, but there was also evidence of the contents of the notice, namely, that he had failed to notify his address to the society. Therefore, there is no doubt that he thereupon became subject to the First Schedule.

[His Lordship read the First Schedule, paras. 1, 2 and 4, and continued:] There is no doubt that the appellant arrived in Portsmouth on February 18. He was arrested on February 20, and the indictment alleged "That between the 18th and 20th "days of February, 1959, at Portsmouth, you, being a person to "whom the Schedule applied, resided within the police area of "Southsea Police Station, being the appointed police station for "the said area, and that you unlawfully failed without reasonable "excuse to register the address of your residence at the police "station." At first he said that he had spent the two nights at the reception centre. When he came to give evidence he denied that and said that he had no fixed abode and that he was wandering about Portsmouth all the time. The recorder told the jury that it mattered not whether he had an address in the ordinary sense of the word, and that it was enough if he had come to Portsmouth other than merely passing through it to get to another destination; in other words, that he had come there to stay, albeit he spent part of the time in a bus shelter or whatever it might be. It is sufficient to refer to the summing-up, where he said: "The first issue of fact for you is 'Did he in fact "'stay at the reception centre?' He said he did, but now he "says that is untrue, that he did not, that he had no place of "residence. I have pointed out to you that he became under an "obligation to report as soon as he arrived, with an intention to "stay even if he had not acquired a place of residence. Any "place where he spent a night is a place within the meaning of "the Act, even if it is only a bus shelter; and it is no answer

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"to say 'I did not have a house to sleep in, I did not have "'lodgings.'"

The first ground of appeal against conviction is based on that passage in the summing-up. It is said, and said with some force, that you cannot register the address of a residence if the place where you have resided is a place such as a bench on the promenade or a bus shelter which is not in the ordinary sense of the word any address. It is true, so the argument runs, that paragraph 4 of the First Schedule provides that "a person shall "be deemed to reside at any house or other place of whatever "description at which he spends a night." Despite those words, so it is said, what is there deemed to be a residence or a residing must be cut down to such house or other place of whatever description which in the ordinary sense of the word can be said to have an address.

As I have said, this is a novel point, and not without difficulty, but the court has come to the conclusion that that argument is wrong. It is to be observed in the first place that there is a duty on a man's discharge from prison to inform the appointed society of his address. It would be a very curious result if a man could avoid his obligations under the statute by sleeping rough and saying, in effect, "I have no address." Similarly, in the case of a man who had failed to inform the appointed society of his address and had been reported to the police it would be even more curious if he was able to say: "I do not have to report at "the police station; I do not have to register anything at the "police station because I have not in the ordinary sense of the "word an address at all." Quite clearly the whole object of the Act would be defeated if such argument were to prevail, but quite apart from that the court feels that as a matter of construction there is no reason to give that effect to the statute. As I have said, the residence which calls for registration and a monthly report is something which is described by the words "shall be "deemed to reside." "A person shall be deemed to reside," that is, to have his residence, "at any house or other place of "whatever description at which he spends a night." Observe, therefore, that even one night in such a place brings upon him the obligation to register and that the residence can be any place of whatever description. Wider words could not be imagined, and the whole question is whether there is any justification for cutting down those very wide words by, in effect, inserting words to the effect "provided always that such place has an address." It seems to this court that "address" both in section 29 of the Act and in the First Schedule is not referring to an address in the ordinary sense of the word as a postal address. It denotes something less than that, and the court thinks that the obligation which arises on a deeming to reside in any place of whatever description at which he spends a night can be fulfilled and should properly be fulfilled by giving a reasonable identification of such a place, not necessarily a postal address but something

which describes or identifies the place with reasonable certainty. Accordingly, the court feels in the present case that the direction by the recorder is unobjectionable. He clearly did spend a night. Observe, it does not say "sleeps for a night," but he did spend the night in a place of some description in Portsmouth, and therefore it became his obligation to register at the appointed police station a reasonable identification of that place.

The second ground of appeal concerns the phrase in paragraph 2 (1) of the First Schedule, "If any person fails without "reasonable excuse to comply with any of the requirements of "the preceding paragraph." Here a number of points have been taken by Mr. Brock, but it is sufficient, the court thinks, to deal with only one of them, namely, that he had not been informed and was ignorant of his obligation. It had not been proved by the prosecution, so it is said, that first of all the governor of the prison had given him information as to his liability under the order, and secondly that the appointed society had not used their best endeavours to inform the offender that they had given notice to the Commissioner of Police.

As to the duty of the governor, it is provided by section 29 (2): "It shall be the duty of the governor of a prison on the discharge "from prison of an offender against whom an order has been "made under the said section 22 to serve upon him a notice "stating the effect of the order." It seems clear upon that provision that it is the duty of the governor to serve upon a prisoner in such circumstances a notice which not merely says that it is his duty to inform the appointed society of his address but to go on and explain to the prisoner what will happen to him if he fails to give that information and, in particular, that he will then become subject to the First Schedule.

The court finds it unnecessary in this case to consider exactly where the onus of proof lies, though it certainly looks as if it would be for the prisoner in the first instance to put forward what he considers some reasonable excuse, although it may well be that at the end of the day the question will arise whether the prosecution have proved that he failed without reasonable excuse to comply with the requirement. So far as the present case is concerned, it seems perfectly clear that the governor did give a notice to the prisoner, for the prisoner himself admits that when he was discharged from Preston Prison on October 25 he was told to report to the after-care association.

So far as concerns the failure of the appointed society to use their best endeavours to inform him that the notice had been given, it is really difficult in a case such as this to see how the society can do anything in the matter, having taken the steps which they have taken, namely, notifying the Commissioner of Police, for the very reason that the prisoner has not given an address. Therefore there can, in the present case, so it seems to the court, be no question of the prisoner being able to say: "I was acting under a reasonable excuse in that I did not

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"appreciate that I was going to make myself liable to the First "Schedule." So much for the appeal against conviction.

As regards the appeal against sentence, the recorder sentenced the appellant to nine months' imprisonment whereas paragraph 2 (1) of the First Schedule provides that a man guilty of this offence shall be "liable on summary conviction thereof to "imprisonment for a term not exceeding six months." What, of course, happened in this case was that this offence, which is triable summarily, providing as it does for a maximum sentence in excess of three months, the prisoner was entitled to elect, and did elect, to be tried at sessions. It is said by Mr. Edwards on behalf of the prosecution that, in effect, this provision in paragraph 2 of the First Schedule is merely saying that if the trial is a summary trial the maximum sentence is six months whereas, if he elects to be tried at sessions, the punishment is entirely at large. The court cannot accede to that argument. It seems plain that the provision in the schedule that a person is liable on summary conviction to imprisonment for a term not exceeding six months means that he is so liable on conviction in proceedings initiated in a court of summary jurisdiction. Accordingly, the court feels that in the present case the maximum sentence was a sentence of six months.

Lastly, it is urged by Mr. Brock that in all the circumstances of the case six months would be excessive and there ought to be some further reduction. The court sees no reason to give a sentence in the present case of less than six months, and therefore while the sentence of nine months cannot stand the court will substitute a sentence of six months. Accordingly, the appeal against conviction is dismissed; the appeal against sentence is allowed and six months is substituted for nine months.

Appeal against conviction dismissed.
Appeal against sentence allowed.

Solicitors: *Registrar, Court of Criminal Appeal; V. Blanchard, Town Clerk, Portsmouth.*

J. D. P.

[CHANCERY DIVISION.]

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June 17, 18, 19; *July* 13.
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[1959 C. No. 718.]

Electricity — Supply — Placing of lines — Installation of transmission system—Consent of Minister to erection of line—Notice of intention to place line and erect steel towers — Refusal of consent by landowner — Whether Minister's consent invalidated by variation in route shown — Whether steel towers included in consent — "Above ground"—"Electric line"—Whether towers included in implied grant of necessary ancillary rights—Transfer of functions to new authorised undertakers—Whether notice deemed to be served by new undertakers—Electric Lighting Act, 1882 (45 *&* 46 *Vict. c.* 56) *s.* 32—*Electric Lighting (Clauses) Act,* 1899 (62 *&* 63 *Vict. c.* 19), *Sch., s.* 10 (*b*)—*Electricity Supply Act,* 1919 (9 *&* 10 *Geo.* 5, *c.* 100), *s.* 22 (1) — *Electricity Act,* 1957 (5 *&* 6 *Eliz.* 2, *c.* 48), *ss.* 25, 26.

Easement — Ancillary rights — Wayleave — Electric line — Supporting towers—Statutory easement.

By section 10 (*b*) of the Schedule to the Electric Lighting (Clauses) Act, 1899 (as amended), "The undertakers shall not, "without the express consent or authorisation of the Minister of "Power, . . . place any electric line above ground except within "premises in the sole occupation or control of the undertakers."

By section 22 (1) of the Electricity (Supply) Act, 1919 (as amended), "Any authorised undertakers may place any electric "line below ground across any land, and above ground across any "land other than land covered by buildings or used as a garden or "pleasure ground in cases where the placing of such lines above "ground is otherwise lawful, and where any line has been so placed "across any land the undertakers may enter on the land for the "purpose of repairing or altering the line: Provided that, before "placing any such line across any land, the undertakers shall "serve on the owner and occupier of the land notice of their inten-"tion, together with a description of the nature and position of "the lines proposed to be so placed; and if, within twenty-one days "after the service of the notice, the owner and occupier fail to give "their consent . . . it shall not be lawful to place the line across "that land without the consent of the Minister of Power."

On August 30, 1957, the Central Electricity Authority applied for the consent of the Minister of Power under section 10 (*b*) of the Schedule to the Electric Lighting (Clauses) Act, 1899, to the placing of electric lines along a route crossing the defendant's land. On January 17, 1958, the Minister gave his consent subject to the condition, inter alia, that the line was erected as shown on certain maps enclosed with the application and along the route there delineated in a full red line or as near as possible thereto, as might be agreed by the owners and occupiers of any land across which the line might be placed, provided that it should not deviate laterally more than 200 yards. On January 15 and October 21, 1957, the authority gave notice to the defendant under section 22 (1) of the Electricity (Supply) Act, 1919, of intention to place electric lines supported by three steel towers across his land and above

[Reported by Miss VERITY ANN MOXON, Barrister-at-Law.]

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ground and asked him to consent thereto. The defendant refused his consent and the Central Electricity Generating Board, to whom by section 25 (5) of the Electricity Act, 1957, the functions of the authority had been transferred as from January 1, 1958, applied to the Minister. On December 5, 1958, the Minister gave his consent to the placing of the lines across the defendant's land: the route of the line shown on the plan attached to the notice of intention and to that consent differed from that shown on the plan attached to the consent under section 10 (*b*) of the Act of 1899, but the lateral difference did not exceed 200 yards. In an action in which the board claimed a declaration that it was entitled to place the lines and towers on the defendant's land in the position shown on the plan attached to the later consent and in which the defendant counterclaimed for a declaration that that consent was void:—

Held, (1) that the condition contained in the consent under the Act of 1899 as to the agreement of the owners or occupiers of the land over which the line might be placed related to the fact of erection and did not give any owner or occupier any part in determining how near to the route marked on the plan attached thereto the line should run, and that, since that consent rendered lawful the placing of electric lines above the ground across the defendant's land, the consent under section 22 (1) of the Act of 1919 was not rendered void by reason of the fact that it more particularly specified the route within the limit of the 200 yards.

(2) That the expression "above ground" as used in the Electricity Acts was not restricted to "on the ground"; and the consent under the Act of 1919 of December 5, 1958, must be treated as granting a wayleave to carry the lines over the defendant's land.

(3) That towers were not included in "electric line" as defined by section 32 of the Electric Lighting Act, 1882, but that, in the absence of any context which indicated some intended limitation, an easement secured otherwise than from a consenting dominant owner ought not to be rendered ineffective by a denial of ancillary rights which its proper exercise required, and that, as there was no such limiting context and the siting and type of the proposed towers was necessary for the authorised line to be carried above ground, the wayleave carried with it the right to place the towers.

(4) That the consent under the Act of 1919 was not invalidated by reason that the notice of intention was served by the Central Electricity Authority and not by the board, for by virtue of section 26 of the Electricity Act, 1957, the board were to be regarded as the substitute party and were to be deemed to have served the notice, and therefore the requirements of the section had been complied with. Accordingly, the board was entitled to the declaration sought.

Action.

On August 30, 1957, the Central Electricity Authority applied under section 10 (*b*) of the Schedule to the Electric Lighting (Clauses) Act, 1899 (as modified by the Electricity Acts, 1947 and 1957, and the Minister of Fuel and Power (Change of Style and Title) Order, 1957 (S.I. 1957, No. 48)), for the consent of the Minister of Power to the placing of electric lines between Castle Donington in the county of Leicestershire and the border between Northamptonshire and Buckinghamshire. The functions of the Central Electricity Authority were transferred to the Central Electricity Generating Board as from January 1, 1958,

by the Electricity Act, 1957. On January 17, 1958, the Minister gave his consent as regards certain sections of the line on condition of (inter alia) "(1) the lines being erected between "the . . . points as shown on [certain maps] enclosed with the "authority's application and along the route between these "points as delineated on the said maps in a full red line or as "near as possible thereto, as may be agreed by the owners and "occupiers of any land across which the lines may be placed; "provided that the Central Electricity Generating Board shall "not deviate laterally from the line of the said route to a greater "extent than 200 yards."

On January 15, 1957, and October 21, 1957, the Central Electricity Authority served on the defendant notice under section 22 (1) of the Electricity (Supply) Act, 1919 (as modified by the Ministry of Fuel and Power Act, 1945, and S.I. 1957, No. 48) of intention to place electric lines across his land supported by three steel lattice towers along the route and in the positions shown on the plan annexed thereto subject to the Minister's consent, and asked the defendant to consent thereto. The route shown on the plan was different from that shown on the map annexed to the consent of January 17, 1958, nor did the map attached to the consent of January 17, 1958, show the positions of the towers. The defendant did not consent and the plaintiffs applied to the Minister for his consent. A public inquiry was held on September 24, 1958, at which the defendant was represented by his solicitors and gave evidence. On December 5, 1958, the Minister gave his consent in writing identifying the line and the positions of the towers by reference to a plan identical to that attached to the notice of intention. The consent stated that on January 17, 1958, "the consent as required under the provisions of section 10 (*b*) "of the Schedule to the Electric Lighting (Clauses) Act, 1899, "as incorporated in the Electricity Act, 1947, to the placing of "the line above ground was duly given."

The plaintiffs claimed a declaration that in accordance with the terms of the consent of December 5, 1958, and so long as such consent remained in force they were entitled to place lines above ground on the defendant's property in the position shown on the plan attached to such consent and to erect and maintain three towers on such property for the purpose of supporting the line.

The defendant by his counterclaim asked for a declaration that the consent of December 5, 1958, was void, or, alternatively, that it did not include the placing or erection of the towers.

Sir Milner Holland Q.C. and *George Hesketh* for the plaintiff board.

John L. Arnold Q.C. and *J. P. Harris* for the defendant.

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The following cases were cited in argument: *Bulstrode* v. *Lambert* [1]; *London and North-Western Railway Co.* v. *Evans* [2]; *National Trust for Places of Historic Interest or Natural Beauty* v. *Midlands Electricity Board* [3]; *Leeds Industrial Co-operative Society Ltd.* v. *Slack.* [4]

Cur. adv. vult.

July 13. LLOYD-JACOB J. read the following judgment: By this action the plaintiffs, who are in process of installing a transmission system for electrical energy at a pressure of 275,000 volts from a point in Leicestershire to a terminus in Buckinghamshire, which system will traverse certain farmlands of the defendant, seek a declaration and injunction and other relief in justification of their intention to erect and maintain three supporting towers upon the defendant's property and suspend an array of electrical conductors and ancillary mechanism therefrom, despite the defendant's refusal of consent.

The intended transmission system is of the most advanced type as yet installed in Great Britain for the conveyance of current and will carry such current at the highest pressure so far developed for the purpose. It will operate on the double-circuit principle, so that each tower will support two sets of three-phase conductor cables, suitably spaced to minimise electrical losses and protected by an earth wire mounted above them.

Such an array will be subject to heavy physical stresses, and if, as is proposed, it is to be carried above ground, compliance with the appropriate regulations will require that a minimum height of 23 feet for the lowermost conductor must be provided. Where, as here, a sag of 40 feet or so is to be anticipated, as the supporting towers are about 1,200 feet apart, the effective height of the uppermost portion of the array at a supporting tower will be of the order of 136 feet or so.

The evidence established that the construction and design of these supporting towers had been the subject of much consideration. They are to be of steel construction, with each of the four legs sunk about 12 to 15 feet into the ground and embedded in concrete muffs, each some 3 to 4 feet square. The lateral spread of the array will be of the order of 60 feet.

The plan for this system has taken some years to prepare and, when devised and approved, the implementation was the responsibility of the Central Electricity Authority. By section 25 (5) of the Electricity Act, 1957, the property, rights, liabilities and obligations of that authority were transferred to the plaintiffs as of January 1, 1958. Some questions were raised in relation to this devolution of title, which must later be considered; but, for the more convenient statement of the history of the case, the

[1] [1953] 1 W.L.R. 1064; [1953] 2 All E.R. 728.
[2] [1893] 1 Ch. 16; 9 T.L.R. 50.
[3] [1952] Ch. 380; [1952] 1 T.L.R. 74; [1952] 1 All E.R. 298.
[4] [1924] A.C. 851; 40 T.L.R. 745.

expression "the authority" will be used to denote the currently responsible electrical authority at all material times.

The necessity of providing and maintaining an efficient and economical system of electrical supply for the whole country has been the concern of the legislature over many years; and it has come to be recognised that the installation of a grid arrangement, whereby appropriately sited generating stations can be selectively utilised to maintain electrical pressure at widely spaced consuming areas, must require great lengths of transmission lines, which lines, in order that transmission losses may be kept as low as possible, will operate at high electrical pressures and be preferably located above ground.

It has thus been found necessary to devise means whereby the conflict between different aspects of the public interest can be reconciled. For present purposes two in particular must be noted. The first concerns the aesthetic objection to the introduction of a line of cable-carrying towers across stretches of the countryside; and for this "planning permission" is required. The second is concerned with the invasion of the rights of individual landowners in cases where the transmission lines will pass over private property and may need supporting therefrom. This calls for the grant of a voluntary or compulsory wayleave.

The effective statutory provision in regard to planning permission is to be found in the Schedule to the Electric Lighting (Clauses) Act, 1899, s. 10 (*b*) of which, as modified by subsequent statutory enactments, provides that, save with the express consent and authorisation of the Minister of Power, no authority shall place any electric line above ground except in locations which are not material to the present case.

The authority made application on August 30, 1957, for the consent of the Minister of Power to the placing of electric lines transmitting energy at 275,000 volts above ground, which consent was given in writing on January 17, 1958. This consent was conditional, and the material condition, for present purposes (modified merely to read on to the defendant's property), can be expressed as follows: "The Minister's consent is given subject "to the lines being erected as shown on [the map] enclosed with "the authority's application and along the route as delineated . . . "in a full red line or as near as possible thereto, as may be "agreed by the owners and occupiers of any land across which "the lines may be placed; provided that the authority shall not "deviate laterally from the line of the said route to a greater "extent than 200 yards."

The statutory provision which deals with the acquisition of wayleaves is to be found in section 22 of the Electricity (Supply) Act, 1919, the material portion of which, modified by subsequent legislation, reads: "(1) Any authorised undertakers may place "any electric line below ground across any land, and above ground "across any land other than land covered by buildings or used "as a garden or pleasure ground in cases where the placing of

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"such lines above ground is otherwise lawful, and where any line "has been so placed across any land the undertakers may enter "on the land for the purpose of repairing or altering the line: "Provided that, before placing any such line across any land, "the undertakers shall serve on the owner or occupier of the "land notice of their intention, together with a description of "the nature and position of the lines proposed to be so placed; "and if, within twenty-one days after the service of the notice, "the owner or occupier fail to give their consent or attach to "their consent any terms or conditions or stipulations to which "the undertakers object, it shall not be lawful to place the line "across that land without the consent of the Minister of Power; "and the Minister of Power may, if after giving all parties con-"cerned an opportunity of being heard he thinks it just, give "his consent either unconditionally or subject to such terms, "conditions and stipulations as he thinks just; and in deciding "whether to give or withhold his consent or to impose any terms, "conditions or stipulations (including the carrying of any portion "of the line underground) the Minister shall, among other con-"siderations, have regard to the effect, if any, on the amenities "or value of the land of the placing of the line in the manner "proposed."

The authority served upon the defendant on January 15, 1957, notice of intention to place lines above ground across his land, seeking his consent to a wayleave for the same and for three supporting towers, identifying the location of the towers and of the lines upon an attached plan. No consent was forthcoming from the defendant, and the authority applied to the Minister. The Minister directed a public inquiry before one of his inspectors, which was held on September 24, 1958, at which the defendant was represented and gave evidence.

After consideration, the Minister gave his consent in writing under date December 5, 1958. This consent identified the location of the lines and the sites of the towers on a map which corresponded precisely to that attached to the notice of intention served upon the defendant on January 15, 1957. It recited that on January 17, 1958, "the consent as required under the provi-"sions of section 10 (*b*) of the Schedule to the Electric Lighting "(Clauses) Act, 1899, as incorporated in the Electricity Act, "1947, to the placing of the lines above ground was duly given."

It is not disputed that there is a variation in the location of the lines between that shown on the plan attached to the consent of December 5, 1958, under section 22 of the Act of 1919 and that shown on the plan attached to the consent of January 17, 1958, under the Act of 1899. This variation, which appears to have been due to the authority's acquiescence in a 60 yard deviation sought by a neighbouring landowner, will take the lines farther from the defendant's house. The defendant, who has at all material times refused to give any consent to the placing of any lines or the installation of any towers over or on his property,

contends that this variation has nullified the plaintiffs' purported entitlement to proceed with the work on the defendant's land.

The point was developed and argued in a number of ways; but all depend initially upon the true construction of the condition attached by the Minister to the planning consent given by him on January 17, 1958. This condition includes the phrase, "as "may be agreed by the owners and occupiers of any land across "which the lines may be placed," and it is necessary to ascertain the matter to which this qualification applies. In my judgment, it must be read as applying to the phrase, "the lines being "erected," and relate to the fact of erection. It does not, as I read it, give to any one owner or occupier of the land over which the section of the line will run any part in the determination of how near to the full red line the possible location of the line must be brought, for this may well depend upon the siting of supporting towers upon land not so owned or occupied. It is, in effect, confining the Minister's expressed consent to the planning permission aspect of his powers and leaving for subsequent consideration, should any owner or occupier fail to agree to the erection of lines across his land, the powers open to him under section 22 of the Act of 1919, should they be invoked by the authority.

If this construction of the section 10 (*b*) condition be right, it follows that the recital in the section 22 consent that "the "consent as required under the provisions of section 10 (*b*) . . . to "the placing of the lines above ground was duly given" cannot be untrue, misleading or incorrect, as the defendant contends, for the location of the lines shown on the plan attached to the section 22 consent is such as to fall within the terms of the section 10 (*b*) consent, for it nowhere deviates beyond the lateral limit of 200 yards, nor is there any material to show that, the towers on adjacent properties being where they are, the lines could have been brought any nearer to the line originally marked out.

If, as I hold, the consent of the Minister given under section 10 (*b*) rendered lawful the placing of electric lines above ground across the defendant's land—albeit within a limited zone thereof —the fact that his consent under section 22 more particularly specified the position of the proposed lines, provided it was within the zone limits, cannot be held to make it ultra vires. I conclude, therefore, that the two necessary consents have been given.

It then becomes necessary to consider the defendant's next point, which is that such consents relate only to the placing of lines above ground and do not, either explicitly or implicitly, cover the installation of three or any supporting towers.

The use in these Electricity Acts of the antithesis "below or "above ground," as well as the characteristics of these transmission lines with which they deal, lead me to the conclusion that "above ground" cannot properly be limited to "on the "ground." The Minister's consent must, accordingly, be treated

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as the grant of a wayleave to carry the lines over the defendant's land.

It was contended by the plaintiffs that these lines must be deemed to include the supporting towers by reason of the definition of "electric line" in section 32 of the Electric Lighting Act, 1882, which reads: " . . . The expression 'electric line' means a "wire or wires, conductor, or other means used for the purpose of "conveying, transmitting, or distributing electricity with any "casing, coating, covering, tube, pipe, or insulator enclosing, "surrounding, or supporting the same or any part thereof, or "any apparatus connected therewith for the purpose of convey-"ing, transmitting, or distributing electricity or electric currents." As that definition makes plain, the insulator wherewith the line is supported is to be treated as part of the line, but a structure which is required for the support of an insulator itself can only come within the definition if it comprises apparatus connected to the insulator for the purpose of conveying, transmitting or distributing current. If, for the purposes of argument, it be assumed that a supporting tower can properly be called apparatus, it is most certainly not connected to the insulator for the purpose of conveying, transmitting or distributing current. This is the function of the line, and the function of the tower is physical and not electrical in its nature. I accordingly reject this contention.

The plaintiffs alternatively relied upon the well-established doctrine that in the grant of an easement or like right the law will imply the additional grant of what is necessary for the enjoyment of the same; and they contend that a wayleave for overhead transmission lines must accordingly carry with it the right to place such supports as are requisite to the carriage thereof.

The defendant, whilst not questioning the proposition of law, contends that it has, or should have, no application where the power to secure the easement derives from a statute, and he further contends that, in the particular case of rights procured under the Electricity Acts, the existence of alternative procedures for the acquisition of ancillary rights negatives any such implication. So far as concerns the contention in its broadest form, there is no intrinsic reason for supposing that the legislature, in directing the procedure for the acquisition of easements, intended them, when procured, to be shorn of any of the rights which the law regards as normally and properly incidental to them, so that, in the absence of any context which indicates some intended limitation, an easement secured otherwise than from a consenting dominant grantor ought not to be rendered ineffective by a denial of ancillary rights.

In the present case it is urged that no implication of ancillary rights in a wayleave procured pursuant to section 22 is proper, because by section 9 of the Electricity Act, 1947, the Minister may authorise the compulsory purchase of land. Subsection (2) reads: "In this section the expression 'land' includes easements "and other rights over land, and an Electricity Board may be

"authorised under this section to purchase compulsorily a right "to place an electric line across land, whether above or below "ground, and to repair and maintain the line, without purchasing "any other interest in the land. . . ." This subsection makes it plain that the purpose is to offer an alternative to the section 22 procedure rather than to supplement deficiencies in it (see also section 44 of the Electricity (Supply) Act, 1926); and, if, contrary to my opinion, a section 22 easement is devoid of any ancillary rights, it would appear that a similar defect would attach to an easement purchased pursuant to section 9 of the Act of 1947, if it related simply to the right to place an electric line above ground across land. I can find no reason for construing these Acts as depriving a compulsory wayleave secured under section 22 of any incidental right which its proper exercise requires.

The defendant then contends that such incidental right, being limited to the provision of such supporting means as are necessary, does not extend to cover the towers proposed. The evidence established that if the transmission array were to be rearranged, with the spacing necessary for the avoidance of electrical losses provided by horizontal and not vertical distances, the individual conductor cables could be supported upon a collection of wooden poles which need no concrete surround for their effective maintenance, but which would extend the width of the array to some 60 yards and would involve a conversion of a neighbouring 11,000 volt transmission line from above to below ground for part of its run. The evidence further established that, although a sufficient number of appropriate poles might be procured to carry the transmission across the defendant's property, it would not be practicable to adopt such suspension for the generality of the run.

In my judgment, the court must approach this aspect of the case on the footing of what is reasonable. If, as is to my mind manifest, the general conception of this important project required a decision as between horizontal and vertical spacing of conductors and the propriety of the authority's determination of this issue is not challenged, it is the transmission line designed in accordance with that determination which has to be carried across the defendant's land. Can it be said to be reasonable to leave to the choice of any individual landowner the redesign of the electrical array, whatever his lack of qualifications for the task, and provide him with an alternative group of supports which cannot in practice be made available to others who may share his aversion to steel and concrete? In my judgment, the siting and the type of the proposed three towers upon the defendant's land is necessary for the authorised transmission line to be carried above ground; and an alteration of the system for that section of the line which crosses the defendant's land, which would permit of substitution by wooden poles, would be unreasonable.

The defendant, who admits that the notices of intention to place lines across his land were served upon him on January 15,

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Lloyd-Jacob J.

1957, and October 21, 1957, respectively, by the Central Electricity Authority, then contends that such service is of no avail to the plaintiffs in the acquisition of a right under section 22 of the Act of 1919. That section requires the undertakers, before placing a line across another's land, to serve notice of intention, and it is the defendant's submission that the plaintiffs as the present authorised undertakers must themselves serve or have served such notice. It is clear that at the time of service of these two notices, the then authorised undertakers were the Central Electricity Authority and that such service completed the statutory requirements for seeking the Minister's consent under section 22. This authority was dissolved by section 1 of the Electricity Act, 1957, as of January 1, 1958, and other sections of that Act transferred to the plaintiffs the exercise of certain functions previously performed by the authority.

Section 26 (2) provides: "Other documents, not being enactments, which refer, whether specifically or generally, to the Central Authority shall be construed in accordance with the provisions of the preceding subsection, so far as applicable." The material provision of the preceding subsection is subsection (1) (*b*), which reads: "for any reference (however worded and whether express or implied) to the Central Authority there were substituted, as respects anything falling to be done on or after the vesting date, a reference to the appropriate transferees."

If the notice of October 21, 1957, is construed in accordance with these provisions, that part of it which gives notice of intention will read, "I am directed to give you formal notice in pursuance of section 22 (1) of the Electricity (Supply) Act, 1919, as amended by section 57 of, and Part I of the Fourth Schedule to, the Electricity Act, 1947, of the intention of the Central Electricity Authority (and if anything falls to be done on or after 1st January, 1958, of the Central Electricity Generating Board) to place electric lines above ground . . ."

This is clearly a statement of intention on the part of the present authorised undertakers in relation to a continuing intention, should fulfilment of it not be possible before their powers accrue. Moreover, the present plaintiffs must, by virtue of section 26, be regarded as the substitute party serving the notice. They must, accordingly, be deemed to have served the document wherein their intention to place the line above ground in the position identified by the appended map was transmitted to the defendant; and I must hold, accordingly, that the requirements of section 22 have been complied with.

There were a number of alternative submissions developed by counsel for the defendant, which I have not set out. On the conclusions I have already endeavoured to express, they do not strictly arise; and, save to acknowledge that they were made and that I have had them in mind, I can see no point in burdening

this judgment with further reference to them and still less to their recital in extenso.

I turn, therefore, to the question of relief. In the light of my conclusion that the proper consents under sections 10 (*b*) and 22 have been given to these plaintiffs and of my conclusion that supporting towers of the type and locations proposed are necessarily incidental to the carriage of this transmission line across the defendant's property, the declaration in the form sought in the statement of claim appears to be proper to be granted and I accordingly make it.

My impression at the hearing was that the defendant's expressed intention to deny access to the plaintiffs' contractors was based upon his views of his legal rights, and it may be that it will not be repeated or persisted in hereafter. It would, of course, be undesirable to leave the prompt completion of this transmission line project at risk of such repetition or persistence and thus create the possibility of further proceedings, but I will invite the defendant by his counsel, if he so wishes, to make any suggestion which, whilst removing any likelihood of further interference, would make it unnecessary to grant an injunction.

So far as concerns the claim to damages, the plaintiffs' evidence failed to establish the facts upon which either liability for compensation to contractors or for increase in installation costs were at one time thought to be justified. There was a dispute between the parties upon the legality of the right claimed by the plaintiffs which, in the absence of evidence of actual or potential damage, could at the most justify only a nominal award. The defendant's submissions possessed sufficient substance to show that his objections were not fractious and, in my discretion, I shall refrain from making even a nominal award.

The defendant has failed, in my judgment, to establish his counterclaim and I must in consequence dismiss it.

Judgment for the plaintiffs with costs.

[July 30. On the board's application, his Lordship granted an injunction against the defendant, suspended until the expiry of the time for appeal, or, if notice of appeal was given, until determination of the appeal, provided that the appeal was prosecuted with due diligence.]

Solicitors: *W. Usher; Kingsford, Dorman & Co. for Crane & Walton, Leicester.*

[CHANCERY DIVISION.]

1959
June 30;
July 1.

Vaisey J.

*INLAND REVENUE COMMISSIONERS *v.* HUDSPETH.

Revenue—Surtax—Company—Apportionment of undistributed income pursuant to surtax direction—Subsequent distribution of sums greater than available net profits of relevant years—Extent of relief—Income Tax Act, 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 10), *ss.* 245, 249 (5).

A taxpayer was a shareholder in a company to which section 245 of the Income Tax Act, 1952,[1] applied. For the years ended March 31, 1951 and 1952, the company made net profits of £8,032 and £7,019 respectively, on which were paid respective gross dividends of £2,300 and £2,500. In June, 1955, the special commissioners gave the company notice that they had computed its "actual income from all sources" for the purposes of assessment to surtax under section 21 of Finance Act, 1922, at £16,824 for the year ended March 31, 1951, and at £15,906 for that ended March 31, 1952. In February, 1956, the company passed a resolution that its profits for those years should, as they had been subjected to surtax, be distributed in the form of a dividend among the shareholders. The taxpayer received a gross dividend of £7,820, comprising sums which were the equivalent of the total of what had been apportioned to him out of the £16,824 and the £15,906 in subjecting the profits to surtax, which sum he included in his return for 1955–56. For that year he was assessed to surtax in the sum of £10,956 and claimed relief on the ground that, in computing for surtax purposes his total income for that year, the whole of the £7,820 should "be deemed not to form part" thereof under section 249 (5) of the Act of 1952. In fact the company's commercial profits available for distribution during those two years, including exempted profits tax, amounted to £13,171, so that the rest of what was distributed in February, 1956, must have come from profits of other years. As the amount distributed exceeded available profits, the commissioners offered to exempt from surtax £6,413, being the taxpayer's proportionate share of what could properly have been considered a distribution by the company of its income for the two years. This the taxpayer declined, appealing that his assessment be reduced:—

[1] Income Tax Act, 1952, s. 245: "With a view to preventing the avoidance of the payment of surtax through the withholding from distribution of income of a company which would otherwise be distributed, it is hereby enacted that where it appears to the Special Commissioners that any company to which this section applies has not, within a reasonable time after the end of any year or other period for which accounts have been made up, distributed to its members, in such manner as to render the amount distributed liable to be included in the statements to be made by the members of the company of their total income for the purposes of surtax, a reasonable part of its actual income from all sources for the said year or other period, the Commissioners may, by notice in writing to the company, direct that, for purposes of assessment to surtax, the said income of the company shall, for the year or other period specified in the notice, be deemed to be the income of the members, and the amount thereof shall be apportioned among the members."

S. 249 (5): "Any undistributed income which has been assessed and charged to surtax under this chapter shall, when subsequently distributed, be deemed not to form part of the total income for the purposes of surtax of any individual entitled thereto; . . ."

Held, that section 249 (5) was intended to prevent surtax being paid twice on the same sum, and the "undistributed income" to be deemed not to be part of the taxpayer's total income for the purposes of surtax was the income of the company which had been assessed and charged to the appropriate surtax referable to the relevant years when distributed; that to come within the section the taxpayer must show that he was being assessed to surtax on money which had already been subjected to it; and that, as the taxpayer could only show that as to part of the £7,820, namely, £6,413, the rest of that distribution must have come from profits of years other than those ending March 31, 1951 and 1952, and he could not claim relief on the whole of the £7,820 merely because the company was liable to surtax on the whole amount. The relief, accordingly, must be limited to £6,413.

APPEAL from the Commissioners for the Special Purposes of the Income Tax Acts.

A taxpayer, Alfred Hudspeth (hereinafter called "the respondent"), appealed to the special commissioners against an assessment to surtax for the year 1955–56 in the sum of £10,596 on the ground that, in computing for surtax purposes his total income for that year, the whole of a dividend of £7,820 8s. gross, received from a company, Holland and Webb Ltd., should be deemed not to form part thereof under the provisions of section 249 (5) of the Income Tax Act, 1952.

According to the case stated the following facts were proved or admitted before the special commissioners:

The respondent was chairman of the company at all material times and out of a total of 10,000 issued ordinary shares of 10s. each held 2,800. The net profit shown in the accounts of the company for the year to March 31, 1951, was £8,032 and a dividend of £2,300 (gross) was paid in respect of that year; for the year ended March 31, 1952, the net profits of the company were £7,019 and a dividend of £2,500 (gross) was paid in respect of that year.

On June 17, 1955, the special commissioners issued notices to the company that (a) "in pursuance of the powers conferred "on them by the Finance Act, 1922, they have computed the "actual income from all sources of Holland and Webb Ltd. for "the purposes of assessment to surtax under section 21 of that "Act at £16,824 for the year ended March 31, 1951, and that "they have apportioned that amount by reference to para-"graph 8 of Schedule I to the Finance Act, 1922. Amounts "apportioned . . . Ordinary shareholders: A. Hudspeth "£4,626 14s. 6d. . . ." (b) ". . . that, in pursuance of the powers "conferred on them by the Finance Act, 1922, they have com-"puted the actual income from all sources of Holland and Webb "Ltd. for the purposes of assessment to surtax under section 21 "of that Act at £15,906 for the year ended March 31, 1952, and "that they have apportioned that amount by reference to para-"graph 8 of Schedule I to the Finance Act, 1952. Amounts "apportioned: A. Hudspeth £4,453 13s. 6d. . . . Dated this 17th

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"day of June, 1955." The company accepted the notices without demur.

On September 26, 1955, the accountants received a letter from the special commissioners in the following terms: " . . . I "am directed to . . . say it is agreed that the amounts entered "by Mr. Alfred Hudspeth and Mr. Harold F. Groves in the "returns of their income of the years 1950–51 and 1951–52 in "respect of gross dividends from Holland and Webb Ltd. are "correct. The sums apportioned to each of those members in "respect of the years 1950–51 and 1951–52 will therefore be "adjusted as follows, and the surtax assessments under section "21, Finance Act, 1922, will be amended accordingly. 1950–51. "Amount apportioned £4,626 14s. 6d. less relief under section 21 "(1), Finance Act, 1922, £560, £4,066 14s. 6d. 1951–52. Amount "apportioned £4,453 13s. 6d. less relief under section 21 (1), "Finance Act, 1922, £700, £3,753 13s. 6d. . . ."

On January 26, 1956, notice of an extraordinary general meeting of the company was sent to the shareholders in the following terms: "January 26, 1956. Notice is hereby given that "an extraordinary general meeting of the company will be held "on Monday, February 20, 1956, at 10 a.m. to consider and, if "thought fit, pass the following resolution: 'That, as a result "'of a direction by the Special Commissioners of Income Tax "'under section 21, Finance Act, 1922, whereby the profits of "'the company for the years ended March 31, 1951 and 1952, "'respectively have been subjected to surtax, the said profits "'should now be distributed in the form of a dividend pro rata "'amongst the shareholders amounting to £2 15s. 11d. per share "'less income tax at 8s. 6d. in the £. By order of the "'Board . . .'" The extraordinary general meeting was duly held and that resolution duly passed on February 20, 1956. As a result of the passing of the resolution, the respondent received from the company on February 21, 1956, a dividend amounting to £7,820 8s. (gross), which amount was returned by him in his annual return of income for the year 1955–56.

On February 18, 1957, the special commissioners computed the respondent's total income for the year 1955–56 for surtax purposes at the sum of £10,596, which included the sum of £7,820 8s. On April 25 and July 10, 1957, the special commissioners wrote to the accountants proposing that relief should be restricted to £6,413 13s. 6d., on the footing that the dividends paid in respect of the years to March 31, 1951 and 1952, exceeded the profits available according to the "commercial" accounts. The letter was [*sic*] in the following terms: " . . . April 25, "1957. . . . In the commissioners' view the dividend of £27,930 "gross cannot wholly be regarded as a distribution of the com- "pany's income of the years ended March 31, 1951 and 1952. "The available net profit of these two years, even after writing "back the profits tax exempted following the surtax directions,

"amounts only to £13,171 2s. 6d. as follows: Balance of unap-
"propriated profit, year ended March 31, 1951, £5,731 10s. 10d.
"Balance of unappropriated profit, year ended March 31, 1952,
"£4,518 10s. 8d. . . . Profits tax exempted and repaid, £2,921 1s.
"Available net profit, £13,171 2s. 6d. The balance of the distri-
"bution of February 20, 1956, £2,888 12s. 6d. net (i.e.,
"£16,059 12s. less £13,171 2s. 6d.) must therefore have come
"from the profits of other years. The commissioners propose
"accordingly to allow relief to the members under the provisions
"of section 249 (5), Income Tax Act, 1952, on their propor-
"tionate shares of that part only of the dividend declared on
"February 20, 1956, that can properly be regarded as a distribu-
"tion of the company's income of the years ended March 31,
"1951 and 1952, i.e., on £22,906, the gross equivalent of £13,171
"net. . . .

"July 10, 1957, . . . as already explained in their letter of
"April 25, 1957, . . . the full amount of the dividend of
"February 20, 1956, from Holland and Webb Ltd. is not, in the
"Assessing Commissioners' view, relievable under the provisions
"of section 249 (5), Income Tax Act, 1952, on their propor-
"tion of the dividend of £7,820 8s. received by Mr. Hudspeth
"which is relievable is £6,413 13s. 6d., i.e., 2,800/10,000 of
"£22,906. They accordingly propose to adjust the 1955–56
"surtax assessment on this basis (i.e., excluding from assess-
"ment £6,413 13s. 6d. of the dividend of £7,820 8s.). I am to
"add, however, that if this proposal is not acceptable, the commis-
"sioners would be prepared to accept a late notice of appeal
"against the assessment so that the matter may be brought
"before the Appeal Commissioners at a personal hearing. . . ."
The respondent declined to accept the proposal of the special commissioners and the difference between £7,820 8s. and £6,413 13s. 6d. formed the subject-matter of the appeal.

It was contended on behalf of the respondent: (i) that, in computing for surtax purposes his total income for the year 1955–56, the whole of the dividend of £7,820 8s. received by him from the company should be deemed not to form part thereof under the provisions of section 249 (5) of the Income Tax Act, 1952; and (ii) that the appeal should be allowed and the assessment reduced accordingly.

It was contended on behalf of the appellants: (i) that the amount of the dividends paid by the company in respect of the years ended March 31, 1951 and 1952, exceeded the amount of the profits shown in the "commercial" accounts as earned by the company for those two years and, accordingly, that, in computing for surtax purposes the total income of the respondent for the year 1955–56, only the proportionate amount of the profits attributable to the respondent, namely, £6,413 13s. 6d., should be deemed not to form part of his total income under the provisions of section 249 (5) of the Income Tax Act, 1952; and

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(ii) that the appeal should be dismissed and the assessment adjusted accordingly.

The commissioners decided: (i) that the expression "actual "income from all sources" used in Chapter III of Part IX of the Income Tax Act, 1952, referred to a fictitious amount calculated in accordance with rules prescribed in the Income Tax Acts for the purposes of Chapter III; as such it was incapable of distribution itself, and all that could be distributed was a sum equivalent thereto; (ii) that, in construing section 249 (5), the expression "undistributed income" referred to "actual income from all "sources" because it was that "which has been assessed and "charged to surtax under this chapter"; (iii) that, the intention of section 249 (5) being to give relief, it must be taken to refer to a sum capable of distribution and such a sum would be a sum equivalent to the "actual income from all sources" of the company which had been assessed and charged to surtax under the provisions of Chapter III; relief fell to be given, therefore, on the whole of such amount when subsequently distributed; (iv) accordingly, the amount distributed by the company being a sum equivalent to the "actual income from all sources," relief fell to be given to the respondent under the provisions of section 249 (5) in respect of the whole of the dividend received by him; and (v) that the appeal therefore succeeded in principle, and they adjourned the hearing of the appeal for agreement of figures between the parties on the basis of their decision in principle. On September 24, 1958, figures having been so agreed between the parties, they determined the appeal by reducing the assessment to £2,798.

The Crown appealed, the question of law for the opinion of the High Court stated in the case was whether, on the facts found by the special commissioners, there was evidence upon which they could properly arrive at their decision, and whether, on the facts so found, their determination of the appeal was correct in law.

F. N. Bucher Q.C. and *A. S. Orr* for the Crown.
P. W. I. Rees for the taxpayer.

No cases were cited in argument.

Vaisey J. This is a short point. It is not a very easy one to grasp and I am not surprised that the commissioners have come to a conclusion which does not appeal to me, because I think that the matter is confused.

I have been extremely attracted by the argument of Mr. Rees, for the taxpayer, who appeared to support the findings of the commissioners. I thought that he argued his case extremely well and forcibly, but I do not find myself able to concur in his conclusions.

The matter arises under Chapter III of Part IX of the Income Tax Act, 1952, which is the fasciculus of sections which deal with

surtax on undistributed income of certain bodies corporate. The relevant sections are 245 and 249 (5). [His Lordship read section 245 and continued:] Notices have been served in the present case and an order has been made, with the result that certain income of the company has been distributed and has come into the hands of the taxpayer, and it is with regard to that income that this question arises.

The case has been argued by Mr. Rees for the taxpayer and by Mr. Bucher for the Crown with great skill, and it really comes to this: there is no doubt that section 245 is referring to the income, not of the taxpayer, but of the company, and that that income—namely, the income of the company from all sources for the period in question—is the subject-matter of taxation for the purposes of surtax. There is certainly no doubt that the whole of the company's income is subject to such an assessment, but we are now dealing with the question of the taxpayer's surtax for two years, the year ending on March 31, 1951, and the year ending on March 31, 1952. Distribution having been made by the company, we now come, by virtue of that distribution, to the income in the hands of the taxpayer and the question is: to what extent, if at all, is the taxpayer entitled to be relieved from the payment of surtax?

The words of section 249 (5) are apparently very simple, very plain and very easy to construe. They are these: "Any undis-"tributed income which has been assessed and charged to surtax "under this chapter shall, when subsequently distributed, be "deemed not to form part of the total income for the purposes of "surtax of any individual entitled thereto; . . ." Under that direction the taxpayer claims to be totally exempted from the payment of surtax on the whole of the moneys which he received from the company, by virtue of the operation carried out under section 245. Section 249 (5) begins by referring to "Any "undistributed income," which is undoubtedly a reference to the income of the company, but the rest of the subsection is dealing with the position not of the company but of the shareholder, the taxpayer. It certainly looks as though that which is free from any further charge to surtax is something which has already been assessed and charged to surtax under the provisions of these sections, and it seems to me to be an almost inevitable consequence that the shareholder is not entitled to exemption from surtax unless he can prove that the money which he has received has already been—in the words of the subsection—"assessed and "charged to surtax." Unless he can show that he is going to be asked to pay surtax on money which has already been subjected to surtax, he does not really come within the provisions of the subsection.

In this case a larger sum than the amount which I shall mention in a moment has, in fact, been received by the taxpayer from the company in the shape of dividends, and only part of that sum can be attributable or referable to the years in question—

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1951 and 1952—and only that part of the sum which the taxpayer received which is referable to those years has already been subjected to and has borne surtax. So far as that part of the money which he has received from the company is concerned, the taxpayer is exempted from surtax or, at any rate, is not bound to bring it in in any return which he makes for the purposes of surtax. With regard, however, to any money which he has received from the company which is not referable to those two years, and has been derived by the company from some source other than the profits and gains of those two years, that is something which has not been assessed to surtax and has not borne surtax. Therefore, with regard to that part of the amount, the taxpayer is not entitled to any relief.

The taxpayer cannot predicate that the whole of the money which he has received from the company has borne, has been assessed to, and has been charged with, surtax. He can establish that with regard to only part of the sum, and the dividend, in so far as it is not referable to the two years in question, has not at present been subjected to surtax. It is not a very large sum. The bulk of the money which the shareholder received from the company amounted to £6,413 13s. 6d. That sum has been assessed to and charged with surtax under the provisions of the chapter. It has, to that extent, been subsequently distributed along with other moneys which are not franked, so to speak, by a previous payment of surtax.

The taxpayer's claim was that, because the company itself was liable to surtax on the whole amount, he ought to have a corresponding relief in respect of the whole sum, but I do not think that that can be so because, as is pointed out in the case, part of the total sum which the taxpayer claimed to be exempt must have come from the profits of other years, that is to say, years other than those which ended on March 31, 1951, or March 31, 1952.

The commissioners allowed relief to the taxpayer under section 249 (5) on that part only of the dividend declared that could properly be regarded as a distribution of the company's income for the years in question. As there is no doubt about the figures, the result of any decision is that the relief is limited to the sum which I have already mentioned—£6,413 13s. 6d.—and does not extend further to the larger sum in respect of which the commissioners were disposed to extend relief.

As I say, I am not at all surprised that there has been some confusion of thought in this case, because I have not myself found it altogether easy to grasp the various considerations. However, looking at it broadly, it seems to me that the object of this subsection is to ensure that the taxpayer should not have to pay surtax twice in respect of the same sum of money. The only sum of money as to which the present question arises is the difference between the larger sum which the commissioners have

found to be exempt and the sum of £6,413 13s. 6d., which seems to me to be the proper figure.

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This is a complicated section in a way, but the key to it seems to be this: that the undistributed income (meaning the income of the company which was assessed and charged to surtax, i.e., the appropriate surtax which is not necessarily all the surtax but the surtax referable to the relevant years) when distributed is to be deemed not to be part of the total income of the taxpayer for the purposes of surtax. That is the whole operation of the subsection, and I think the commissioners came to a wrong conclusion. Therefore, this appeal must be allowed.

Appeal allowed with costs.

Solicitors: *Solicitor of Inland Revenue; Nordon & Co.*

K. R. A. H.

[BRISTOL ASSIZES.]

* PATCH v. UNITED BRISTOL HOSPITALS BOARD.

1959
June 25.

Streatfeild J.

Practice and Procedure — Discovery — Privilege — Documents made in contemplation of litigation—Written statements by hospital staff concerning post-operative infection—Statements made in accordance with procedure recommended by Ministry of Health circular, before any intimation of plaintiff's claim—Whether such statements privileged.

The plaintiff developed an infection following a surgical operation. In accordance with the procedure recommended by a Ministry of Health circular, written statements were very shortly afterwards made by doctors and nurses with knowledge of the case, and these were at once forwarded by the hospital secretary to solicitors to the hospital. At the time of the making of the statements there had been no intimation that the plaintiff intended to make any claim in respect of the infection.

When such a claim was subsequently made, the defendants claimed privilege for the statements upon the ground that they came into existence solely or mainly for the purpose of enabling the solicitors to advise the defendant board, in contemplation of litigation. The plaintiff contended that since the statements were made before any claim was made or adumbrated, privilege could not be claimed for them upon this ground:—

Held, that since the statements were made not in the ordinary course of hospital treatment but in reasonable anticipation of litigation, to enable the solicitors to advise should a claim be made, they were clearly privileged.

[Reported by GROVE HULL, Esq., Barrister-at-Law.]

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Seabrook v. *British Transport Commission* [1959] 1 W.L.R. 509; [1959] 2 All E.R. 15 applied.

ACTION.

The plaintiff, Reginald Charles Patch, developed a gas gangrene infection following a surgical operation upon his hand. In accordance with the procedure recommended in the Ministry of Health Circular H.M. (55) 66 of July 7, 1955, written statements were made by the consulting surgeon, the senior registrar, house surgeons and nurses at the hospital. These statements were all made within 10 days of the discovery of the plaintiff's infection, and were sent to the solicitors to the hospital as soon as they were received by the hospital secretary.

At the time when the statements were made the plaintiff had not intimated any intention of making a claim in respect of the infection. He subsequently started an action for damages against the defendants, the Board of Governors of the United Bristol Hospitals, who claimed privilege for the written statements upon the ground that they came into existence solely or mainly for the purpose of enabling the solicitors to advise the board, in contemplation of litigation.

It was submitted on behalf of the plaintiff that since the statements were made at a time when no claim had been made or even adumbrated, it could not be said that they came into existence solely or mainly for the purpose of enabling the solicitors to advise in contemplation of litigation.

The case is reported solely upon the ruling of the court on the claim for privilege.

Norman Skelhorn Q.C. and *Michael Lavington* for the plaintiff.
Roger Ormrod Q.C. and *F. Cyril Williams* for the defendants.

The cases cited in argument upon the point reported are referred to in the judgment.

STREATFEILD J. The case of *Seabrook* v. *British Transport Commission*,[1] being a judgment of a court of concurrent jurisdiction, is not, of course, binding upon me. At the same time, I have no reason whatever to differ from the judgment of Havers J. in that case and, in my respectful opinion, it is manifestly correct. In that case the claim for privilege succeeded.

I should have thought that this case was almost an a fortiori one because, having regard to the decision of the Court of Appeal in *Cassidy* v. *Ministry of Health*,[2] in such a case as the present where a substantial onus is on the hospital authority, it seems to me that when something goes wrong in medical or surgical treatment which reasonably gives rise to anticipation of litigation, any statement which is then made by persons concerned with the

[1] [1959] 1 W.L.R. 509; [1959] 2 All E.R. 15.

[2] [1951] 2 K.B. 343; [1951] 1 T.L.R. 539; [1951] 1 All E.R. 574.

patient in anticipation of the kind of claim which may be made is quite clearly privileged. It is not a document which is made in the ordinary course of treatment, but it is made simply because something has gone wrong; and in order to provide the legal advisers of the hospital authority with the necessary material to advise, if such a claim should be made, these documents come into existence. I should have thought these documents were even more privileged than were those in *Seabrook* v. *British Transport Commission*.[3] Accordingly, this claim for privilege must be upheld.

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PATCH v. UNITED BRISTOL HOSPITALS BOARD.

Streatfeild J.

Ruling accordingly.

Solicitors: *Cooke, Painter, Spofforth & Co., Bristol; Clarke, Gwynn & Press, Bristol.*

[3] [1959] 1 W.L.R. 509.

[PROBATE, ETC., DIVISION.]

* MEYER *v.* MEYER (HODGE CITED).

1959 *May* 11, 12, 13, 14, 15, 26, 27, 28; *June* 12.

Collingwood J.

PRACTICE NOTE.

Husband and Wife—Practice (in matrimonial causes)—Submission of no case—Divorce—Submission of "not sufficient evidence" by party cited—Election—Matrimonial Causes Act, 1950 (14 *Geo.* 6, *c.* 25), *s.* 5.

PETITION.

A wife petitioned for divorce on the ground of the husband's cruelty. The husband, by his answer, denied the alleged cruelty and sought a divorce on the ground of the wife's adultery with the party cited. At the conclusion of the cases for the wife and for the husband counsel for the party cited argued that he was entitled to make a submission that the party cited should be dismissed from the suit without being put to his election whether or not to call evidence.

Gerald Gardiner Q.C. and *Victor Williams* for the wife.

W. A. Fearnley-Whittingstall Q.C. and *C. A. Marshall-Reynolds* for the husband.

Geoffrey Crispin for the party cited. In *Yuill* v. *Yuill*[1] it was held that the rule that a party to proceedings making a submission of no case to answer must be put to his election applies in divorce proceedings. That, however, was a suit in which the submission

[1] [1945] P. 15; 61 T.L.R. 176; [1945] 1 All E.R. 183.

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Meyer v. Meyer (Hodge cited). (Practice Note.)

was made on behalf of the respondent wife, and has no application to the present circumstances. Here the party cited is in the position of a co-respondent and I invoke, on his behalf, the provisions of section 5 of the Matrimonial Causes Act, 1950,[2] by which the power of the court to put counsel making a submission to his election is purely discretionary: *Gilbert* v. *Gilbert and Abdon*[3] and *Lance* v. *Lance and Gardner*.[4] It is further submitted that the present case is precisely the sort of case in which counsel should be given leave to make a submission without being put to his election. I am in a stronger position than that of counsel in *Lance* v. *Lance and Gardner*[4] because, at the present stage of this case, the court has had the advantage of hearing the case for the wife as well as that for the husband, and there might be a great saving of time and convenience in allowing me to make a submission without being put to my election. It will not be necessary to go so far as to submit that there is no case to answer. The words of section 5 are "not sufficient evidence" which, it is submitted, means that although there may be some evidence there is not enough to satisfy the court as required by section 4 of the Act of 1950: *Wilson* v. *Wilson*.[5]

[Collingwood J. Do you say that *Yuill* v. *Yuill*[6] has no application where a submission is sought to be made on behalf of a party who is in the position of a co-respondent?]

Geoffrey Crispin. I venture to submit not.

Collingwood J. I am prepared to hear your submission without putting you to an election.

[Collingwood J. rejected the submission that there was not sufficient evidence of adultery against the party cited and, after hearing evidence on his behalf, granted a decree nisi to the wife on the ground of the husband's cruelty, rejected the husband's cross-prayer, based on the charge of adultery, and dismissed the party cited from the suit with costs.]

Solicitors: *Allen & Overy; Summer & Co.; J. D. Langton & Passmore.*

E. J.

[2] Matrimonial Causes Act, 1950, s. 5: "In any case in which, on the "petition of a husband for divorce on "the ground of adultery, the alleged "adulterer is made a co-respondent or "in which, on the petition of a wife "for divorce on the ground of adultery, "the person with whom the husband "is alleged to have committed adul-"tery is made the respondent, the "court may, after the close of the "evidence on the part of the peti-"tioner, direct the co-respondent, or "the respondent, as the case may be, "to be dismissed from the proceedings "if the court is of the opinion that "there is not sufficient evidence "against him or her."

[3] [1958] P. 131; [1958] 2 W.L.R. 8.

[4] [1958] P. 134n.; [1958] 2 W.L.R. 316n.; [1958] 1 All E.R. 388.

[5] [1958] 1 W.L.R. 1090; [1958] 3 All E.R. 195.

[6] [1945] P. 15.

[QUEEN'S BENCH DIVISION.]

* CHING GARAGE LTD. *v.* CHINGFORD CORPORATION.

1959
July 8, 10.

Lord Parker C.J.

[1959 C. No. 908.]

Highway—Access—Adjoining owner—Proposal by highway authority to erect "refuge" at point where means of access emerged on to highway.

Highway—"Refuge"—Power to erect—"Places of refuge for the protection of foot passengers crossing the road"—Meaning—Whether proposed refuge within power of authority to "alter" street—Public Health Act, 1875 (38 *&* 39 *Vict. c.* 55), *s.* 149—*Road Traffic Act,* 1956 (4 *&* 5 *Eliz.* 2, *c.* 67), *s.* 45 (1).

The plaintiffs who, in 1932, had erected a garage at the junction of two main roads, had also constructed at their own expense, and to plans approved by the highway authority, a means of access to the highway at the road junction. At the point where the means of access emerged on to the highway there was a gap of 40 feet where there was no kerb, granite sets being set down into the road to form the plaintiffs' means of access. The highway authority now proposed to obstruct the plaintiffs' means of access by erecting a structure (which they described as a street refuge) at the road junction and in the middle of the 40-foot wide gap forming the means of access.

In an action by the plaintiffs for a declaration that the highway authority had no power to obstruct, limit or interfere with the means of access from the garage to the highway the authority claimed that they were empowered by section 45 (1) of the Road Traffic Act, 1956,[1] to construct places of refuge for the safety of foot passengers crossing the road, and, further, that they were empowered by section 149 of the Public Health Act, 1875,[2] to cause the street to be altered:—

Held, (1) that although the "places of refuge" in section 45 (1) (*c*) of the Act of 1956 meant places of refuge not only for pedestrians who were crossing the road but who were about to cross or had crossed the road, nevertheless the power of the highway authority under the section was limited to constructing and maintaining such structures "in the carriageway," and as the proposed structure was not in the carriageway but in the means of access thereto from the plaintiffs' premises they had no power under the section to erect it in the place proposed.

(2) That the power given to the urban authority to "alter" streets did not cover the construction of the refuge in question.

Sellors v. *Matlock Bath Local Board* (1885) 14 Q.B.D. 928 considered.

Accordingly, there was no statutory power which entitled the highway authority to obstruct the means of access from the plaintiff's premises and the plaintiffs were entitled to the declaration sought.

[1] Public Health Act, 1875, s. 149: "The urban authority shall from "time to time cause all such streets "to be levelled paved metalled "flagged channelled altered and re-"paired as occasion may require; ". . ."

[2] Road Traffic Act, 1956, s. 45 (1): "The highway authority for any "road repairable by the inhabitants "at large shall have power to con-"struct and maintain works in the "carriageway—. . . (*c*) for providing "places of refuge for the protection "of foot passengers crossing the "road."

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Ching Garage Ltd. v. Chingford Corporation.

Action.

The plaintiffs, Ching Garage Ltd., were the owners of the Ching Garage sited at the junction of Sewardstone Road and Lea Valley Road, Chingford. Both roads were highways repairable by the inhabitants at large. Sewardstone Road ran from north to south and Lea Valley Road from east to west. The defendants, Chingford Corporation, were the highway authority for both roads. According to a statement of facts agreed between the parties the plaintiffs or their predecessors erected the garage in 1932, having obtained permission from the corporation as required by the Town Planning Act, 1925 (the Act then in force). The verge between the plaintiffs' land and the carriageway of Sewardstone Road, which had originally belonged to the Conservators of Epping Forest, had been dedicated by the Conservators as part of the highway in 1928. There was no kerbed or paved footway on Sewardstone Road nor had such ever existed, but Lea Valley Road had had a kerbed and paved footway since before 1932. After the erection of the garage the plaintiffs or their predecessors applied to the corporation under section 18 of the Public Health Acts Amendment Act, 1907, to carry out works of access. Those works were approved on May 2, 1932, and were ultimately carried out and certified as having been properly carried out by the corporation's surveyor. Means of access were created to Sewardstone Road and at the junction of Sewardstone Road and Lea Valley Road. The latter led first of all on to that part of the highway dedicated by the Conservators of Epping Forest and then over a frontage of about 40 feet on to the carriageway at the junction of the two roads. At that point the kerb along the Lea Valley Road was set down into the road with inset granite blocks.

The corporation now proposed to erect a structure which they termed a street refuge at the junction of the Sewardstone and Lea Valley roads right in the middle of the 40-foot stretch where the access from the plaintiffs' garage emerged on to the carriageway.

In this action the plaintiffs claimed that their premises had at all times enjoyed a right of access to the highways in Sewardstone Road and Lea Valley Road. The existing means of access at the junction of the two roads was laid out, formed and constructed when the premises were erected at the plaintiffs' expense in accordance with town planning control then exercisable and had at all times since its construction been used as formed, laid out and constructed. They claimed that the corporation now proposed to obstruct their means of access by placing an island in the carriage crossing and to curtail or limit the use of the carriage crossing and that the corporation had not obtained and had not endeavoured to obtain any order under section 26 of the Town and Country Planning Act, 1947, to impose conditions on the use of the means of access. Accordingly they claimed (1) a declaration that the corporation was not entitled to obstruct.

interfere with or otherwise limit the use of the means of access which the plaintiffs enjoyed with their premises; (2) an injunction restraining the corporation from causing any such obstruction, interference or limitation.

The corporation contended that they proposed to execute works of highway improvement including the erection of a street refuge at and nearby the junction of the Sewardstone and Lea Valley roads and that the works would be executed partly on the land dedicated in 1928 and partly on the existing carriageway. They admitted that the effect of the works on the plaintiffs' existing means of access would be to cause a partial obstruction thereof by a street refuge. They claimed that it was unnecessary to obtain an order under section 26 of the Town and Country Planning Act, 1947, by reason of the statutory powers conferred upon the corporation, in particular by section 149 of the Public Health Act, 1875; section 18 of the Public Health Acts Amendment Act, 1907; section 55 of the Road Traffic Act, 1930; and section 45 of the Road Traffic Act, 1956. They denied that the plaintiffs were entitled to the reliefs claimed.

G. D. Squibb Q.C. and *D. P. Kerrigan* for the plaintiffs.
Douglas Frank for the corporation.

The cases cited in argument are referred to in the judgment.

Cur. adv. vult.

July 10. LORD PARKER C.J. stated the facts and continued: Whether this proposed action by the corporation will really damage the plaintiffs, I do not know, and I am not concerned with that. It may be that they will suffer some damage. At any rate, the plaintiffs object to it being done without payment of compensation. There seems little doubt that if certain machinery had been exercised and the matter had been approached in a certain way, there was power [under section 26 of the Town and Country Planning Act, 1947], to do what the corporation propose to do, but always subject to the payment of compensation. The corporation, on the other hand, say that they are perfectly entitled to do what they propose to do, and to do it without payment of compensation.

The starting point in this matter must be the common law position, that everyone who owns and occupies land adjoining a highway has a right of access to any part of the highway. It is best stated by Lord Atkin in *Marshall* v. *Blackpool Corporation*,[1] where he sets out what he conceives to be the legal position in these words: "The owner of land adjoining a highway has a right "of access to the highway from any part of his premises. This "is so whether he or his predecessors originally dedicated the

[1] [1935] A.C. 16, 22; 50 T.L.R. 483.

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"highway or part of it and whether he is entitled to the whole "or some interest in the ground subjacent to the highway or not. "The rights of the public to pass along the highway are subject "to this right of access: just as the right of access is subject to "the rights of the public, and must be exercised subject to the "general obligations as to nuisance and the like imposed upon "a person using the highway. . . . As was pointed out by the "Lord Chief Justice, it would be remarkable to find this well-"established right of an adjoining owner taken away and without "compensation, especially in a local Act, unless there were very "plain words to that effect."

On the other hand, it is undoubtedly true that many statutory powers given to local authorities in these matters clearly contemplate interference with private rights of access, and in those circumstances must be treated as giving powers of interference.

The principle is set out in Pratt & Mackenzie's Law of Highways, 19th ed. (1952), p. 127, in these words: "Where there is "a statutory authority to erect obstructions in the highway such "as lamp posts, electricity poles or bus shelters, the adjoining "owner has no right to restrain the exercise of the statutory "authority to obstruct the highway where they bona fide think it "necessary, and if by the terms of the statute and the nature of "the obstruction the legislature must be taken to have contem-"plated the probability if not the certainty that the obstructions "erected under the statute would interfere with rights of adjacent "property owners, then the statute impliedly authorises inter-"ference with those rights in the reasonable exercise of the "statutory powers, notwithstanding the absence of any provision "for compensation."

It therefore becomes necessary—and this is the sole point in this case—to see whether, by statute, the corporation have the powers, which they claim that they have, to erect this obstruction in the access which was constructed to plans approved by them in 1932.

The defence sets out a great number of statutory provisions, but only three have been relied upon in this court. The first that is relied upon is section 149 of the Public Health Act, 1875; secondly, the Road Traffic Act, 1930, s. 55; and, thirdly, the Road Traffic Act, 1956, s. 45.

I propose to deal in the first instance with section 55 of the Road Traffic Act, 1930. On being referred to that section as set out in Pratt & Mackenzie's Law of Highways, 19th ed., p. 593, it seemed to me to give the corporation power to do what they now propose to do.

Mr. Frank, for the corporation, naturally relied on the words in the statute: "A highway authority," as the corporation are, "as respects any road vested in them may, for the purpose of ". . . making the crossing of any road less dangerous to foot "passengers, . . . erect . . . places of refuge."

It is true that, in the ordinary way, one thinks of a refuge as something in the middle of a crossing—somewhere where a pedestrian in crossing a highway can stop and look the other way before crossing the other part of the highway. But it seemed to me equally clear that a refuge may be necessary at the beginning or at the end of a crossing.

To take the present case, those pedestrians who, if the scheme goes through, come down Sewardstone Road from north to south and cross the Lea Valley Road, will, if there is no refuge where the corporation propose to erect one, come on to some sunken granite sets in the middle of a wide 40 foot access. They have thus no safe place to go to or to start from. They have, it is true, crossed the road, but they are, though having crossed the road, in the middle of this access.

In those circumstances, it seemed to me perfectly clear that this would be a refuge "for the purpose of making the crossing "of any road less dangerous to foot passengers."

It seemed to me that Mr. Squibb's argument that there is no refuge within the meaning of that Act, except in the case of pedestrians who are in course of crossing, was based on too narrow a construction of the words, and that any refuge which makes the crossing of a road more safe, whether at the beginning or at the end of, or in the course of the actual crossing, was within the section.

As a result, I had almost completed giving judgment on the basis that the so-called obstruction which the corporation seek to erect is a refuge which they have power to erect under section 55 of the Road Traffic Act, 1930, when it was discovered for the first time that the section had been amended. Indeed, it appears that as amended by the Road Traffic Act, 1956, that section has now no application to refuges at all. That being so, I have felt it right to start my judgment again, the position now being that only two statutory provisions are relied upon by the corporation, namely, section 149 of the Public Health Act, 1875, and section 45 of the Road Traffic Act, 1956.

I will deal with the latter provision first. That section provides by subsection (1): "The highway authority for any road "repairable by the inhabitants at large shall have power to con-"struct and maintain works in the carriageway . . . (*c*) for provid-"ing places of refuge for the protection of foot passengers crossing "the road." There, again, I should be prepared to read "places "of refuge" as places for the safety of pedestrians who are about to cross, or who have just crossed, the road. But the difficulty is that the power there given is only to "construct and maintain "works in the carriageway," and the place where this refuge is proposed to be erected, though in the highway, is not in the carriageway.

Reliance was, however, placed on section 18 of the Public Health Acts Amendment Act, 1907—indeed, the provision under which the access in question was originally made, because by

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paragraph (*c*) of that section it is provided that: "After the "completion of the works"—that would be, in this case, after 1932, when these works were done—"the new means of access "may be used, subject to the conditions which, in pursuance of "any provisions of the law relating to highways, attach to the "use for the like purpose of any carriageway forming part of a "highway repairable by the inhabitants at large."

In fact, that section does not now apply, by virtue of the Essex County Council Act, 1952; but, be that as it may, I do not read the words in that paragraph (*c*) as saying that after the construction of the works the access is deemed to be a carriageway, so that this obstruction, if erected, would be in the carriageway. I do not read it in that way at all, and accordingly I do not think that the corporation have any power to do what they propose to do under section 45 of the Road Traffic Act, 1956.

I turn now to section 149 of the Public Health Act, 1875. That section, which concerns the vesting of streets in urban authorities, provides, inter alia, that: "The urban authority "shall from time to time cause all such streets to be levelled "paved metalled flagged channelled altered and repaired as "occasion may require."

The only words in that section upon which the corporation can rely are "shall cause all such streets to be altered"; and reference has been made to *Sellors* v. *Matlock Bath Local Board.*[2] In that case the plaintiff had some land and buildings consisting of an inn and stables abutting upon the high road. These stood back from the road and in front of them was a space which had been left open to and on a level with the road until recently, when the defendants had made a footpath on the road outside the plaintiff's land, with raised kerbstones, but leaving openings so that carriages could still go on and out on to the road, but not at every part of the boundary. The plaintiff contended that this was an interference with her right at common law. In the course of his judgment Denman J. said[3]: "Looking at the whole of the "clause together, I think it cannot be contended that wherever "any person has land adjoining the road which has remained "undistinguished from the road, perhaps for centuries, he can "as a matter of course restrain the local authorities from making "a raised footpath for the accommodation of the public on a part "of the road which is vested in them, merely because by so doing "they may render it impossible for the time, for the owner of "the land, to draw up a carriage close to the exact boundary of "his land, or to enter his land, at every inch of the boundary."

I appreciate that in that case a wide meaning was given to the word "altered," but so far as the present case is concerned the facts are entirely different. There was a footpath there already and the access had been permitted and constructed pursuant to section 18 of the Public Health Acts Amendment Act,

[2] (1885) 14 Q.B.D. 928. [3] Ibid. 935.

1907. Reading the section as a whole, I find it difficult to think that the words used cover the construction of this street refuge in these circumstances. Indeed, the construction of any street refuge was probably not within the contemplation of the legislature in 1875, and indeed their construction has been specifically dealt with by later statutes.

In my judgment, the corporation cannot justify the proposed construction under that section, but even if I am wrong they would have to pay compensation for any resulting injury under section 308 of the same Act.

Finally, it was submitted, albeit faintly, on behalf of the corporation, that they are not proposing to do anything which interferes with any right that the plaintiffs have. They concede that the plaintiffs have always had at common law a right of access at any point on to the highway, but claim that they will still have that right since they will be able to emerge through the opening on to the highway without any interference. In other words, they maintain that the proposed construction will not prevent the plaintiffs from having access to the highway, but will only interfere with them when they get out into the highway. I myself cannot accede to this argument, since it seems to me that in this connection access to the highway must mean access to the carriageway.

In these circumstances, I do not think that either of the statutory provisions now relied upon enable the corporation to do what they propose to do in regard to this street refuge. There will be a declaration that the corporation are not, by virtue of their powers under section 149 of the Public Health Act, 1875, or section 45 of the Road Traffic Act, 1956, entitled to obstruct, interfere with or otherwise limit the use of the means of access enjoyed with the plaintiffs' premises known as the Ching Garage, at the junction of Sewardstone Road and Lea Valley Road, Chingford, as constructed, formed and laid out.

Declaration accordingly.

Solicitors: *Hillearys; C. G. Dennis, Town Clerk, Chingford Corporation.*

E. M. W.

[COURT OF APPEAL.]

C. A.

1959
June 1, 2, 3;
July 24.

Morris,
Ormerod and
Willmer L.JJ.

* BAKER AND ANOTHER *v.* T. E. HOPKINS & SON LTD.

[1956 B. No. 1948.]

Negligence—Duty of care—Extent—Rescuer—Employees overcome by fumes in well—Dangerous system of work—Employees ordered not to go down well—Whether orders sufficiently precise and urgent to absolve employers from blame—Attempt by doctor to rescue employees—Death of doctor—Whether right of action in injured rescuer when peril caused by negligent act arising out of relationship of master and servant.

The defendants, a small firm of contractors, were engaged in cleaning a well 50 feet deep and 6 feet wide, in which there was about 12 feet of water. The defendants' managing director, H., decided to use a petrol-driven pump to clear the water out of the well and a small platform, reached by two ladders, was constructed inside the well 29 feet below the ground, on to which the pump was lowered. The pump's tank held enough fuel to work the pump for about six hours which H. thought would be a sufficient period to empty the well. On the afternoon of Tuesday, August 16, 1955, he and two of the defendants' employees, W. and Y., went to the farm where the well was. W. and H. went down the well and W. started the engine of the pump. Having come to the surface again W. said: "By gum, you couldn't stay down there long; the fumes "would kill you," and H. replied, "That's how they commit "suicide in motor-cars." Up to that time H., who was ignorant of the problems which the use of a petrol-driven pump in a well might involve, had not directed his mind to the possibility that difficulty or danger might arise; but after the engine had been running for about a quarter of an hour, he began to realise that a dangerous situation might be building up and before leaving the farm said to W. "Don't go down the well tomorrow until the "fumes have cleared." W. replied, "All right." Just before W. and Y. left the farm the engine, which had then been running for one and a half hours, stopped. That period of time was sufficient for the fumes to produce a lethal concentration of carbon monoxide in the lower part of the well, which would not disperse for several days. H. became worried about the situation during the night and on the next morning, when giving instructions to the workmen in the defendants' yard, he told W. and Y. that the lorry would take them to the farm and said: "Don't go down that bloody well till I "get there." He then left the yard intending to join the two men at the farm after he had kept a business appointment elsewhere. When W. and Y. arrived at the farm W. went down the well. Y. saw that he was ill, and, after someone from the farm had gone for help, went down the well too. Y., also, became overcome by the fumes and fell on to the platform. Shortly after a doctor, who had been summoned to the scene, arrived, and was told by persons gathered at the surface that it was feared that the two men had been overcome by poisonous gas in the well. The doctor was told that the engine had been running on the previous evening and emitting fumes, that the fire brigade was coming, and he was urged not to go down. He replied "There are two men down there. I must see "what I can do for them," and having tied a rope round his waist and asked the persons at the well to hold one end of the rope and

pull him up if he felt ill, descended the well. He was heard to call up that there was nothing he could do for the men, and had started to climb up when he collapsed and his full weight came on the rope. Those on top started to haul him to the surface, but the rope became inextricably caught in a pipe or cross-member of the well and they were unable to raise him any further. Soon afterwards a fire brigade arrived and the doctor was brought to the surface, but he was then unconscious and died before reaching hospital. The other two men were dead when they were brought up. In an action by the executors of the doctor claiming damages under the Fatal Accidents Acts and the Law Reform (Miscellaneous Provisions) Act, 1934, against the defendants in respect of his death, Barry J. found for the plaintiffs and awarded damages. On appeal:—

Held, (1) that the defendants in adopting a highly dangerous system of work in the well were in breach of the duty which they, as employers, owed to their employees, W. and Y., and that it was that negligence and not the disregard by the employees of the orders given to them not to go down the well which was the cause of the accident, because those orders, on their wording and in the light of the circumstances in which they were given, were insufficiently precise and urgent to give warning of danger and thus to absolve the defendants from blame.

(2) That the doctor was within the class of persons to whom the defendants owed a duty of care, for he was a person whom they might reasonably have anticipated, and should have anticipated, would attempt to rescue their employees whose lives had been imperilled by their negligence, and it was immaterial that the peril was caused by an act of negligence arising out of the relationship of master and servant. The doctor's executors, therefore, were entitled to recover damages from the defendants.

Haynes v. *Harwood* [1935] 1 K.B. 146; 51 T.L.R. 100; and *Donoghue* v. *Stevenson* [1932] A.C. 562; 48 T.L.R. 494 applied.

Dicta of Cardozo J. in *Wagner* v. *International Railway Co.* (1921) 232 N.Y. 176, at p. 180, also considered and approved.

(3) That the defence of novus actus interveniens and the maxim volenti non fit injuria were not applicable to the facts of the case.

Dictum of Greer L.J. in *Haynes* v. *Harwood* [1935] 1 K.B. 146, 156, and *Letang* v. *Ottawa Electric Railway Co.* [1926] A.C. 725 applied.

Judgment of Barry J. [1958] 1 W.L.R. 993 affirmed.

APPEAL from Barry J.[1]

The plaintiffs, Dr. Ailsa Battie Baker, the widow of Dr. Mark Gregory Baker, and Geoffrey Murkett, the executors of Dr. M. G. Baker, who died on August 17, 1955, in attempting to rescue from a well two workmen, Ward and Wileman, who had been overcome by fumes, claimed damages in respect of his death under the Fatal Accidents Acts, 1846–1908, and the Law Reform (Miscellaneous Provisions) Act, 1934, against the defendants, T. E. Hopkins & Sons Ltd., the employers of the workmen.

Barry J. found for the plaintiffs and awarded damages. The defendants appealed against both the award to Dr. Baker's executors and an award to the widow of Ward. The case is reported only on the claim concerning Dr. Baker.

[1] [1958] 1 W.L.R. 993; [1958] 3 All E.R. 147.

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The facts of the case are abbreviated in the headnote and are fully set out in the judgment of Morris L.J.

Marven Everett Q.C. and *H. Tudor Evans* for the defendants.
F. W. Beney Q.C. and *Douglas Lowe* for the plaintiffs.
M. K. Harrison-Hall for the widow of Ward.

The following cases were cited in argument in addition to those referred to in the judgments: *Horton* v. *London Graving Dock Co.*[2]; *Clifford* v. *Challon & Son*[3]; *Lloyd* v. *Grace Smith & Co.*[4]; *Century Insurance Co. Ltd.* v. *Northern Ireland Road Transport*[5]; *Conway* v. *George Wimpey & Co.*[6]; *L.C.C.* v. *Cattermoles (Garages) Ltd.*[7]; *Staveley Iron & Chemical Co. Ltd.* v. *Jones*[8]; *Cutler* v. *United Dairies (London) Ltd.*[9]; *Handcock* v. *Operating and Vending Machine Co.*[10]; *Hutchinson* v. *London & N. E. Railway Co.*[11]; *Davies* v. *Swan Motor Co.*[12]; *Dupuis* v. *New Regina Trading Co. Ltd.*[13]; *Eckert* v. *Long Island Railroad Co.*[14]

Cur. adv. vult.

On July 24, 1959, the following judgments were read:

MORRIS L.J. The tragic events which gave rise to this litigation occurred within a very short space of time on Wednesday, August 17, 1955. The appellant company had been engaged to undertake the task of cleaning out a well at Tadser Farm, Ticknell, in the county of Derby, which had become contaminated. The well was about 50 feet in depth with a diameter of 6 feet. On Saturday, August 13, Mr. Hopkins, together with his employees, Ward and Wileman, went to the farm. They appear first to have attempted to empty the well by using the hand pump which was normally used. It was obviously necessary to empty the well of water before it could be adequately cleaned. The hand pump proved to be ineffective for the purpose of pumping the water from the bottom of the well. An alternative method of pumping had to be devised. Mr. Hopkins decided to use a Pegson pump, which was one that was operated by a petrol engine. Mr. Hopkins went away in order to get the pump in question and returned with it and with other equipment on his lorry. Mr. Hopkins made a test of the atmosphere in the well. He adopted the method of lowering a lighted candle which was

[2] [1951] A.C. 737; [1951] 1 T.L.R. 949; [1951] 2 All E.R. 1.
[3] [1951] K.B. 495; [1951] 1 T.L.R. 234; [1951] 1 All E.R. 72.
[4] [1912] A.C. 716, 733, 737.
[5] [1942] A.C. 509; [1942] 1 All E.R. 491.
[6] [1951] 2 K.B. 266, 272.
[7] [1953] 1 W.L.R. 997; [1953] 2 All E.R. 582.
[8] [1956] A.C. 627; [1956] 2 W.L.R. 479; [1956] 1 All E.R. 403.
[9] [1933] 2 K.B. 297.
[10] (1938) 31 B.W.C.C. 209, 218.
[11] [1942] 1 K.B. 481; [1942] 1 All E.R. 330.
[12] [1949] 2 K.B. 291.
[13] [1943] 4 Dom.L.R. 275.
[14] (1871) 43 N.Y. 502.

placed in a bucket. When the bucket was raised again the candle was still alight. The evidence showed that a candle would remain alight if the percentage of oxygen in the atmosphere was not below 17 per cent. Having made the test Mr. Hopkins and his two men proceeded to erect a wooden platform in the well at a position approximately 9 feet above the existing water level in the well. The depth of the water in the well was approximately 12 feet. In the well there were certain permanent wooden fixtures which supported and contained the pipe through which water was pumped from the well. A ladder from the surface was placed on to one of the cross-members of the wooden structure; from that ladder it was possible to step on to a second ladder which was placed so as to reach down to the platform that was erected. The pump was lowered down to the platform. No sufficiently long delivery hose was then available. On Tuesday, August 16, Mr. Hopkins and the two men went again to the farm. The judge accepted the evidence of Mr. Hopkins that he made a test by lowering a candle into the well and that the candle was not extinguished. A length of hose had to be obtained so that the water could be pumped to ground level. After that was obtained the petrol engine of the pump was started up. It was started by Ward, Mr. Hopkins being then halfway down the well. After some initial uncertainty the engine ran smoothly. Mr. Hopkins and Ward came up to the surface after the engine had been made to run and the latter made a remark to Mr. Hopkins to this effect: "By gum, you couldn't stay down there long; "the fumes would kill you." Mr. Hopkins replied: "That is "how they commit suicide in motor-cars." The remarks so made were considered by the judge to be by way of casual exchange. The petrol tank of the engine contained enough petrol to enable the motor pump to run for about six hours, and Mr. Hopkins considered that such period of time would be sufficient to enable the pump to clear the well. The engine was started just after 4 o'clock in the afternoon.

The evidence established that the use of a petrol-driven engine in the well was productive of most serious consequences. The exhaust from the petrol engine would contain carbon monoxide. Carbon monoxide is an odourless gas and is very slightly lighter than air but in the confines of the well, where the air would be undisturbed, it would not be drawn away or rise but would gradually build up a most dangerous concentration of lethal gas. It is not in contest in the litigation that the method employed was improper and was highly dangerous. There were no means of ventilation in the well. The evidence showed that a concentration of half of one per cent. of carbon monoxide is fatal, and that a most dangerous quantity of carbon monoxide may be present even though the oxygen content of the air remains at over 17 per cent. The lighted candle test to which I have referred is, therefore, quite useless for the effective detection of carbon monoxide.

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Mr. Hopkins was absolved from conduct that involved callousness or moral turpitude on his part, but it was clearly shown that by reason of his lack of knowledge and experience, and his failure to take advice, he employed a system which inevitably exposed those called upon to operate it to unnecessary risks. He did not appreciate the grave dangers of the system that he adopted, and did not know that the tests of the atmosphere in the well that he made were wholly ineffective as a means of detecting the presence of a highly dangerous concentration of poisonous gas.

Although when Mr. Hopkins first adopted the plan of having a petrol-driven pump some 30 feet down in the well he had not appreciated the dangers that he was creating, he does appear to have had some sense of alarm after the pump had been working for a short time. When a friend of his, a Mr. Grew, called upon him while he was at the farm on that Tuesday afternoon he and Mr. Grew made a test to measure the depth of the water in the well. A test of the air was then made by attaching a lighted candle to a line and lowering it down into the well. After the candle had been lowered approximately 15 feet the candle became extinguished. That took place at about 4.55 p.m. Shortly after that Mr. Hopkins went away from the farm leaving Ward and Wileman there. Before he went away Mr. Hopkins spoke to Ward, and it was held by the judge that he used words to this effect: "Don't go down the well tomorrow until the fumes have "cleared." Ward replied: "All right." Ward and Wileman remained at the farm until approximately 5.30, but just before they left the engine stopped of its own accord. It had by then been running for about 1½ hours. It seems very probable that the reason why the engine stopped was that the well had become so devoid of oxygen that combustion in the engine was not possible.

In the evening Mr. Hopkins became uneasy about the conditions in the well. He decided to go back there and did so at about 7 p.m. Ward and Wileman did not know of this visit and never came to know of it. Mr. Hopkins had expected to find the petrol engine still running but he learned that it had stopped just before his men, Ward and Wileman, left for the day. Looking into the well he saw that it contained a kind of blue haze and there was a smell of fumes.

Next morning, at 7.30, Ward and Wileman, in accordance with the usual practice, went to the yard of the defendant company at Ashby, and there met other employees and Mr. Hopkins. Certain orders for the men were given and Ward and Wileman were told that the lorry driver, whose name was Cartlidge, would drive them in the lorry to Tadser Farm. Before the lorry left the yard certain posts had to be unloaded and Ward and Wileman were to assist in their unloading. The lorry was to take certain tiles to a nearby village and was then to take the two men on. The judge held that Mr. Hopkins said to Ward and Wileman: "Frank (i.e.,

"Frank Cartlidge) will take you to Tadser Farm and don't go "down that bloody well till I get there." From the yard Ward and Wileman took with them a partly filled two-gallon can of petrol. Mr. Hopkins thought that the time which would be taken in carrying out the early duties would be about an hour. In fact the two men arrived at Tadser Farm at about a quarter past eight. Mr. Hopkins had an engagement which took him to Ellistown and he planned thereafter to go on to Tadser Farm.

After Ward and Wileman arrived at Tadser Farm, bearing with them the partly filled two-gallon petrol can, they appear first to have made a test of the depth of the water in the well. So Miss Insley, who was staying at the farm, concluded by reason of some sounds that she heard. Then after the men had been at the farm some seven to ten minutes Miss Insley heard Wileman call out in a tone of some agitation—"Bill, are you all right?" Miss Insley called her brother-in-law, Mr. Taylor. Mr. Taylor went out and saw and spoke to Wileman, who said that he feared that his mate, who had gone down the well, must be ill. Mr. Taylor said that he would seek help and requested Wileman not to go down the well. Mr. Taylor went to a near-by farm in order to telephone for, or to cause telephone messages to be sent for, the police and for a doctor and to summon Mr. Hopkins. Miss Insley went outside shortly thereafter. She and Mrs. Taylor looked down into the well and listened. They could see that Wileman had gone down. He appeared to be on the platform down in the well. Heavy breathing could be heard and a splashing sound that may have been caused by the falling of petrol from the platform to the water below. Mr. Taylor returned and was accompanied by the neighbouring farmer. Being told of the situation Mr. Taylor went away in order to get the police to call a fire brigade that would have breathing apparatus. Then Dr. Baker arrived at the farm. It seems clear that in some manner he must have received a message or request to go there. The details of the subsequent events are chronicled in the very careful judgment of the judge. Miss Insley told Dr. Baker what had happened and told him about the running of the petrol engine and, saying that the fire brigade had been sent for, suggested that he ought not to go down. Dr. Baker, who had by then tied a rope round his waist, said: "There are two men down "there. I must see what I can do for them." Miss Insley feared that Dr. Baker would, to use her words, "only make a "third," and urged him not to go into the well. But Dr. Baker, prompted by the finest instincts of humanity, proceeded to go down. He did so after arranging for Miss Insley and Mrs. Taylor to hold on to the rope and to pull him up if he called. He went down. He replied to Miss Insley's inquiries and made oral reports of his progress. Thereafter the doctor became overcome and his weight came on to the rope. The two ladies had by then been joined by a Mr. Weaver, and the three of them proceeded to pull

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up the rope. Then, by the cruellest mischance the rope became caught and they could raise it no further. In the result Ward and Wileman and Dr. Baker lost their lives.

Actions were brought against Mr. Hopkins' company—T. E. Hopkins & Son Ltd.—in respect of the deaths of Ward and Dr. Baker. The claims were put forward under Lord Campbell's Act and under the Law Reform Act. Barry J. held that the claims succeeded and appeals are now brought to this court. In regard to the appeal in the action concerning Dr. Baker's death there was a notice served by the respondents, Dr. Baker's executors, under Order 58, r. 6, that it would be contended that the amount of the general damages should be increased. By a supplemental notice of appeal the appellants gave notice that in the event of their appeal as to liability being unsuccessful, they would contend that the amount of the damages should be reduced. With the approval of the court, the respective claims to increase or to reduce the damages were, however, withdrawn.

It will be convenient to deal first with the Baker case. The claim which was put forward was that there was negligence for which the company was responsible, and that such negligence resulted in the death of Dr. Baker.

The first stage in the proof of the claim involves proof that the company were negligent towards their employees, the second that such negligence caused such employees to be in peril, the third that this could reasonably have been foreseen, and the fourth that it could also have been reasonably foreseen that someone would be likely to seek to rescue them from their peril and might either suffer injury or lose his life. In the classic words of Lord Atkin in *Donoghue* v. *Stevenson*[1]: "You must take reasonable "care to avoid acts or omissions which you can reasonably foresee "would be likely to injure your neighbour." Neighbours are those persons "who are so closely and directly affected by my "act that I ought reasonably to have them in contemplation as "being so affected when I am directing my mind to the acts or "omissions which are called in question." So in this case it is said that if the company negligently caused or permitted their servants to be placed in dire peril in a gas-filled well it ought reasonably to have been contemplated that some brave and stalwart man would attempt to save their lives. In the eloquent words of Cardozo J. in *Wagner* v. *International Railway Co.*[2]: "Danger invites rescue. The cry of distress is the summons to "relief. The law does not ignore these reactions of the mind in "tracing conduct to its consequences. It recognises them as "normal. It places their effect within the range of the natural "and probable. The wrong that imperils life is a wrong to the "imperilled victim: it is a wrong also to his rescuer."

[1] [1932] A.C. 562, 580; 48 T.L.R. 494.

[2] (1921) 232 N.Y.Rep. 176, 180.

The decision of this court in *Haynes* v. *Harwood*[3] shows (i) that there may be circumstances in which, if A by negligence places B in peril, A ought reasonably to contemplate or to have contemplated that C might endeavour to rescue B, and (ii) that if in such circumstances C suffers hurt he may recover damages from A. It is said that in the present case there was negligence on the part of the company and that, as a result, Ward and Wileman were placed in peril, and that as a further result Dr. Baker tried to rescue them, and in the attempt lost his life. But on behalf of the company it is submitted that even if the company was at fault in arranging to have a petrol-driven pump in the well the predicament of peril of Ward and Wileman was not a result of such fault. It is said that the instruction or admonition of Mr. Hopkins, expressed in the words which I have quoted, was such that the later presence of Ward and Wileman in the dangerous well must be attributed solely to a disobedience on their part of a direct prohibition, and not at all to any negligence which created the elements of danger in the well.

In considering this submission it becomes necessary to examine (a) the duty owed by the company to Ward and Wileman in the circumstances of this case, and (b) the nature of the instruction given and the effect of giving it. Stated in general terms, the duty of the company was to take reasonable care to provide for the well-being and safety of their employees so as to avoid exposing them to any unnecessary risks. When, however, the company set about the task which they had undertaken of cleaning out the well, they proceeded to adopt a method of operation which was extremely dangerous and unsafe. The employment of the petrol-driven pump in the well involved that lethal conditions would be created which might long persist. The pump could only be started if someone went down into the well: such person would soon thereafter be exposed to the risk of inhaling gases which might kill him. Such person, having started the engine of the pump, might come safely to the surface—but it might thereafter be unsafe for anyone to go into the well for many days or weeks. It is manifest that the petrol-driven pump would never have been used if there had been an appreciation of the most serious dangers as well as of the impracticabilities of the system adopted. But though the company were not indifferent or callous in regard to the welfare of their employees, the unawareness which allowed them to follow a most hazardous and dangerous method of operations cannot in law absolve or excuse them.

But then it is said that Ward and Wileman were told on the Wednesday morning not to go down the well until Mr. Hopkins arrived, and so it is said that by the giving of that instruction the company discharged their duty to exercise reasonable care. It is argued that if Ward and Wileman had obeyed the instruction

[3] [1935] 1 K.B. 146; 51 T.L.R. 100.

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there would have been no situation of peril, and that if they had waited for the arrival of Mr. Hopkins there would then have been a test made by Mr. Hopkins of the air conditions in the well which would have revealed the dangers, and which would have brought it about that no one would have gone down. The question arises, therefore, as to whether the company did all that the dictates of reasonable care demanded. Involved in this question is the further question as to the nature of the instruction given.

The situation on the Wednesday morning was that the company had by the system they had adopted caused the well to be a place entry into which would probably result in death. Ward and Wileman had left their work the previous evening at the normal hour for finishing work, and neither then nor on the following morning was there any suggestion to them that operations in the well might have to be abandoned or for a long period suspended. The men were sent to the farm on the Wednesday morning. If there had been a proper realisation on the part of the company that a descent into the well would mean death, I cannot conceive that there would have been a failure so to inform the men. Common humanity and common sense alike would call for a warning in the clearest terms. If an unambiguous order to refrain in any circumstances from going into the well for a certain time was to be given, and if the reason for the giving of such an order was that disobedience to it would mean death, I cannot imagine that any employer could reasonably refrain from explaining and emphasising the reason for the order. In the case of the most trusted and diligent of employees it would be but prudence to warn them of the consequences that would befall them if, prompted by zeal and ardour, they set about their work. If non-compliance with an instruction will mean death from a lurking and hidden peril no reasonable employer, remembering that men may perhaps at times be forgetful or may not clearly understand, would fail to make sure that the nature of the peril was explained and described.

I cannot think, therefore, that in the circumstances of this case the company discharged their duty by the mere uttering of the words spoken by Mr. Hopkins. There was ample evidence to support the finding of the judge that the words were spoken. But what instruction did the words convey? Unhappily neither Ward nor Wileman can say what they understood. They are not here to explain. They were conscientious and responsible men. It ought not lightly to be thought or held that they were recalcitrant or disobedient. If they had clearly understood that the direction to them was that they were to enjoy the August morning in peace and idleness there is no reason why they should not have been well content. If, however, they had known or thought that if they went into the well they would be entering a lethal chamber it is clear that they would never have gone. In my judgment they

ought to have been warned of the perils that existed: I feel sure that they would have been warned had the company not been negligently ignorant of the great dangers of the system that they were negligently employing. In the case of dangers so appalling, it seems to me that a warning should have been given.

Even if it be thought that Ward understood that he had been told not to go down the well under any circumstances until Mr. Hopkins arrived, and that, nevertheless, he for some reason proceeded to do so, it can with assurance be said that he would not have gone down if he had thought or known that he would be overcome by poisonous fumes. It will never be known why Ward went down. It will never be known whether he thought or realised that he was acting contrary to an order. It may be that his understanding was that he was not to go down the well for the purpose of cleaning it until Mr. Hopkins came, or was not to go down and then remain down: it may be that he had not understood or had not thought that he was enjoined from going down in order to set the pump in motion. It may be that when he got to the well he forgot what had been said. It may be that, prompted by zeal, he did disobey an instruction, thinking that at least he ought to make an inspection. The true explanation can never be known. But if the employers had done what, in my judgment, they ought to have done, Ward would certainly not have gone down the well. Even if some fault is attributed to Ward it seems to me that his presence in the well must, at least in part, be attributable to the breach of duty of the company in the respects which I have described. It was, therefore, as a result of the company's negligence (or, at least, was in part a result of it) that the time came when Ward was in dire peril in the well. The company could and should, in my judgment, have anticipated that if as a result of their negligence their men were exposed to great danger in the well, it would be a natural and probable consequence that someone would attempt a rescue. Subject to a consideration of certain further submissions made by the appellant company, it seems to me, therefore, that it is shown that Dr. Baker's death was a result of the company's negligence.

It is submitted, however, that the action of Dr. Baker in descending the well was a novus actus interveniens, and it is further submitted that the company could not reasonably have foreseen the possibility of such a disaster as that which occurred. In my judgment, these submissions are wholly unsustainable once it is held that the company were negligent in creating a situation of great danger and, further, in failing to warn their servants of it, or in failing to ensure that their servants would not be exposed to it. There is, happily, in all men of good will an urge to save those who are in peril. Those who put men in peril can hardly be heard to say that they never thought that rescue might be attempted, or be heard to say that the rescue attempt was not

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caused by the creation of the peril. As Greer L.J. said in *Haynes* v. *Harwood*[4]: "If what is relied upon as novus actus interveniens "is the very kind of thing which is likely to happen if the want "of care which is alleged takes place, the principle embodied in "the maxim is no defence."

Equally unavailing, in my judgment, is the plea which is expressed in the words "volenti non fit injuria." In *Letang* v. *Ottawa Electric Railway Co.*[5] it was said: "It is quite a mistake "to treat volenti non fit injuria as if it were the legal equipollent "of scienti non fit injuria." Approval was given of the proposition that "If the defendants desire to succeed on the ground "that the maxim volenti non fit injuria is applicable, they must "obtain a finding of fact that the plaintiff freely and voluntarily "with full knowledge of the nature and extent of the risk he ran, "impliedly agreed to incur it." In *Dann* v. *Hamilton*[6] Asquith J. said: "Where a dangerous physical condition has been brought "about by the negligence of the defendant, and, after it has "arisen, the plaintiff fully appreciating its dangerous character, "elects to assume the risk thereof, the maxim has often been held "to apply and to protect the defendant."

If, however, A by negligence places B in peril in such circumstances that it is a foreseeable result that someone will try to rescue B, and if C does so try—ought C in any appropriate sense to be described as a "volunteer"? In my judgment, the answer is No. I confess that it seems to me to be indeed ungracious of A even to suggest it. C would not have agreed to run the risk that A might be negligent, for C would only play his part after A had been negligent. C's intervention comes at the moment when there is some situation of peril, and the cause of, or the responsibility for, the creation of the peril may be quite unknown to C. If C, actuated by an impulsive desire to save life, acts bravely and promptly and subjugates any timorous over-concern for his own well-being or comfort, I cannot think that it would be either rational or seemly to say that he freely and voluntarily agreed to incur the risks of the situation which had been created by A's negligence.

When Dr. Baker arrived at the well he proceeded to act as the promptings of humanity directed. He tried to save life. He tried to save the company's servants. He was doubtless trying to do the very thing that the company hoped could be done. But, in any event, what he did was brought about by and was caused by the negligence of the company. In these circumstances, the company cannot say that he was a volunteer.

It was further said that Dr. Baker himself acted with negligence, and that his death was caused, or was partly caused, thereby. This contention was not advanced harshly or in the language of any carping criticism: it was said that Dr. Baker had

[4] [1935] 1 K.B. 146, 156.
[5] [1926] A.C. 725, 730.
[6] [1939] 1 K.B. 509, 517; 55 T.L.R. 297; [1939] 1 All E.R. 59.

been "unreasonably" brave. If a rescuer acts with a wanton disregard of his own safety it might be that in some circumstances it might be held that any injury to him was not the result of the negligence that caused the situation of danger. Such a contention cannot be here asserted. Dr. Baker tied a strong rope round his body and arranged for the rope to be held by those on the surface, and arranged to maintain oral communication with them. It must be remembered also that the chances of success of his attempt would diminish moment by moment if he tarried. He in no way acted recklessly or negligently. In my judgment, the judge came to a correct conclusion in regard to the claim made by his executors.

The conclusions at which I have arrived make it unnecessary for me to express any view in regard to certain alternative submissions made by Mr. Beney. It was said that, even if the company had not been negligent, they would be vicariously responsible for any negligent acts of Ward or Wileman while acting within the scope of their employment: and it was said that if Ward or Ward and Wileman were wholly to blame, and as a result put themselves in a position of peril of a kind which invited rescue, they would be liable directly, and the company vicariously, for any injury caused to someone who, as could have been foreseen, would attempt a rescue.

[His Lordship then proceeded to consider the appeal in the claim for an award concerning the death of Ward, and came to the conclusion that the decision and award of the judge should not be disturbed.]

ORMEROD L.J., having considered the appeal against the award to the widow of Ward and stated that he would not seek to disturb the conclusions of the judge, continued: The first question which falls for consideration in the case of Dr. Baker is whether, in the circumstances, the defendants owed any duty to him. If Mr. Hopkins should have foreseen, and, in my view, he should, that in the absence of a clear warning of the danger Ward or Wileman might go down the well and be overcome by the fumes, should he also have foreseen that some person might attempt to rescue them, and, in so doing, suffer injury? *Haynes* v. *Harwood*[7] establishes that if one person by his negligence causes another to be in a position of danger, he should have regard to the probability that a third person might attempt a rescue. In my judgment, in this case Mr. Hopkins should have foreseen that a rescue would be attempted, and that efforts would be made to obtain the help of a doctor. The defendants did not, I think, dispute that, in these circumstances, a doctor, endeavouring to assist, might well come within this class of rescuer, but they argued that the conduct of Dr. Baker, who, they agree, acted with supreme courage, was such that it was not reasonable to expect

[7] [1935] 1 K.B. 146.

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them to foresee it. It is true that Dr. Baker was probably fully aware of the dangerous condition of the atmosphere of the well. Miss Insley had told him that the petrol engine had been running at the bottom of the well, and tried hard to persuade him not to go down. He knew that there were two men in the well who had obviously been overcome by the fumes. But, in accordance with the high tradition of his profession, he said: "There are two men "down there—I must see what I can do for them," and went down the ladder with the tragic consequence that he in turn was overcome. It may be that circumstances can arise of attempted rescue where the risk to the rescuer is so great, and the chances of rescue so small, that it could not be expected that a rescue would be attempted. That, however, is not this case. Before he went down the well Dr. Baker tied a rope round his waist and arranged for Miss Insley and Mrs. Taylor to pull him up if he called. He then went part of the way down the well. There is some doubt from the evidence how far down he went, but he seems to have gone far enough to make sure that there was nothing he could do to help the men. He then gave Miss Insley the signal to pull him up, and it appears probable he would have been brought out of the well but for the tragic circumstance that the rope became jammed. Dr. Baker's conduct was highly courageous, but it was not foolhardy. He took precautions that might well have been effective for his own rescue in case he felt that he was being overcome. This is conduct which, in my judgment, Mr. Hopkins should reasonably have foreseen. I cannot do better than adopt the words of the judge: "It is "beyond question that the late Dr. Baker acted as he did in an "urgent and passionate desire to do everything that he could, "even at great risk to himself, to preserve human life. It would "be an insult to the profession to which he belonged if I were to "hold that such conduct, on the part of a brave and humane "doctor, could not be reasonably anticipated by those whose "negligent acts created the peril which he sought to avert. From "Miss Insley's evidence it is clear that Dr. Baker was fully alive "to the risk, but I can find no evidence to suggest that he "voluntarily undertook to accept all the consequences of the "defendants' negligence; nor do I think that he acted in a fool-"hardy or unreasonable way. Despite the emergency, he arranged "for himself to be roped, and, had it not been for the quite "unforeseeable mischance of the rope becoming caught in the "down pipe or cross-members of the well, he might easily have "been hauled to the surface and his life saved. The defendants, "whose negligence brought about the danger, must, however, "accept the risk of mischances of this kind."

The defendants submitted further that they could be under no liability in the case of Dr. Baker as his conduct in going down the well consisted of a novus actus interveniens. On this submission it is appropriate to adopt the words of Greer L.J. in *Haynes* v.

Harwood [8]: "If what is relied upon as novus actus interveniens "is the very kind of thing which is likely to happen if the want of "care which is alleged takes place, the principle embodied in the "maxim is no defence." Here the want of care alleged was creating a situation of danger in the well, and failing to warn the two men in terms which would ensure that they would not expose themselves to it. It cannot, in my view, be a case of novus actus interveniens if the conduct of Dr. Baker is the sort of conduct which the defendants should have foreseen would happen as a result of such want of care.

The next question for consideration is whether the defendants can avail themselves of the protection of the doctrine volenti non fit injuria. In my judgment, they cannot so avail themselves. The important word is volenti and not scienti. Dr. Baker may well have had knowledge of the risk he was running, but that is wholly different from saying that he freely and voluntarily took the risk. He was a member of the medical profession, schooled in the tradition to do all he could to save life and relieve suffering. In addition he was a brave man, and, in my view, he acted under the compulsion of his instincts as a brave man and a doctor. This would, I think, be sufficient to dispose of the defence of volenti non fit injuria, but in any event the doctrine would not, in my judgment, apply in a case of an attempted rescue when the act was the natural and foreseeable result of the negligence of the defendants. I think the right view was expressed by Greer L.J. in *Haynes* v. *Harwood* [9] where he quoted a passage from an article by Professor Goodhart which ran as follows: "The Ameri-"can rule is that the doctrine of the assumption of risk does not "apply where the plaintiff has, under an exigency caused by the "defendant's wrongful misconduct, consciously and deliberately "faced a risk, even of death, to rescue another from imminent "danger of personal injury or death, whether the person "endangered is one to whom he owes a duty of protection, as a "member of his family, or is a mere stranger to whom he owes no "special duty." Greer L.J. went on to say: "In my judgment, "that passage not only represents the law of the United States, "but I think it also accurately represents the law of this country."

The last plea raised by the defendants was that of contributory negligence. In my view, in this case, the plea cannot help the defendants. The facts must be considered as they presented themselves at the time to Dr. Baker. There was an emergency as a result of which two men's lives were in grave danger. If they were to be saved urgent action was required. Dr. Baker attempted to take that action, but not without taking such precautions as he could for his own safety. In the circumstances he did what he felt he must do. He could not be expected to have foreseen that the rope would have become jammed, and his precautions be of no help to him. There is not, on the facts of

[8] [1935] 1 K.B. 146, 156. [9] Ibid. 157.

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this case as disclosed by the evidence, any ground, in my judgment, for a finding of contributory negligence on the part of Dr. Baker.

For these reasons, I would dismiss both these appeals.

Willmer L.J. I am in no doubt that both these appeals must be dismissed. The conduct of Mr. Hopkins was, in my judgment, blameworthy in the extreme. The gravamen of his fault lay in the fact that he embarked on a most hazardous enterprise without apparently seeking any advice or taking any steps to ascertain or guard against the dangers which he was creating. I need not enlarge upon this, for the argument for the appellants has not been directed to this aspect of the case, and it is sufficient to say that I find myself wholly in agreement with the judge's conclusion that Mr. Hopkins "embarked upon the whole enterprise "with almost complete disregard to its danger."

[His Lordship considered Ward's case and found no reason to interfere with the judge's decision therein.]

The conclusion that the negligence of Mr. Hopkins was a substantial contributory cause of Ward's death is a matter of vital importance in connection with Dr. Baker's case. It becomes unnecessary to consider what would have been the position had Ward's predicament been brought about entirely by his own fault, which would, in turn, have involved consideration of the difficult question whether Ward was acting within the scope of his employment, so as to affect the defendants, his employers, with responsibility. Dr. Baker's case falls to be determined on the basis that Mr. Hopkins' own negligence was at least a substantial cause of the peril in which the two men, Ward and Wileman, found themselves, and which led to their death. The case, therefore, raises once more the not unfamiliar problems, much discussed in the so-called "rescue cases," which arise where A's wrongful act puts B in a situation of peril, and C, a stranger, suffers injury in the course of attempting to rescue B.

It seems to me that in this case, as in any case where a plaintiff is injured in going to the rescue of a third party put in peril by the defendants' wrongdoing, the questions which have to be answered are fourfold: (1) Did the wrongdoer owe any duty to the rescuer in the circumstances of the particular case? (2) If so, did the rescuer's injury result from a breach of that duty, or did his act in going to the rescue amount to a novus actus? (3) Did the rescuer, knowing the danger, voluntarily accept the risk of injury, so as to be defeated by the maxim volenti non fit injuria? (4) Was the rescuer's injury caused or contributed to by his own failure to take reasonable care for his own safety? All these questions are raised by the circumstances of this case, and have been much canvassed in argument before us. I will endeavour to deal with each in turn.

(1) The question whether the wrongdoer owed any duty to the

rescuer must be determined, in my judgment, by reference to Lord Atkin's familiar statement of the law in *Donoghue* v. *Stevenson*,[10] when he said: "You must take reasonable care to "avoid acts or omissions which you can reasonably foresee would "be likely to injure your neighbour." In the circumstances of the particular case is the rescuer in law the "neighbour" of the wrongdoer, in the sense that he is so closely and directly affected by the wrongdoer's act that the latter ought reasonably to have him in contemplation as being so affected? Where the act of the wrongdoer has been such as to be likely to put someone in peril, reasonable foresight will normally contemplate the probability of an attempted rescue, in the course of which the rescuer may receive injury. In the American case of *Wagner* v. *International Railway Co.*[11] Cardozo J., as it seems to me, foreshadowed in a remarkable way Lord Atkin's statement of principle, and applied it to a typical rescue case. He said: "Danger invites rescue. The cry of distress is the summons to "relief. The law does not ignore these reactions of the mind in "tracing conduct to its consequences. It recognises them as "normal. It places their effects within the range of the natural "and probable. The wrong that imperils life is a wrong to the "imperilled victim; it is a wrong also to his rescuer." Then a little later he went on: "The risk of rescue, if only it be not "wanton, is born of the occasion. The emergency begets the "man. The wrongdoer may not have foreseen the coming of a "deliverer. He is accountable as if he had." The judgment of Cardozo J. was referred to with approval by Lord Wright in *Bourhill* v. *Young*[12] and Lord Wright went on to say: "This "again shows how the ambit of the persons affected by negligence "or misconduct may extend beyond persons who are actually "subject to physical impact. There may, indeed, be no one "injured in a particular case by actual impact, but still a wrong "may be committed to anyone who suffers nervous shock or is "injured in an act of rescue." I should also refer to *The Oropesa*,[13] where Lord Wright, quoting from the speech of Lord Haldane in *Canadian Pacific Railway Co.* v. *Kelvin Shipping Co.*[14] said: "Reasonable human conduct is part of the ordinary "course of things." Assuming the rescuer not to have acted unreasonably, therefore, it seems to me that he must normally belong to the class of persons who ought to be within the contemplation of the wrongdoer as being closely and directly affected by the latter's act. In the present case the fact that Dr. Baker was a doctor is of itself significant. Having regard to the nature of the peril created by the wrongful act of Mr. Hopkins, it was only too likely that a doctor would be summoned—as Dr. Baker in fact was—and, if summoned, would

[10] [1932] A.C. 562, 580.
[11] (1921) 232 N.Y.Rep. 176, 180.
[12] [1943] A.C. 92, 108, 109; [1942] 2 All E.R. 396.
[13] [1943] P. 32, 39; [1943] 1 All E.R. 211.
[14] (1927) 138 L.T. 369, 370.

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attempt to do all he could for the victim, even at the risk of his own safety. In such circumstances I am satisfied that Dr. Baker was one of the class who ought to have been within the contemplation of Mr. Hopkins when he brought about the dangerous situation at the bottom of this well. I do not think, therefore, that it is open to the defendants to contend that no duty was owed by Mr. Hopkins to Dr. Baker.

(2) The question whether the act of the rescuer amounts to a novus actus answers itself, in my judgment, as soon as it is determined that it is the kind of act which ought to have been within the contemplation of the wrongdoer, so as to bring the rescuer within the class of persons to whom a duty was owed. I cannot do better than quote the words used by Greer L.J. in *Haynes* v. *Harwood*[15]—a case in which a police officer was injured while attempting to stop two runaway horses drawing a van, which had been left unattended through the negligence of the defendants' servant. Dealing with the contention that the plaintiff's act amounted to a novus actus, Greer L.J. said: "If what is relied "upon as novus actus interveniens is the very kind of thing "which is likely to happen if the want of care which is alleged "takes place, the principle embodied in the maxim is no defence. "The whole question is whether or not, to use the words of the "leading case, *Hadley* v. *Baxendale*,[16] the accident can be said "to be the 'natural and probable result' of the breach of duty. "If it is the very thing which ought to be anticipated by a man "leaving his horses, or one of the things likely to arise as a "consequence of his wrongful act, it is no defence; it is only a "step in the way of proving that the damage is the result of the "wrongful act." In *Hyett* v. *Great Western Railway Co.*[17] these words of Greer L.J. were expressly approved and followed by Tucker L.J., with whose judgment the other two members of the court concurred. They must, therefore, be regarded as authoritative so far as this court is concerned. In my judgment, it was a natural and probable result of the wrongdoing of Mr. Hopkins that, in the likely event of someone being overcome by the carbon monoxide poisoning, a doctor would be called in, and that such doctor, having regard to the traditions of his profession, would, even at the risk of his own safety, descend the well for the purpose of attempting a rescue. Unless it can be shown, therefore, that Dr. Baker displayed such an unreasonable disregard for his own safety as to amount to negligence on his own part—with which suggestion I will presently deal—I do not think it can be said that his act constituted a novus actus interveniens.

(3) The next question is whether the plaintiff in Dr. Baker's case is defeated by the maxim volenti non fit injuria. Our attention was

[15] [1935] 1 K.B. 146, 156.
[16] (1854) 9 Ex. 341.
[17] [1948] 1 K.B. 345; 63 T.L.R. 411; [1947] 2 All E.R. 264.

directed to a passage in the judgment of Asquith J. in *Dann* v. *Hamilton*,[18] where he said: "Where a dangerous physical condi-"tion has been brought about by the negligence of the defendant, "and, after it has arisen, the plaintiff, fully appreciating its "dangerous character, elects to assume the risk thereof, the "maxim has often been held to apply, and to protect the defen-"dant." These words were clearly obiter, for the actual question in issue in that case was whether the plaintiff took the risk of future negligence on the part of the defendant by accepting a lift in his motor-car when she knew that he was the worse for drink. If the judge meant that in all cases where the dangerous physical condition has already come into existence before the plaintiff's intervention the plaintiff is liable to be defeated by a plea of volenti, I think that he went too far. So applied, the maxim would defeat the plaintiff's claim in any rescue case, save possibly a case in which the rescuer has acted so instinctively, or so much on the impulse of the moment, that his conduct cannot be regarded as a conscious act of volition. But, as was said by Greer L.J. in *Haynes* v. *Harwood*[19]: "It would be absurd to say "that if a man deliberately incurs a risk he is entitled to less "protection than if he acts on a sudden impulse without thinking "whether he should do so or not." It seems to me that, when once it is determined that the act of the rescuer was the natural and probable consequence of the defendant's wrongdoing, there is no longer any room for the application of the maxim volenti non fit injuria. It would certainly be a strange result if the law were held to penalise the courage of the rescuer by depriving him of any remedy. Greer L.J. in *Haynes* v. *Harwood*,[20] was clearly of the view that the maxim cannot be applied to defeat the plaintiff's claim in a rescue case. He quotes from an article by Professor Goodhart in the Cambridge Law Journal, vol. 5, at p. 196, as follows: "The American rule is that the doctrine of the assump-"tion of risk does not apply where the plaintiff has, under an "exigency caused by the defendant's wrongful misconduct, "consciously and deliberately faced a risk, even of death, to "rescue another from imminent danger of personal injury or "death, whether the person endangered is one to whom he owes "a duty of protection, as a member of his family, or is a mere "stranger to whom he owes no such special duty." Greer L.J. goes on: "In my judgment, that passage not only represents the "law of the United States, but I think it also accurately repre-"sents the law of this country." It is by no means clear that the other two members of the court were prepared to go so far as Greer L.J. in stating the principle, and they appear to have based their judgments to a great extent on the fact that in the particular case the plaintiff was a police officer. But for my part I am content to accept Greer L.J.'s statement of the law, and to hold

[18] [1939] 1 K.B. 509, 517.
[19] [1935] 1 K.B. 146, 159.
[20] Ibid. 157.

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that the maxim volenti non fit injuria cannot be invoked in this case to defeat the plaintiff's claim. In my judgment, the real question to be determined in a case such as the present is not whether the rescuer voluntarily accepted the risk of injury, but whether his injury was caused or contributed to by any failure on his part to take reasonable care for his own safety. This was the view expressed by Swift J. in *Brandon* v. *Osborne Garrett*,[21] and I think it is the right view.

(4) I pass, therefore, to the fourth and last question, which is raised by the defendants' plea that the death of Dr. Baker was caused or contributed to by his own negligence. The burden of proof with regard to this allegation is upon the defendants, and in order to succeed I think they would have to show that the conduct of Dr. Baker was so foolhardy as to amount to a wholly unreasonable disregard for his own safety. Bearing in mind that danger invites rescue, the court should not be astute to accept criticism of the rescuer's conduct from the wrongdoer who created the danger. Moreover, I think it should be remembered that it is fatally easy to be wise after the event. It is not enough that, when all the evidence has been sifted and all the facts ascertained in the calm and deliberate atmosphere of a court of law, the rescuer's conduct can be shown ex post facto to have been misguided or foolhardy. He is entitled to be judged in the light of the situation as it appeared to him at the time, i.e., in a context of immediate and pressing emergency. Here Dr. Baker was faced with a situation in which two men were in danger of speedy death at the bottom of the well, unless something were done very quickly. He was a doctor, and he had been specially summoned to help. Any man of courage in his position would have felt impelled to act, even at the risk of his own safety. Time was pressing; immediate action was necessary if the men in danger were to be helped; there was virtually no opportunity for reflection, or for estimating the risks involved in an act of rescue. If Dr. Baker in such circumstances had instinctively gone straight down the well, without stopping to take any precautions at all, it would, I think, have been difficult enough to criticise him. But in point of fact he did take the very wise precaution of securing himself with a rope, whereby those on the surface could pull him up if he himself were overcome. The immediate cause of his death was the sheer mischance of the rope becoming caught on some obstruction, so as to make it impossible for those on the surface to pull him to safety. I do not think that, having regard to the emergency in which he was acting, he is to be blamed for not foreseeing and guarding against the possibility of such a mischance. On the contrary, I entirely agree with the view expressed by the judge that the defendants, whose negligence brought about the danger, must accept the risk of mischances of this kind. In

[21] [1924] 1 K.B. 548, 554, 555.

all the circumstances, I find it impossible to accept the contention that Dr. Baker was guilty of any negligence either causing or contributing to his death.

For these reasons I am of opinion that the appeal in Dr. Baker's case must also be dismissed.

Appeal dismissed with costs in the case of the executors of Dr. Baker, and in the case of Mrs. Ward the appeal was dismissed with costs with an order for taxation under the Legal Aid and Advice Act. No order for costs in connection with the cross-notice of appeal or the supplementary notice of appeal.

Solicitors: *Gregory, Rowcliffe & Co., for Fishers, Ashby-de-la-Zouch; Hempsons; George Thatcher & Son for A. H. & H. W. Timms, Burton-on-Trent.*

A. W. G.

[QUEEN'S BENCH DIVISION.]

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Rates and Rating—"Social welfare"—Friendly society—Provision of orthopaedic, medical and surgical treatment for members—Payment for benefits by subscriptions—Hospital—Claim for rating relief—Absence of public benefit—Absence of altruistic motive—Objects not "charitable or . . . otherwise concerned with the advancement of . . . "social welfare"—Rating and Valuation (Miscellaneous Provisions) Act, 1955 (4 *&* 5 *Eliz.* 2, *c.* 9), *s.* 8.

Rates and Rating—"Social welfare"—Claim for rating relief—Refusal of relief—Notice of appeal to quarter sessions—Notice out of time—Notice withdrawn—Payment of full rate—Whether overpayment recoverable—Whether right to relief lost through overpayment—Whether overpayment and withdrawal of notice of appeal operate as estoppel per rem judicatam—Rating and Valuation (Miscellaneous Provisions) Act, 1955, *s.* 8, *Sch. V.*

Practice and Procedure—Declaratory judgment—Rates and rating—Whether jurisdiction to grant declaration that organisation entitled to rating relief.

The plaintiffs, the trustees of the Industrial Orthopaedic Society, a society registered under the Friendly Societies Acts, 1896 to 1948, applied to the defendant rating authority for rating relief under section 8 of the Rating and Valuation (Miscellaneous Provisions)

[Reported by GROVE HULL, Barrister-at-Law.]

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Act, 1955,[1] in respect of certain hereditaments, the most important of which was a hospital maintained almost entirely for the benefit of members of the society. The rules of the society provided that the society's object should be the relief by orthopaedic, medical, surgical and other treatment at the society's premises of members in sickness or infirmity. This relief was to be provided by the contributions of the members, all of whom were required to make subscriptions.

The defendants refused to grant rating relief and the plaintiffs gave notice of appeal to quarter sessions. This notice was invalid and was subsequently withdrawn by the plaintiffs, who then paid the full rate without deduction.

The plaintiffs claimed by the present action a declaration that the society was an organisation within the meaning of section 8 (1) of the Act of 1955. The defendants contended, in addition to their submission that the society was not such an organisation, that the court had no jurisdiction to grant the declaration sought, or alternatively, that the court should, in the exercise of its discretion, refuse to grant the declaration:—

Held, (1) that on the true construction of the Act a ratepayer who paid the full rate in the first year without claiming relief did not lose his right to relief for all subsequent years, and that payment of the full rate coupled with withdrawal of the notice of appeal to quarter sessions did not operate to estop the plaintiffs per rem judicatam from claiming the relief sought; but that any overpayment was irrecoverable.

(2) That the right to claim relief was not restricted to a claim by way of appeal to quarter sessions, or to contesting the rating authority's application for a distress warrant, and that the court had jurisdiction to grant a declaration.

(3) That the main objects of the society were not charitable, since the members did not form a "section of the community" so as to satisfy the test of public benefit, and the object of the members was not to do good to others but to themselves.

Dictum of Viscount Simonds in *Oppenheim* v. *Tobacco Securities*

[1] Rating and Valuation (Miscellaneous Provisions) Act, 1955, s. 8: "(1) This section applies to the following hereditaments, that is to say—(*a*) any hereditament occupied for the purposes of an organisation (whether corporate or unincorporate) which is not established or conducted for profit and whose main objects are charitable or are otherwise concerned with the advancement of . . . social welfare; . . . (2) For the purposes of the making and levying of rates in a rating area, for the year beginning with the date of the coming into force of the first new valuation list for that area (in this section referred to as 'the first year of the new list'), and for any subsequent year, the amount of rates chargeable in respect of a hereditament to which this section applies shall, subject to the following provisions of this section, be limited as follows, that is to say—(*a*) for the first year of the new list, the amount so chargeable shall not exceed the total amount of rates (including any special rates) which were charged in respect of the hereditament for the last year before the new list came into force; (*b*) if, by virtue of the preceding paragraph, the amount of rates chargeable in respect of the hereditament is less than it would have been apart from that paragraph, the proportion by which it is thereby required to be reduced shall apply to any subsequent year during which the hereditament continues to be one to which this section applies, and accordingly the amount of rates chargeable in respect of the hereditament for any such year shall be reduced by that proportion: Provided that this subsection shall have effect subject to the provisions of the Fifth Schedule to this Act in cases falling within that Schedule."

Trust Co. Ltd. [1951] A.C. 297, 306; [1951] 1 T.L.R. 118; [1951] 1 All E.R. 31 applied.

(4) That the main objects of the society were not otherwise concerned with the advancement of social welfare, since they were not characterised by altruism, and that, accordingly, the society was not entitled to rating relief.

National Deposit Friendly Society Trustees v. *Skegness Urban District Council* [1958] 3 W.L.R. 172; [1958] 2 All E.R. 601 applied.

Skegness Urban District Council v. *Derbyshire Miners' Welfare Committee* [1959] 2 W.L.R. 711; [1959] 2 All E.R. 258 distinguished.

ACTION.

The following statement of the facts is taken in substance from the judgment:

The plaintiffs were the trustees of the Industrial Orthopaedic Society, which was a society registered under the Friendly Societies Acts, 1896 to 1948. The society, which at the time of the action consisted of about 400,000 members, owned certain hereditaments in Golders Green, N.W.11, of which the most important was the Manor House Hospital. In August, 1956, the plaintiffs applied to the defendants, the rating authority, for relief from rates in respect of these hereditaments under section 8 of the Rating and Valuation (Miscellaneous Provisions) Act, 1955. On March 28, 1957, the defendants notified the plaintiffs that they refused to grant this relief. On October 25, 1957, the plaintiffs, as persons aggrieved by this refusal and by the rates charged upon them for the year ending March 31, 1956, gave notice of appeal to Middlesex Quarter Sessions. The notice was out of time and invalid, and was subsequently withdrawn by the plaintiffs, who then paid the full rates without deduction.

The relevant rules of the society were as follows: Rule 1: "(1) The society is a friendly society. It shall be called the "Industrial Orthopaedic Society. (2) The society shall consist "of an unlimited number of members and every member shall "have an equal voice in all the property and concerns thereof "except as otherwise provided in these rules or by law." Rule 3: "(1) The objects of the society shall be to provide by the volun-"tary contributions of the members for the relief of members in "sickness or infirmity. (2) Such objects shall be carried into "effect by the provision of orthopaedic treatment and such "surgical and medical treatment at the hospital's rehabilitation "or other medical units of the society as the executive committee "may from time to time determine. (3) The provision of dental "and optical benefits at the Manor House Hospital or its clinics "for members." Rule 4: "(1) Membership of the society shall "be open to the following classes of persons:—(*a*) Founder "members who shall subscribe a sum of not less than one "hundred guineas. (*b*) Life members who shall subscribe in one "sum twenty-five guineas. (*c*) Annual members who shall make

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"an annual subscription of not less than one guinea. (*d*) Industrial members . . . (3) Industrial membership shall be open to all engaged in industry or commerce. The wives and children (over the age of 15) of industrial members shall also be eligible for industrial membership." Rule 5: "(1) Every member of the society, other than founder, life or annual members, shall pay a minimum contribution of threepence per week except members who have contributed for not less than 10 years and who on retirement at 65 are not gainfully employed shall pay 1d. per week." Rule 6: "(1) Any member Twenty-Six weeks in arrears with contributions shall cease to be a member of the society. Group members shall retain their membership and right to benefit whilst their contributions are being paid but shall cease to be members directly their contributions are discontinued by the group, unless application be made to the appropriate area organiser, district secretary or local secretary for transfer of membership within a period of thirteen weeks." Rule 8: "(1) The executive committee may accept donations from persons in sympathy with the objects of the society or desirous of furthering such objects. Such donations in the absence of any expressed desire by the donor that the gift shall be applied to any particular purpose shall be placed to the credit of the general funds."

Rule 11 provided that if any member should require treatment, then if he had been a member of the society for six months and was not more than 13 weeks in arrear with his subscriptions, he should receive such treatment and maintenance free of charge as the society's medical referee might prescribe. The patients at the Manor House Hospital were all members of the society, with the exception of a very few admitted as emergency cases.

By their statement of claim in this action the plaintiffs referred to the rules of the society, pleaded that the objects of the society were carried into effect by the provision of orthopaedic, medical, surgical, dental and optical treatment at the society's hospital and other premises belonging to the society and by the instruction of students and doctors, and claimed a declaration that the society was an organisation within the meaning of section 8 (1) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955.

By their defence the defendants contended that by reason of the facts set out above the court had no jurisdiction to grant the declaration claimed, or alternatively, that the court should, in the exercise of its discretion, refuse to grant the declaration. The defendants further contended that the society was not an organisation within the meaning of section 8 (1) of the Act.

The submissions made in argument are set out in the judgment.

J. L. Arnold Q.C. and *Gerald V. Owen* for the plaintiffs.

J. T. Molony Q.C. and *Monique S. Viner* for the defendants.

The following cases, in addition to those which were referred to in the judgment, were cited in argument: *Income Tax Special Purposes Commissioners* v. *Pemsel* [2]; *Gilmour* v. *Coats* [3]; *Gibson* v. *South American Stores (Gath & Chaves) Ltd.* [4]; *Working Men's Club & Institute Union Ltd.* v. *Swansea Corporation* [5]; *In re North of England Zoological Society* [6]; *British Legion* v. *Cambridge Corporation.* [7]

Cur. adv. vult.

June 22. SALMON J. The plaintiffs sue as trustees of the Industrial Orthopaedic Society for a declaration that this society is an organisation within the meaning of section 8 (1) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, and accordingly entitled to relief under the statute.

[His Lordship stated the facts and continued:] The first point taken by the defendants is that the court has no jurisdiction to hear the present action. Mr. Molony, on their behalf, argued that even if the plaintiffs are right in their contention that they would have been entitled to relief in respect of the rates for the year ending March 31, 1956, nevertheless no declaration should be granted since it would be wholly ineffective. He contends (1) that if the plaintiffs paid more than they need have done in respect of the year ending March 31, 1956, such overpayment was made under a mistake of law and is irrecoverable; (2) that on the true construction of the Act a ratepayer who pays the full rate in the first year without claiming relief loses his right to relief for all subsequent years; and (3) that the payment of the full rate and the withdrawal of the notice of appeal to quarter sessions operate as a species of res judicata or estoppel.

In my judgment, Mr. Molony's first point is clearly a sound one and has not been seriously contested; the declaration could not operate to enable the plaintiffs to recover any amount they may have overpaid. Mr. Molony did not press his third point and it seems to me clearly to be unarguable. As to the second point, I cannot find anything in the language of section 8 (2) or in the language of clause 3 of the Fifth Schedule to the Act to support the contention put forward on the part of the defendants.

[His Lordship read section 8 (2), and continued:] Clause 3 of the Fifth Schedule deals with the position where structural alterations are made to the hereditament during the first year of the new list, but its language so far as it is relevant to Mr. Molony's point is substantially the same as the language of section 8 (2). In my judgment, "The amount of rates chargeable "for the first year" means the amount of rates for which the ratepayer would have been liable after any relief to which he was

[2] [1891] A.C. 531; 7 T.L.R. 657.
[3] [1949] A.C. 426; 65 T.L.R. 234; [1949] 1 All E.R. 848.
[4] [1950] Ch. 177; 66 T.L.R. (Pt. 1) 83; [1949] 2 All E.R. 985.
[5] [1958] 1 W.L.R. 1135; [1958] 3 All E.R. 414.
[6] [1958] 1 W.L.R. 1258; [1958] 3 All E.R. 535.
[7] Unreported.

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entitled. This means that the amount of rates chargeable for the following year is calculated under the Act not in relation to the amount which he paid in the first year but in relation to the amount of rates less relief for which the ratepayer would have been liable in the first year. Accordingly, in my judgment, the fact that he may have made an overpayment in the first year is quite irrelevant in considering his rights to relief in the following years.

It has also been faintly suggested that a ratepayer can, in any event, claim relief only by way of appeal to quarter sessions or by contesting the rating authority's application for a distress warrant, which would follow a refusal to pay. There does not seem to me to be anything in this suggestion. I can see no reason why proceedings in this Division or in the Chancery Division should not be instituted for a declaration. Indeed, *Berry* v. *St. Marylebone Borough Council* [1] and *General Nursing Council for England and Wales* v. *St. Marylebone Borough Council* [2] are examples of actions for a declaration in similar circumstances. It was not suggested in either case that the action was not maintainable. I, therefore, come to the conclusion that the court has jurisdiction to entertain this action and that, if the society is an organisation within the meaning of section 8 (1), a declaration to that effect would entitle it to obtain relief for the years following the year ending March 31, 1956.

The real question in this case turns upon whether the hereditaments in question are occupied for the purpose of an organisation which is not established or conducted for profit, and whose main objects are charitable or otherwise concerned with the advancement of social welfare, within the meaning of section 8 (1) (*a*). It is conceded that the society is an organisation which is not established or conducted for profit. Mr. Arnold contends first that the main object of the society is charitable. It is now generally accepted that, for the object of an organisation to be charitable, the object must confer a public benefit except only where the object is to relieve poverty. Here the object is the relief of sickness and infirmity. Although Mr. Arnold has kept the point open, he virtually concedes that this court cannot depart from the generally accepted view. He argues, however, that the object of the society confers a public benefit.

In considering a similar point in *Oppenheim* v. *Tobacco Securities Trust Co. Ltd.*,[3] Viscount Simonds said [4]: "The "difficulty arises where" [the object] "is . . . for the benefit of "a class of persons at large. Then the question is whether that "class of persons can be regarded as such a 'section of the com-"'munity' as to satisfy the test of public benefit. These words "'section of the community' . . . indicate first, that the . . .

[1] [1958] 1 Ch. 406; [1957] 3 W.L.R. 1029; [1957] 3 All E.R. 677.

[2] [1958] 1 Ch. 421; [1957] 3 W.L.R. 1039; [1957] 3 All E.R. 685.

[3] [1951] A.C. 297; [1951] 1 T.L.R. 118; [1951] 1 All E.R. 31.

[4] Ibid. 306.

"beneficiaries must not be numerically negligible, and secondly, "that the quality which distinguishes them from other members "of the community, so that they form by themselves a section of "it, must be a quality which does not depend on their relation-"ship to a particular individual . . . A group of persons may be "numerous but, if the nexus between them is their personal "relationship to a single propositus or to several propositi, they "are neither the community nor a section of the community for "charitable purposes."

In the present case the beneficiaries are certainly not numerically negligible. There is, however, in my judgment, the closest nexus between the beneficiaries and the society since de minimis they are all members of it. This is apparent from the evidence and the rules, to which I shall presently refer. Moreover, the object of the members of the society is not to do good to others but to themselves. This object is not altruistic and is, in my judgment, not charitable.

Mr. Arnold contends, secondly, that the main object of the society if not charitable is at any rate "otherwise concerned with "the advancement of . . . social welfare." This raises a familiar and usually perplexing problem. The society is an unincorporated society registered under the Friendly Societies Acts, 1896 to 1948. [His Lordship referred to the rules of the society, and continued:] There are today about 400,000 members of the society, all of whom except about 2,000 are industrial members. The Manor House Hospital is a large, well-equipped hospital, fully staffed for treating almost every type of surgical or medical case. The patients at the hospital are all members of the society, except for a very few accepted as emergency cases. The main object of the society, as the rules make plain, is to afford its members (who are the society) free medical services and maintenance at the Manor House Hospital in return for their subscriptions. This object seems to me to be concerned primarily with self-help and the private interests of the society's own subscribing members rather than social welfare. I have no doubt that the hospital itself makes a notable contribution to social welfare. In my judgment, the main object of the society, however laudable, is not social welfare, notwithstanding that social welfare is a by-product of its activities. Although there are differences on the facts, this case, in my judgment, is indistinguishable in principle from *National Deposit Friendly Society Trustees* v. *Skegness Urban District Council.*[5] No precise definition has ever been attempted of the words "otherwise concerned with the advance-"ment of social welfare," nor, perhaps, is any such definition possible. I shall certainly attempt none. The cases, however, seem to support the view that the main object of the organisation in question must be characterised by altruism, inasmuch as the words in the statute connote doing good for others rather than for

[5] [1958] 3 W.L.R. 172; [1958] 2 All E.R. 601.

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oneself; see, for example, *National Deposit Friendly Society Trustees* v. *Skegness Urban District Council*[5] and *Independent Order of Oddfellows Manchester Unity Friendly Society* v. *Manchester Corporation.*[6]

Mr. Arnold contends that although this may have been the correct view before the decision of the House of Lords in *Skegness Urban District Council* v. *Derbyshire Miners' Welfare Committee,*[7] that view can no longer prevail. He relies on a passage in the speech of Viscount Simonds, with which Lord Morton, Lord Reid and Lord Keith agreed, and from which Lord Denning did not dissent. This passage reads as follows[8]: "They urge "that a trust or institution cannot be regarded as charitable if it "is not created by the benevolence of a donor or donors and that "that element is absent in the present case. Next, they say, that "just as benevolence or altruism is a necessary element in legal "charity, so an object of an organisation cannot be regarded as "'otherwise concerned with the advancement of social welfare' "unless it too has such an element. I accept neither of these "propositions. The crucial test is the purpose to which money "is devoted, not the source from which it is derived." It may be that Viscount Simonds meant no more than that it is unnecessary for the donors of the funds which support the organisation to be actuated by benevolence so long as the main object of the organisation and the purpose for which the money is devoted has an altruistic character. If that is so, the fact upon which Mr. Arnold relies strongly, namely, that this society is partly supported by donations from benevolent outside sources, is irrelevant. In the *Derbyshire Miners'* case[9] a holiday centre was provided and maintained by a statutory levy and contributions from the National Coal Board and from those who made use of the holiday centre. Accordingly, the money did not come from donors actuated by benevolence. The precise composition of the organisation which occupied the holiday centre was never ascertained. It was, however, clear that whatever the organisation's composition might be, its object was not to benefit itself but to benefit Derbyshire miners generally. Accordingly, the object of the organisation may be said to have been characterised by altruism and the money used for a benevolent purpose. If the House of Lords in the *Derybshire Miners'* case[9] intended to disapprove or question the dicta or, indeed, the basis of the opinions of Lord MacDermott and Lord Denning in *National Deposit Friendly Society Trustees* v. *Skegness Urban District Council,*[10] it is perhaps strange that it did not expressly do so However this may be, I find it impossible on the facts of this case to hold that the main object of this society is concerned with the

[5] [1958] 3 W.L.R. 172.
[6] [1958] 1 W.L.R. 1171; [1958] 3 All E.R. 378.
[7] [1959] 2 W.L.R. 711; [1959] 2 All E.R. 258.
[8] Ibid. 718.
[9] [1959] 2 W.L.R. 711.
[10] [1958] 3 W.L.R. 172.

advancement of social welfare. The main object of the members of the society, who are the society, is to benefit themselves. There will, accordingly, be judgment for the defendants.

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Judgment for the defendants; defendants to have nine-tenths of the costs.

Solicitors: *Pattinson & Brewer; R. H. Williams.*

[COURT OF APPEAL.]

* *Ex parte* ASSOCIATED NEWSPAPERS LTD.

C. A.

1959 *Oct.* 2.

Morris, Romer and Willmer L.JJ.

PRACTICE NOTE.

Practice and Procedure—Central Office—Public access to documents—Enforcement of public right—Rule of Supreme Court providing that documents filed at the Central Office "shall . . . be accessible to the "public"—Refusal by master and judge in chambers to grant leave to see document filed at Central Office—Leave granted to appeal from refusal—Application ex parte to Court of Appeal made before institution of any proceedings—No jurisdiction in court to hear application ex parte—Whether proper procedure by prerogative writ or declaration—R.S.C., Ord. 61, *r.* 17.

Court of Appeal—Ex parte application to—No proceedings—Jurisdiction.

Crown Practice—Mandamus—Central Office—Refusal of clerk to give access to document—Whether mandamus lies—R.S.C., Ord. 61, *r.* 17.

The Court of Appeal cannot hear an application ex parte in a matter in which no proceedings have been instituted.

APPLICATION EX PARTE.

A newspaper, desirous of seeing an injunction granted by a judge in chambers in certain proceedings and filed in the Central Office, applied, pursuant to R.S.C., Ord. 61, r. 17,[1] to the office and was informed that leave must be obtained from a master of the Supreme Court. Leave was granted by Master Clayton on September 17, 1959; but when the newspaper, armed with that order, applied to the Central Office, the senior clerk took time to consider the order, and a junior clerk stated that the defendant's solicitors did not wish anyone to know about the matter. Master Clayton thereupon reversed his former order, stating that he had a discretion under R.S.C., Ord. 61, r. 17; and Winn J. in chambers upheld that decision, but granted the newspaper leave to appeal.

[1] R.S.C., Ord. 61, r. 17: "Proper "indexes or calendars to the files or "bundles of all documents filed at the "Central Office shall be kept, so that "the same may be conveniently "referred to when required, and such "indexes or calendars and documents "shall, at all times during office "hours, be accessible to the public on "payment of the usual fee."

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ASSOCIATED NEWSPAPERS LTD., *Ex parte.* (PRACTICE NOTE,)

Neville Faulks Q.C. and *D. Hirst* for the applicants. This matter has no name, no writ has been issued, and the applicants have no opponent; but leave to appeal has been granted by the judge in chambers and advice has been tendered to counsel that the only method of coming before the court is by an application ex parte. The matter is of great public interest. The history is that on January 29, 1959, in *Cadam* v. *Beaverbrook Newspapers Ltd.*,[2] counsel for a newspaper (Gerald Gardiner Q.C.) called attention to the existence of R.S.C., Ord. 61, r. 17, a rule which had been somewhat overlooked. Publicity had been given to that in the Press (see note in "The Times" newspaper, January 30, 1959), and to the existence of a Practice Master's Rule [rule 23], which provided as follows: "Inspection. The Chancery Registrar's "books and the volumes of the Chancery Master's and Taxing "Master's Certificates are open to general inspection. Deposi-"tions and all proceedings in the Queen's Bench Division are open "to the inspection of parties or their solicitors only" and, accordingly, appeared to conflict with the mandatory terms of Order 61, r. 17, which had the force of statute. A newspaper, the "Evening Standard," thereupon tested the matter by applying to a master for leave to see a document filed in the Central Office, and appealed from his refusal to Hinchcliffe J. in chambers. The judge held that the Practice Master's Rule was ultra vires the Rules of the Supreme Court; but in the interval that part of the Practice Master's Rule which was ultra vires Order 61, r. 17, had been withdrawn, namely, the words "Depositions and all proceedings in the Queen's Bench Division "are open to the inspection of parties or their solicitors only": see notes in "The Times" newspaper, February 19 and 20, 1959.

One ultra vires practice having been abandoned, another appeared to have taken its place, in that a member of the public desiring to see a document filed in the Central Office was now required to apply to a master for leave. In September, 1959, the applicants, wishing to see an injunction granted by a judge in chambers, accordingly applied for leave to Master Clayton, who granted leave; but when they went to the Central Office, the senior clerk said: "One moment"; the junior clerk said that the defendant's solicitors did not want anybody to know about the matter, and Master Clayton then reversed his former order, holding that he had a discretion. Winn J., on appeal, upheld that refusal but granted leave to appeal.

MORRIS L.J. But how do you come before this court which only hears appeals or applications from an order in some proceedings?

ROMER L.J. This rule is very peculiar. I should have thought that, where no specific procedure is laid down, the remedy for

[2] [1959] 1 Q.B. 413, 420; [1959] 2 W.L.R. 324; [1959] 1 All E.R. 453.

someone who cannot get a sight of a document would be to apply for mandamus to the person who will not let him see it.

MORRIS L.J. Or for a declaration?

Faulks Q.C. This application is by leave but it may well be misconceived. The matter having been ventilated, I shall advise my clients to go to the Central Office, and if they are refused a sight of the document they may take steps by way of prerogative writ.

MORRIS L.J. We are not advising you that there is any special procedure; we are only asking questions. But you cannot come before us ex parte by leave or otherwise.

Solicitors: *Swepstone, Walsh & Son.*

M. M. H.

[CHANCERY DIVISION.]

* INLAND REVENUE COMMISSIONERS *v.* COLLCO DEALINGS LTD. SAME *v.* LUCBOR DEALINGS LTD.

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June 25, 26, 29, 30; *July* 24.

Vaisey J.

Revenue—Income tax—Double taxation relief—Residents in Eire—Irish company resident in Eire—Transfer of share capital of English companies to Irish company—Payment to Irish company of dividend on shares of English companies accumulated wholly out of profits made before transfer—Deduction of British income tax—Whether Irish company entitled to repayment of British income tax—"Dividend "stripping"—Whether Irish company "a person entitled under any "enactment to an exemption from income tax"—Income Tax Act, 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 10), *s.* 349 (1) (2) (3 (4); *Sch.* 18 *—Finance (No.* 2) *Act,* 1955 (4 *&* 5 *Eliz.* 2, *c.* 17), *s.* 4 (1) (2).
Statute—Construction—Treaty—Conflict with.

On October 31, 1957, a company resident in the United Kingdom sold to an Irish company, incorporated in Eire in 1957 and never resident in the United Kingdom, the whole of the issued share capital in two English companies. Subsequently there were paid to the Irish company interim dividends on the shares in both companies amounting respectively to £174,500 and £104,000, and paid wholly out of profits accumulated before the Irish company acquired the shares. The Irish company claimed exemption from British income tax by virtue of section 349 and paragraph 1 (*a*) of Schedule 18 to the Income Tax Act, 1952.[1] The Crown refused

[1] Income Tax Act, 1952, s. 349: "(1) The confirmation, by section 23 "of the Finance Act, 1926, section 21 "of the Finance Act, 1928, and section "37 of the Finance Act, 1948, of the "agreements in force at the passing of "this Act . . . which are set out in "Part I of the Eighteenth Schedule to "this Act is not affected by the repeal, "by this Act, of the said sections 23, "21 and 37. Accordingly the first "of the said agreements as modi- "fied by the second and third of the "said agreements, shall, for any year

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exemption, contending that section 4 (2) of the Finance (No. 2) Act, 1955, applied, and deducted from the respective amount income tax of £74,162 10s. and £44,200. The Irish company appealed to the special commissioners, contending that the words "a person "entitled under any enactment to an exemption from income tax" in section 4 (2) of the Act of 1955 should be limited and controlled so as to exclude residents of Eire who were excluded from the ambit of British income tax by the Treaty of April, 1926, with the Government of Eire. The special commissioners held that the Irish company did not come within the subsection and was entitled to repayment of the tax deducted. On appeal by the Crown:—

Held, that on their true construction the words "a person "entitled under any enactment to an exemption from income tax"

"of assessment for which, under the "law of the Republic of Ireland, it has "effect with respect to exemption and "relief from Republic of Ireland tax, "have effect with respect to exemption "or relief to be granted from United "Kingdom tax, and the references in "the said agreements to enactments "repealed by this Act shall be taken "for that purpose to be references to "the corresponding provisions of this "Act. . . . (3) For the purpose "of giving effect to the said agree-"ments, this Act, in relation to—(*a*) "persons resident in the United King-"dom, whether or not also resident "in the Republic of Ireland; and (*b*) "persons entrusted with payment to "persons so resident; and (*c*) claims "by persons resident in the Republic "of Ireland, shall, for any year for "which the said agreements are in "force, have effect subject to the "modifications set out in Part III of "the said Eighteenth Schedule. (4) "The deduction to be given to an "individual under section 220 of this "Act (which relates to the relief "known as the reduced rate relief) "shall not, where relief is given under "section 27 of the Finance Act, 1920, "as set out in Part II of the said "Eighteenth Schedule, be less than "it would have been if the relief had "not been given. (5) The power con-"ferred by subsection (7) of section 27 "of the Finance Act, 1920, as set out "in Part II of the said Eighteenth "Schedule, to make regulations, shall "be deemed for the purposes of sec-"tion 1 of the Statutory Instruments "Act, 1946, to be a power conferred "by an Act passed after the com-"mencement of that Act and shall be "exercisable by statutory instrument."

Sch. 18: "Agreements, etc., for "avoidance of double taxation in the "case of the Republic of Ireland. "Part I. Text of Agreements. Agree-"ment made April 14, 1926, between "the British Government and the "Government of the Irish Free State "in respect of double income tax. "The British Government and the "Government of the Irish Free State, "being desirous of concluding an "agreement for the reciprocal exemp-"tion from income tax and super-tax "of persons who are resident in Great "Britain (including Northern Ireland) "or in the Irish Free State but are "not resident in both countries and "for the reciprocal granting of relief "from double taxation in respect of "income tax (including super-tax) to "persons who are resident in both "countries, and being desirous of "making such supplemental, conse-"quential and incidental provisions as "appear necessary or proper for the "purposes of such agreement, have "agreed as follows: 1.—(*a*) Any per-"son who proves to the satisfaction "of the Commissioners of Inland "Revenue that for any year he is "resident in the Irish Free State and "is not resident in Great Britain or "Northern Ireland shall be entitled "to exemption from British income "tax for that year in respect of all "property situate and all profits or "gains arising in Great Britain or "Northern Ireland and to exemption "from British super-tax for that "year."

Finance (No. 2) Act, 1955, s. 4: "(1) "Where a person engaged in carrying "on a trade which consists of or com-"prises dealings in shares or other in-"vestments becomes entitled to receive "a dividend or a holding of shares "of any class to which this section "applies, being shares sold or issued "to him or otherwise acquired by him "after October 26, 1955, and not more "than six years before the date on "which the dividend becomes payable, "and the dividend is to any extent "paid out of profits accumulated before "the date on which the shares were "so acquired, then, if those shares, "or those shares together with—(*a*) "any other shares the dividend on "which is payable to that person and

in section 4 (2) of the Act of 1955 included persons resident in Eire. The words were not wide and general but comprised a particular and well-defined class of persons, and were unambiguous and explicit and, therefore, it was the duty of the court to construe them as they stood without regard to any consequences of such interpretation, and if such construction did give rise to any infringement of the treaty with the Government of Eire it was not a matter for the court to cure by an illicit process of interpretation, but one which must be put right by diplomatic means or by legislation. The Irish company, accordingly, was not entitled to the exemption claimed.

Attorney-General v. *Prince Ernest Augustus of Hanover* [1957] A.C. 436; [1957] 2 W.L.R. 1; [1957] 1 All E.R. 49 applied.

Per Vaisey J. The plain object of section 4 (2) is to prevent "dividend-stripping." Had Parliament intended to exclude residents in Eire from its restrictions, nothing would have been easier than to do so by inserting a few plain and simple words.

APPEAL from the Commissioners for the Special Purposes of the Income Tax Acts.

The respondent company, Collco Dealings Ltd., appealed to the special commissioners from the refusal of the Inland Revenue Commissioners to grant exemption from United Kingdom income tax in respect of certain dividends received from English companies. The respondent company, which was at all times resident

"which were sold or issued to him "or otherwise acquired by him after "the said October 26 and not more "than six years before the date on "which the dividend becomes payable, "and (*b*) in a case where the trade is "under the same control as another "trade which consists of or comprises "dealings in shares or other investments, any shares the dividend on "which is payable to the person engaged in carrying on that other trade "and which were sold or issued to "him or otherwise acquired by him "after the said October 26 and not "more than six years before the date "on which the dividend becomes payable, and (*c*) any such shares as are "to be brought into account under "subsection (3) of this section, amount "to ten per cent. or more of the "issued shares of that class, the net "amount of the dividend received on "the shares in the holding shall, to "the said extent to which it was paid "out of profits accumulated before "the shares were acquired, be brought "into account in computing the profits "or gains or losses of the trade as if "it were a trading receipt which had "not borne tax. (2) Where a person "entitled under any enactment to an "exemption from income tax which "extends to dividends or shares becomes entitled to receive a dividend "on a holding of shares of any class "to which this section applies, being "shares sold or issued to him or otherwise acquired by him after the said "October 26 and not more than six "years before the date on which the "dividend becomes payable, and the "dividend is to any extent paid out of "profits accumulated before the date "on which those shares were so acquired, then, if those shares, or those "shares together with—(*a*) any other "shares the dividend on which is payable to that person and which were "sold or issued to him or otherwise "acquired by him after the said October 26 and not more than six years "before the date on which the dividend becomes payable, and (*b*) any "such shares as are to be brought "into account under subsection (3) of "this section, amount to ten per cent. "or more of the issued shares of that "class, the exemption shall, to an "extent proportionate to the said extent to which the dividend is paid "out of profits accumulated before "the date on which the shares were "acquired, not apply to the dividend: "Provided that if any annual payment "is payable by that person out of the "dividend, that annual payment shall "be deemed as to the whole thereof "to be paid out of profits or gains "not brought into charge to tax, and "section 170 of the Income Tax Act, "1952, shall apply accordingly."

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in Eire and not in the United Kingdom, claimed to be entitled to exemption from British tax by virtue of section 349 and paragraph 1 (*a*) of Part I of Schedule 18 to the Income Tax Act, 1952. The Inland Revenue Commissioners' refusal of the claim was based on the provisions of section 4 (2) of the Finance (No. 2) Act, 1955, and the question for the special commissioners' decision was whether the company was "a person entitled under any enactment to an exemption from income tax" within the meaning of that section or did not come within those words because it was a resident of Eire.

According to the case stated the following facts were agreed:

(a) The respondent company was incorporated in the Republic of Ireland on May 29, 1957, and was at all material times resident in the Republic of Ireland and not in the United Kingdom. (b) On October 31, 1957, 1,000 ordinary shares of £1 each, fully paid, in Carpets and Textiles (Wholesale) Ltd. (being the whole of the issued share capital of that company), were sold by Matrim Finance Ltd. to, and acquired by, the respondent company. (c) On November 1, 1957, an interim dividend of £174 10s. per share, subject to deduction of income tax, was declared by Carpets and Textiles (Wholesale) Ltd., and became payable, as a result of which the company received a gross dividend of £174,500 from which United Kingdom income tax of £74,162 10s. had been deducted. (d) The dividend so declared was wholly paid out of profits accumulated before the date on which the shares were acquired by the respondent company. (e) Carpets and Textiles (Wholesale) Ltd. was a company incorporated on April 1, 1950, under the Companies Act, 1948, and was throughout resident in the United Kingdom. (f) The ordinary shares in Carpets and Textiles (Wholesale) Ltd. acquired as aforesaid were shares of a class to which section 4 of the Finance (No. 2) Act, 1955, applied, as defined in subsection 8 (*c*) thereof.

(g) Also on October 31, 1957, 2,000 ordinary shares of £1 each, fully paid, in a company then known as Afco Agencies Ltd. and subsequently as A. F. Finance Ltd., and hereinafter called "Afco" (being the whole of the issued share capital of that company) were sold by Matrim Finance Ltd. to, and acquired by, the respondent company. (h) On November 1, 1957, an interim dividend of £52 per share, subject to deduction of income tax, was declared by "Afco" and became payable, as a result of which the company received a gross dividend of £104,000 from which United Kingdom income tax of £44,200 had been deducted. (i) The dividend so declared was wholly paid out of profits accumulated before the date on which the shares were acquired by the respondent company. (j) "Afco" was a company incorporated on March 1, 1951, under the Companies Act, 1948, and was throughout resident in the United Kingdom. (k) The ordinary shares in "Afco," acquired as aforesaid, were shares of a class to which section 4 of the Finance (No. 2) Act, 1955, applied, as defined in subsection 8 (*c*) thereof.

It was also admitted by counsel for the Crown during the hearing that repayments of income tax at the full standard rate had been made by the Crown to Irish residents between 1945 and 1948 on dividends from which income tax had been deducted when payment was made by companies resident in the United Kingdom which had received double taxation relief. Counsel for the respondent company did not contend that it would be liable to pay Irish tax in respect of the dividends in question.

It was contended on behalf of the company that the wide words of section 4 (2) were to be limited and controlled on well-known principles so as to exclude residents of Eire who were by treaty excluded from the ambit of British income tax.

It was contended on behalf of the Inland Revenue Commissioners that section 4 (2) applied to the company, notwithstanding that it was a resident of Eire and that it was not entitled to the exemption claimed.

The special commissioners gave their decision in writing as follows: "1. The question for our decision is whether the words "'a person entitled under any enactment to an exemption' in "section 4 (2) of the Finance (No. 2) Act, 1955, apply to persons "resident in Eire and not in the United Kingdom to whom "exemption from British tax was granted by the various sections "re-enacted by section 349 of the Income Tax Act, 1952. It is "clear that the general words quoted are wide enough to cover "Eire residents so entitled to exemption, but the very wideness "and generality of the words lets in the argument that they are "to be controlled and limited in their application under certain "well-recognised principles of construction.

"2. We are unable to accept the argument that the general "policy of the income tax legislation compels us to impose the "limitation asked for. We have, however, come to the conclu-"sion that Eire residents have to be excluded from the wide "application of the words of section 4 (2) by reason of two "principles of construction which have found expression in the "decided cases. In the first place it appears to be settled law "that if possible a construction is not to be given to general words "in a statute which would have the effect of imposing the will "of Parliament upon persons not within its jurisdiction: see "*Colquhoun* v. *Heddon* [2]; *Ex parte Blain* [3]; and we consider that "Parliament, by entering into the treaty of April, 1926, with "the Government of Eire, in effect relinquished jurisdiction in "matters of income tax over residents of Eire who are not also "residents of the United Kingdom. That this is so is, we con-"sider, emphasised by paragraph 7 of the treaty. In the second "place, if the inroad contained in section 4 (2) upon the exemp-"tion to tax is effective against residents of Eire, it would in "our opinion be a breach of the treaty which afforded absolute

[2] (1890) 25 Q.B.D. 129, 134; 6 T.L.R. 331.

[3] (1879) 12 Ch.D. 522.

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"exemption from British tax to such residents, and it appears to "be a recognised principle of English law that words in an Act "of Parliament are not to be construed in a sense which would "create a breach of a treaty between this country and another "unless such words are so explicit as to allow of no other inter-"pretation. The principal authority for this view appears to be "the case of *Rex* v. *Wilson*[4]; and, although the actual decision "in that case can be explained on the ground that the Order in "Council itself imposed limitations upon the extradition powers "in accordance with section 2 of the Extradition Act, 1870, "Cockburn C.J., in his judgment, used words which seem to us "to recognise such a principle as axiomatic.

"3. The view we have taken of the proper construction of "section 4 (2) appears to us to receive strong confirmation from "the course of legislation with regard to the liability of Eire "residents prior to the Act of 1955. The Finance (No. 2) Act, "1945, uses words in section 52 which have on their face the "widest application and would in their natural meaning apply to "Eire residents. But when the treaty of July 21, 1947, was "subsequently concluded, by which the two countries mutually "agreed that the limitation upon repayments set out in section 52 "was to be applied to Eire residents, it was thought necessary "to give effect to that treaty so far as English taxation was "concerned by section 37 of the Finance Act, 1948. This seems "to us an indication that section 52 was not considered by the "legislature, despite its wide terms, to apply to Eire residents.

"4. In our opinion, therefore, section 4 (2) of the Finance "(No. 2) Act, 1955, has no application to the appellant company "and it is entitled to repayment of tax deducted from the divi-"dends in question. We accordingly make an order for repay-"ment of the sum agreed upon between the parties, namely, "£118,362 10s. 0d."

The Crown appealed. The question of law for the decision of the court was whether on the admitted facts the commissioners' decision was correct in law.

The issues raised by the Crown's appeal in *Inland Revenue Commissioners* v. *Lucbor Dealings Ltd.* were similar.

Sir Reginald Manningham-Buller Q.C., A.-G., E. Blanshard Stamp and *Alan S. Orr* for the Crown.

J. G. Foster Q.C. and *P. Shelbourne* for the respondent company.

The following cases referred to in argument were not cited in the judgment: *Colquhoun* v. *Heddon*[5]; *Ex parte Blain*[6]; *Colquhoun* v. *Brooks*[7]; *Whitney* v. *Inland Revenue Commissioners*[8];

[4] (1877) L.R. 3 Q.B. 42.
[5] 25 Q.B.D. 129.
[6] 12 Ch.D. 522.
[7] (1889) 14 App.Cas. 493; 5 T.L.R. 728; 2 T.C. 490.
[8] [1926] A.C. 37; 42 T.L.R. 58; 10 T.C. 88.

Perry v. *Astor*[9]; *Ellen Street Estates Ltd.* v. *Minister of Health*[10]; *In re Californian Fig Syrup Co.'s Trade Mark*[11]; *Reg.* v. *Wilson*[12]; *In re Bagster*[13]; *Reg.* v. *Inhabitants of Fylingdales*[14]; *In re Copp*[15]; *Williams* v. *Pritchard*[16]; *Sion College* v. *London Corporation*[17]; *Irwell* v. *Eden*[18]; *Sherwood* v. *Cox*[19]; *Lancashire Asylums Board* v. *Manchester Corporation*[20]; *Kutner* v. *Phillips*[21]; *Seward* v. "*Vera Cruz*"[22]; *Cox* v. *Hakes*[23]; *Thorpe* v. *Adams*[24]; *Lyn* v. *Wyn*[25]; *Bishop of Gloucester* v. *Cunnington*[26]; *Blackpool Corporation* v. *Starr Estate Co.*[27]; *Mayor of Leicester* v. *Burgess*[28]; *The Le Louis*[29]; *In re A.B. & Co.*[30]; *Bloxam* v. *Favre*[31]; *Attorney-General of Hong Kong* v. *Kwok-a-Sing*[32]; *Wallace* v. *Attorney-General*[33]; *The Zollverein*[34]; *Adam* v. *British and Foreign Steamship Co. Ltd.*[35]; *The Annapolis*[36]; *Drummond* v. *Collins*[37]; *Ormonde* (*Marchioness*) v. *Brown*[38]; *Inland Revenue Commissioners* v. *Kenmare* (*Countess*).[39]

Cur. adv. vult.

July 24. VAISEY J. read the following judgment. This is an appeal from a decision of the special commissioners dated February 25, 1959. That decision was in favour of the respondent company, Collco Dealings Ltd., which was incorporated in the Republic of Ireland on May 29, 1957, and has at all material times been deemed to be resident in the Republic and not resident in the United Kingdom. The appellants here are the Crown. The facts are not in dispute. The case itself involves considerable sums of money, and other cases which may be governed by my decision involve (as I understand) even larger sums.

The appeal was argued before me at great length, and I thought it was desirable that a full record of the proceedings should be made and preserved for future reference. I was accordingly, at my request, supplied with a transcript of the whole of

9 [1935] A.C. 398; 50 T.L.R. 110; 19 T.C. 255.
10 [1934] 1 K.B. 590.
11 (1888) 40 Ch.D. 620; 5 T.L.R. 120.
12 L.R. 3 Q.B. 42.
13 (1883) 24 Ch.D. 477.
14 (1827) 7 B. & C. 438.
15 (1881) 6 Q.B.D. 607.
16 (1790) 4 Durn. & E. 2.
17 [1901] 1 K.B. 617; 17 T.L.R. 223.
18 (1887) 18 Q.B.D. 588; 3 T.L.R. 535.
19 [1945] K.B. 549; 61 T.L.R. 437; [1945] 2 All E.R. 92.
20 [1900] 1 Q.B. 458; 16 T.L.R. 145.
21 [1891] 2 Q.B. 267; 7 T.L.R. 441.
22 (1884) 10 App.Cas. 59; 1 T.L.R. 111.
23 (1890) 15 App.Cas. 506; 6 T.L.R. 465.
24 (1871) 6 C.P. Cas. 125.
25 (1662) Bridg.C.P. 122.
26 [1943] K.B. 101; 59 T.L.R. 83; [1943] 1 All E.R. 61.
27 [1922] 1 A.C. 27; 38 T.L.R. 79.
28 (1833) 5 B. & Ad. 246.
29 (1817) 2 Dods. 210.
30 [1900] 1 Q.B. 541; 16 T.L.R. 238.
31 (1883) 8 P.D. 101.
32 (1873) L.R. 5 P.C. 179.
33 (1865) L.R. 1 Ch. 1.
34 (1856) Swab. 96.
35 [1898] 2 Q.B. 430; 14 T.L.R. 540.
36 (1861) 1 Lush. 295.
37 [1915] A.C. 1011; 31 T.L.R. 482; 6 T.C. 525.
38 (1932) 17 T.C. 333.
39 [1958] A.C. 267; 37 T.C. 383; [1957] 3 All E.R. 33.

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what was said during the hearing. That transcript is now before me and has materially helped me in the preparation of this judgment, enabling me to express it with far less prolixity than would otherwise have been possible.

The question is quite short and may be quite shortly stated. It is whether in section 4 (2) of the Finance (No. 2) Act, 1955, the words "a person entitled under any enactment to an exemption from income tax" include and apply to persons resident in the Republic of Ireland and not in the United Kingdom to whom exemption from tax was granted by the various sections re-enacted by section 349 of the Income Tax Act, 1952. The special commissioners agreed that the words quoted were wide enough and appropriate to cover Irish residents entitled to exemption, such as the respondent company, but they went on to say that the "very wideness and generality" of the words give rise to the conclusion that they must be limited in their application. They answered the question which they have formulated in the negative.

A great deal of the hearing was occupied in dealing with what I may call the "wideness and generality" argument. Nearly 40 cases were cited in support of it. Thus, in *River Wear Commissioners* v. *Adamson*[1] it was held that a provision that "any "damage" done by any vessel subjected the owner to liability must be controlled by the principle that an owner is not responsible for damage due to no fault of his own. In *Washer* v. *Elliott*[2] the expression "all courts" was held to be limited to courts possessed of a certain jurisdiction. In *Metropolitan Board of Works* v. *London and North Western Railway Co.*[3] "any "person" was held to mean only any person entitled to the benefit of a particular Act. It would be easy to supply other examples. For instance, if it were said that "everybody in the "1870's wore elastic-sided boots," no one would suppose that the whole of humanity was intended, but only a class of wearers of boots. I confess that the argument based on alleged wideness or generality seems to me to be totally ill-founded. Persons "entitled to statutory exemption from tax" form a very limited and perfectly well-defined class of the community; and I should have described the words in question as highly narrow and particular, and not in the least degree either wide or general.

My duty in the present case seems to me to be to construe the relevant words of section 4 (2) of the Finance (No. 2) Act, 1955, as they stand, and not to put a gloss on them for a purely extraneous reason. The words are expressly narrow and particular—the reverse of wide and general—and as they stand are absolutely unambiguous. It is, in my view, a cardinal principle of interpretation that the words of a statute must be taken to mean what they say so that their meaning must be ascertained with no regard to any ulterior consequences of so interpreting

[1] (1876) 1 Q.B.D. 546.
[2] (1876) 1 C.P.D. 169.
[3] (1880) 14 Ch.D. 521.

them. No better exposition of this principle is known to me than the speech of Viscount Simonds in the case of *Attorney-General* v. *Prince Ernest Augustus of Hanover.*[4] I need not recapitulate the facts of that case, in which my own judgment had been reversed by the Court of Appeal and was wholly disapproved of in the House of Lords. From that speech I quote the following sentence[5]: "I reject, therefore, the argument in favour of "restricting the meaning of the enacting words so far as it is "based on any other consideration than that of the words of the "statute itself."

It seems to me that if section 4 (2) does any violence to or interferes with the arrangements made between this country and the Republic of Ireland and embodied in the treaty mentioned in the special case, the matter cannot be cured by a process of interpretation which seems to me to be illicit. If there is anything to be put right, it must be done either by diplomatic means or by legislation: compare *Republic of Italy* v. *Hambro's Bank.*[6] In this case, the treaty has been incorporated in and is part of the statute law, and if it has thereby lost its superior status and falls to be construed in its context along with the rest of that law, it has obviously, I should have thought, been qualified by the plain terms of section 4 (2).

It cannot be disputed that the words "entitled under any "enactment" include residents in Ireland: nor may it be denied that the exemption to which they are entitled is statutory. The special commissioners enunciate the principle on which they base their decision in favour of the respondent company by appealing to international comity, while admitting that if the relevant words are so explicit as to allow for no other interpretation the words must have their proper force. Now it seems to me that the words here are, in fact, explicit beyond any question at all, and it seems to me that I am bound to construe them exactly as they stand without any more regard to ulterior consequences and extraneous considerations than what was held to be proper in *Attorney-General* v. *Prince Ernest Augustus of Hanover.*[7]

The statement of the special commissioners that this country has in effect relinquished jurisdiction in matters of income tax over residents of Ireland who are not also residents of the United Kingdom is, to my mind, a very questionable statement, but it is not, I think, a matter on which I should here express any definite opinion.

I do not regard this as altogether an easy case, and the principles which govern it are, I think, expressed with accuracy in the 10th (1953) edition of Maxwell on the Interpretation of Statutes, at p. 148, as follows: "Under the same general pre-"sumption that the legislature does not intend to exceed its "jurisdiction, every statute is to be so interpreted and applied

[4] [1957] A.C. 436, 457; [1957] 2 W.L.R. 1; [1957] 1 All E.R. 49.

[5] [1957] A.C. 436, 462.

[6] [1950] Ch. 314; 66 T.L.R. (Pt. 1) 468; [1950] 1 All E.R. 430.

[7] [1957] A.C. 436.

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"as far as its language admits as not to be inconsistent with the "comity of nations, or with the established rules of international "law. If, therefore, it designs to effectuate any such object, "it must express its intention with irresistible clearness to induce "a court to believe that it entertained it, for if any other con-"struction is possible, it would be adopted to avoid such an "intention to the legislature. All general terms must be "narrowed in construction to avoid it. But if the statute is "unambiguous its provisions must be followed, even if they are "contrary to international law." In that passage which I have just read, the expressions "as far as its language admits," "irresistible clearness" and "if any other construction is "possible" are all-important, and should be emphasised in the present case.

I will assume, but certainly not decide, that there has, as alleged, been an infraction or breach of the treaty, but I do not see that I can repair it by applying an inadmissible canon of construction. Adopting the concluding words of the quotation from Maxwell, I hold that as the statute is unambiguous its provisions must be followed, even if they are contrary to international law—or, I may add, any international treaty or arrangements.

Towards the end of the hearing a point was made on behalf of the Crown that the confirmation of the treaty involved the proposition that its terms were precarious and liable to be varied by future legislation; and, as a corollary, that it had been varied by the Act of 1955. I do not base my decision on that, and the fact that Mr. Foster, for the respondent company, had, as he complained, no opportunity of dealing with that particular point is irrelevant.

The plain object of section 4 (2) was to prevent what is colloquially called "dividend-stripping," and if the decision of the special commissioners stands, residents in Ireland can do what their fellow-taxpayers in this country are prohibited from doing. If that is the law, so be it, but the consequence is not one which commends itself to me on general principles of justice and fairness. If Parliament had intended to exclude residents in Ireland from the restrictions imposed by section 4 (2), nothing would have been easier than to insert a few plain and simple words to give effect to it. That was a consideration which had great weight with the House of Lords in *Attorney-General* v. *Prince Ernest Augustus of Hanover.*[7]

I think that the decision of the special commissioners was erroneous, and should be reversed; and the figures readjusted accordingly. The respondent company must pay the Crown's taxed costs of the appeal.

Stamp. The court is asked to make a similar order in *Inland*

[7] [1957] A.C. 436.

Revenue Commissioners v. *Lucbor Dealings Ltd.*, in which the facts are agreed to be indistinguishable.

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VAISEY J. I thought so. I treat that case in exactly the same way.

Appeals allowed with costs.

Solicitors: *Solicitor of Inland Revenue; R. M. Bull & Co.*

K. R. A. H.

[QUEEN'S BENCH DIVISION.]

* SALES-MATIC LTD. *v.* HINCHCLIFFE.

1959 *Oct.* 7.

Lord Parker C.J. Ashworth and Hinchcliffe JJ.

Gaming—Lottery—Gaming machine outside shop premises—Charge under general section—Whether section creates offence—Betting and Lotteries Act, 1934 (24 *&* 25 *Geo.* 5, *c.* 58), *s.* 21.

Statute—Construction—Penal Act—"All lotteries are unlawful"—Whether offence created—Betting and Lotteries Act, 1934, *s.* 21.

The appellant company were convicted on two charges of unlawfully conducting a lottery outside shop premises by means of a bubble gum machine, contrary to section 21 of the Betting and Lotteries Act, 1934.[1] On appeal:—

Held, that section 21 was a declaration in general terms that all lotteries were unlawful and did not create an offence.

CASE STATED by Bradford City justices.

On October 1, 1958, two informations were preferred by the prosecutor, Police Inspector Allen Hinchcliffe, against the appellant company, Sales-Matic Ltd., alleging (1) that between July 18 and August 3, 1958, outside the shop, 192, Manchester Road, Bradford, and (2) that between May 20 and 24, 1958, outside the shop, 11, Otley Road, Bradford, the company unlawfully conducted a lottery by means of a bubble gum machine, contrary to section 21 of the Betting and Lotteries Act, 1934.

The justices heard the informations on January 30, 1959, and, after overruling a submission that they disclosed no offence, found the following facts: Between July 18 and August 3, 1958, the company installed and maintained in position outside the shop premises at 192, Manchester Road, Bradford, a coin-operated automatic vending machine, and that between May 20 and 24, 1958, they installed and maintained such a machine outside the shop premises at 11, Otley Road, Bradford. The machine was filled with coloured balls of chewing gum and a quantity of trinkets or charms of plastic material. The number of trinkets or charms in the machine was appreciably less than the number of balls of chewing gum. The intrinsic value of a trinket or charm was

[1] Betting and Lotteries Act, 1934, s. 21: "Subject to the provisions of this "Part of this Act, all lotteries are unlawful."

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trivial, but it was an inducement to children to purchase the gum. The machine was operated by the insertion therein of a penny, in return for which the customer received either a ball of chewing gum or a ball of gum plus a trinket or charm. It was a matter of pure chance, over which the customer had no control, whether he received a trinket in addition to a ball of gum. Members of the public had at the material times full and free access to the machines and used them by inserting coins therein between the relevant dates, sometimes receiving a ball of chewing gum with a trinket and sometimes without one.

It was contended for the company that section 21 of the Betting and Lotteries Act, 1934, did not create a substantive offence but was merely declaratory of the law.

The prosecutor contended that section 21 by implication created an offence for which the penalties prescribed by the Act could be inflicted.

The justices were of the opinion that the company had been properly charged under section 21 and that there was evidence upon which they could find that there had been a breach of that section. They accordingly convicted the company and imposed a fine of £10 with five guineas costs in respect of each of the two offences.

The company appealed.

J. Raymond Phillips for the appellant company.
Geoffrey Baker for the prosecutor.

The following cases were referred to in argument: *Rex* v. *Kirby, Parker and Patrick* [2]; *Corfield* v. *Dolby* [3]; *Rex* v. *Kenyon*.[4]

LORD PARKER C.J. stated the facts and continued: The only question that arises is whether this company which had these machines were properly charged with an offence. They were charged with an offence contrary to section 21 of the Betting and Lotteries Act, 1934. Section 21, which is the opening section of Part II of the Act dealing with lotteries and prize competitions, is very short and provides: "Subject to the provisions of this Part "of this Act, all lotteries are unlawful." The sole question is: Do those words, as the magistrates have held, constitute an offence?

Section 21 is followed by section 22, which sets out a number of offences in connection with lotteries. It is in this form: "Subject to the provisions of this section, every person who in "connection with any lottery promoted or proposed to be pro-"moted either in Great Britain or elsewhere," and then follow a number of things such as printing tickets, selling tickets, using premises, causing or procuring certain matters, and in all those cases the doer shall be guilty of an offence. The penalties are laid

[2] (1927) 20 Cr.App.R. 12.
[3] (1936) 52 T.L.R. 139.
[4] (1901) 36 L.J.N. 571.

down by section 30, which provides that a person guilty of an offence under any section contained in Part II shall be guilty on summary conviction and on indictment as there set out.

I find it unnecessary to refer to any other provisions of the Act, save to say that by sections 23 and 24 certain lotteries which otherwise would be unlawful by reason of the general statement in section 21 are said to be not unlawful if certain conditions are fulfilled. Sections 23 and 24 go on to provide that if the conditions are not fulfilled, then the person concerned in the promotion shall be guilty of an offence.

Going back to section 21, it is in general terms declaring all lotteries to be unlawful. It is, I confess, to my mind, a novel way of declaring something to be an offence. One may test it in this way: Always supposing that the intention was to create an offence or offences by those words, what are they? Is it saying that anybody who conducts a lottery or promotes a lottery is guilty of an offence? Is it saying that anybody who partakes in a lottery is guilty of an offence? It seems to me that the proper construction here is that it is a declaration that all lotteries are unlawful, and then owing to the difficulty of saying what one means by promotion or conducting or being concerned with, the legislature goes on by section 22 to declare a number of matters which are connected with the promotion and form part of the promotion and conducting of a lottery to be offences. Whether if this company had been charged under section 22 they could have been held guilty, I do not know. I suspect here that in the normal way the company would have been charged under section 22 (1) (*f*) in that they used premises for purposes connected with the promotion or conduct of a lottery, but that whoever was considering the matter thought that it was difficult to say that part of a pavement outside a shop was premises, and they fell back then on the general provisions of section 21. In my opinion section 21 does not create an offence and, accordingly, this appeal succeeds.

ASHWORTH J. I agree.

HINCHCLIFFE J. I also agree.

Appeal allowed with costs.

Solicitors: *Ward, Bowie & Co. for James A. Lee & Priestley, Bradford; Wilkinson, Howlett & Moorhouse for W. H. Leathem, Town Clerk, Bradford.*

J. D. P.

[COURT OF CRIMINAL APPEAL.]

C. C. A.

1959
July 27, 30.

Hilbery, Havers and Thesiger JJ.

* REGINA *v.* WALDEN.

Criminal Law — Homicide — Diminished responsibility — Direction to jury—Attention of jury drawn to exact terms of section 2 (1) *of the Homicide Act,* 1957*—Direction including matters of illustration and explanation of the section—Direction that if jury disagreed with judge's construction of the section they were to ignore it—Whether a misdirection—Homicide Act,* 1957 (5 *&* 6 *Eliz.* 2, *c.* 11), *s.* 2.

The applicant was charged with capital murder. His defence was that he was suffering at the material time from an abnormality of mind which substantially impaired his mental responsibility, within the meaning of section 2 (1) of the Homicide Act, 1957. He was convicted and appealed upon the grounds that the judge had misdirected the jury in (1) attempting to redefine diminished responsibility; (2) defining that condition as one approaching insanity; and (3) telling the jury that if they disagreed with this construction they could ignore it:—

Held, (1) that although it was sufficient if the judge drew the attention of the jury to the exact terms of the section, it was not a misdirection to put before them by way of illustration matters which they might consider in deciding whether the case came within the section.

Reg. v. *Spriggs* [1958] 1 Q.B. 270; [1958] 2 W.L.R. 162; [1958] 1 All E.R. 300 explained.

(2) That the passages complained of in the summing-up amounted to no more than illustrations and were not a misdirection; and that it was right to direct the jury that the question whether the applicant brought himself within the section was a matter for them.

H.M. Advocate v. *Braithwaite,* 1945 S.C.(J.) 55 applied.

APPLICATION for leave to appeal against conviction.

The applicant, Bernard Hugh Walden, an assistant lecturer at Rotherham Technical College, was convicted at Sheffield Assizes on July 1, 1959, before Paull J. of the capital murder by shooting of Joyce Moran and Neil Saxton, respectively an employee and student of the college. He was sentenced to death. At the trial the defence put forward was that the applicant was suffering from diminished responsibility within the meaning of section 2 of the Homicide Act, 1957.[1] The judge caused to be prepared and handed to the jury a copy of the section, and directed the jury

[Reported by GROVE HULL, Esq., Barrister-at-Law.]

[1] Homicide Act, 1957, s. 2: "(1) Where a person kills . . . "another, he shall not be convicted "of murder if he was suffering from "such abnormality of mind (whether "arising from a condition of arrested "or retarded development of mind or "any inherent causes or induced by "disease or injury) as substantially "impaired his mental responsibility "for his acts and omissions in doing ". . . the killing. (2) On a charge "of murder, it shall be for the "defence to prove that the person "charged is by virtue of this section "not liable to be convicted of "murder."

that it was for them to say whether upon the evidence the applicant had brought himself within the section. In the course of his summing-up the judge referred to the definition of insanity in *M'Naughten's* case,[2] and continued: "There are some cases, "you may think, where a man has nearly got to that condition "but not quite, where he is wandering on the border-line between "being insane and sane, where you can say to yourself, 'Well, "'really, it may be he is not insane, but he is on the border-line, "'poor fellow. He is not really fully responsible for what he has "'done.' Now, you may think, and it is entirely a matter for "you, that that is what is meant by those words in the Act of "Parliament, 'such abnormality as substantially impairs his "'mental responsibility.' In other words, he is not really respon-"sible for what he has done. His responsibility, if not wholly "gone, has been impaired. . . . What you have got to consider "is whether you think I am right in the interpretation I have "put upon those words. If you do not, put the interpretation "you think is right, because it is for you."

The applicant sought leave to appeal against his conviction on the grounds, inter alia, that the judge had misdirected the jury in the following ways: (1) attempting to redefine the meaning of "a person suffering from diminished responsibility," which Parliament had already defined in section 2 (1); (2) misconstruing the words of the section in the passage of the summing-up quoted above; (3) directing the jury that if they disagreed with his construction of the subsection they could ignore it.

The case is reported solely upon the decision on the grounds of appeal stated above.

H. C. Scott and *J. F. S. Cobb* for the applicant.
G. S. Waller Q.C. and *J. B. Willis* for the Crown.

The cases cited in argument are referred to in the judgment.

Cur. adv. vult.

July 30. HILBERY J. read the judgment of the court: The applicant, Bernard Hugh Walden, was convicted at Sheffield Assizes of the capital murder of Joyce Moran by shooting and of the capital murder of Neil Saxton by shooting. The applicant, aged 33 and a well-educated man, was an assistant lecturer at Rotherham Technical College. He had proposed marriage to Joyce Moran, a girl of 21 employed in the office at the college, who had declined his proposal and favoured a student at the college of the same age as herself, Neil Saxton. A week or so later the applicant left a class he was taking and in the corridor on his way to his locker he passed Neil Saxton, who was talking to Joyce Moran through a window. Returning from his locker

[2] (1843) 10 Cl. & Fin. 200.

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he shot Neil Saxton through the back and then went into the office and shot Joyce Moran through the back six times, the last three shots being fired into her back as she lay on the ground. Neil Saxton and Joyce Moran died from gunshot wounds. The applicant then ran off to his car, which he later abandoned at Leeds with the pistol which he had used and some spare cartridges. He was found three weeks later by a police constable in a shelter at Reading.

The evidence that the applicant had shot and killed Joyce Moran and Neil Saxton was overwhelming, and indeed was not disputed by the defence, but at the trial evidence was adduced with a view to proving that the applicant was suffering from such abnormality of mind as substantially impaired his mental responsibility for his acts in doing the killing, within the meaning of section 2 (1) of the Homicide Act, 1957. Dr. Valentine, a consultant psychiatrist, was of opinion that the applicant was suffering from a severely abnormal type of personality and had a chronic paranoid development, and that he was grossly abnormal so that his mental responsibility for his acts was substantially impaired.

For the prosecution Dr. Walker, the senior medical officer of the prison, who had the applicant under observation from the time of his arrest until the trial, could not detect any signs of chronic paranoid development or of mental disorder or defect, and was of opinion that the applicant was not suffering from any abnormality of mind. Dr. Fraser, a consultant psychiatrist, was also of opinion that the applicant was not suffering from any abnormality of mind and that all his reactions were within the limits of normality. It was therefore for the jury to decide upon the evidence whether the applicant had proved, upon balance of probability, that he was suffering from such abnormality of mind as substantially impaired his mental responsibility for his acts. He was convicted of capital murder upon each count.

The applicant sought leave to appeal against his conviction upon the ground that the judge had misdirected the jury in that (1) the judge attempted to define or redefine what Parliament had already defined in section 2 (1) of the Homicide Act, 1957; (2) the judge was not entitled to do more than call the attention of the jury to the exact words of the section and leave them to say whether upon the evidence they were satisfied that the case came within the section, and accordingly, if the judge said anything whatever to the jury by way of explanation or illustration (as he did) it was a misdirection; it was contended that the decision of the Court of Criminal Appeal in *Reg.* v. *Spriggs* [1] established these two propositions; (3) the judge gave an incorrect definition of and misconstrued the words contained in the said section in that he construed the words as amounting to: Poor fellow, he is not insane, but not far from it; his mental

[1] [1958] 1 Q.B. 270; [1958] 2 W.L.R. 162; [1958] 1 All E.R. 300.

condition is one which is bordering upon, but not amounting to insanity; (4) the judge directed the jury that if they disagreed with his construction of the subsection they could ignore it.

It is to be observed that in section 2 (1) of the Homicide Act, 1957, Parliament has set out the matters of fact which must collectively be proved in order to establish a plea of diminished responsibility. It has not, however, defined in the section or elsewhere "abnormality of mind" or "mental responsibility" or, indeed, any of the other expressions used in the section. Indeed, the expression "such abnormality of mind . . . as substan- "tially impaired his mental responsibility" connotes a question of degree and questions of degree are questions of fact in each case. In our opinion, the decision of this court in *Reg.* v. *Spriggs* [2] must be examined in the light of the argument addressed to the court. In that case it was contended that the judge did not give a sufficient direction as to the meaning of the expression "abnormality of mind" or "mental responsibility," and did not distinguish to the jury between emotional instability and gross personality disorder and so forth. In that case the judge had prepared and handed to the jury the terms of the section so that they could see it, and had told the jury that it was for them to decide whether or not the appellant suffered from such an abnormality of mind as substantially to impair his responsibility, and had reviewed the evidence given on one side and the other. By its judgment this court rejected the appellant's contention that there was any duty upon the judge to define or redefine "abnormality of mind" or "mental responsibility," and held that it was a sufficient direction if he drew the attention of the jury to the exact terms of the section and told them that it contained the tests which they were to apply, and left it to them to decide whether on the evidence the case came within the section or not.

We are of opinion that this is all that *Reg.* v. *Spriggs* [2] decided. It did not, in our view, decide that the judge was not entitled, in order to assist the jury upon the facts of the case before them, to point out to them by way of illustration or explanation the sort of thing which they could look for to see if the case came within the section. Indeed, in *Reg.* v. *Spriggs* [2] Lord Goddard C.J. referred [3] to the direction given by Lord Cooper in *H.M. Advocate* v. *Braithwaite* [4] as to the sort of things which the jury would have to look for.

Reg. v. *Spriggs* [5] does not establish either of the two propositions raised by Mr. Scott and, though it is a sufficient direction if the judge draws the attention of the jury to the exact terms of the section, it is not, in our view, a misdirection if he points out to the jury the sort of things which they could look for in order to decide whether upon the facts the case comes within the

[2] [1958] 1 Q.B. 270.
[3] Ibid. 274.
[4] 1945 S.C.(J.) 55.
[5] [1958] 1 Q.B. 270.

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section. Moreover, *Reg.* v. *Spriggs* [5] certainly did not decide that the course taken by the judges in Scotland to which we have referred would be inappropriate for use by an English judge when directing a jury upon this section.

The trial judge in this case, as in *Reg.* v. *Spriggs*,[5] had prepared and handed to the jury a copy of the section. He directed them that it was for them to say whether upon the evidence the applicant had brought himself within the section. In the course of his summing-up the judge, after referring to the definition of insanity in the *M'Naughten* case,[6] said: "There are some "cases, you may think, where a man has nearly got to that "condition but not quite, where he is wandering on the border-"line between being insane and sane; where you can say to "yourself, 'Well, really, it may be he is not insane, but he is "'on the border-line, poor fellow. He is not really fully respon-"'sible for what he has done.' Now, you may think, and it is "entirely a matter for you, that that is what is meant by those "words in the Act of Parliament, 'such abnormality as sub-"'stantially impairs his mental responsibility.' In other "words, he is not really responsible for what he has done. "His responsibility, if not wholly gone, has been impaired." These words closely approximate to the passage from the direction given by Lord Cooper in *H.M. Advocate* v. *Braithwaite* [7] cited by Lord Goddard C.J. in *Reg.* v. *Spriggs*.[8]

In our view, in this passage from the summing-up the judge was only giving an illustration of the sort of thing which the jury might consider in deciding whether upon the facts the case came within the section, and it was not a misdirection by the judge. We think that the judge was right in directing the jury as he did, that it was a question for them and not for him whether upon the facts they found that the applicant brought himself within the section or not.

Appeal dismissed.

Solicitors: *J. W. Fenoughty, Dunn & Co., Rotherham; Director of Public Prosecutions.*

[5] [1958] 1 Q.B. 270.
[6] (1843) 10 Cl. & Fin. 200.
[7] 1945 S.C.(J.) 55.
[8] [1958] 1 Q.B. 270.

[CHANCERY DIVISION.]

* EAST HAM CORPORATION *v.* MINISTRY OF HOUSING AND LOCAL GOVERNMENT.

1959
Oct. 6.

Danckwerts J.

[1959 E. No. 685.]

Housing — Requisitioned premises — Dwelling-house — Acceptance by owner of licensee as statutory tenant—Loss of owner's right to vacant possession—Compensation payable by local authority—Period when compensation becomes payable—Contribution by Ministry of Housing and Local Government—Requisitioned Houses and Housing (Amendment) Act, 1955 (3 *&* 4 *Eliz.* 2, *c.* 24), *s.* 4 (1) (2), *s.* 10 (1).

On June 6, 1955, the right to possession of a requisitioned dwelling-house occupied by a licensee of the Minister of Housing and Local Government vested in a local authority pursuant to the provisions of section 1 of the Requisitioned Houses and Housing (Amendment) Act, 1955. On January 28, 1956, the local authority served on the owner of the house a notice pursuant to section 4 (1) of the Act inviting him to accept the licensee of the house as a statutory tenant in consideration of the payment of £91 5s. compensation. On March 23, 1956, that offer was accepted by the owner in the statutory form of acceptance. The licensee paid rent weekly so that (pursuant to section 4 (2) (*b*) of the Act) the local authority's right to retain possession of the house ceased on April 2, 1956, when the licensee became the statutory tenant of the owner. On May 2, the local authority paid the compensation to the owner. The authority contended that the compensation was a payment falling to be made in the period ending with March 31, 1956, within paragraph (*a*) of section 10 (1) of the Act,[1] so that the rate of contribution to be made by the Minister should be 100 per cent., and the Minister contended that it was a payment which fell to be made in the period after March 31, 1956, and under paragraph (*b*) of the subsection the contribution should be 75 per cent.:—

Held, that an owner lost his right to vacant possession of a dwelling for which compensation was payable under section 4 (1) when he accepted the local authority's invitation, and that he "thereupon" became entitled to receive compensation; and that, therefore, since the owner in accepting the invitation of the local authority on March 23, 1956, lost his right to vacant possession and became entitled to receive compensation on that date, the compensation was a payment falling to be made in the period ending with

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[Reported by Miss ROSINA PHILIPPA PRICE, Barrister-at-Law.]

[1] Requisitioned Houses and Housing (Amendment) Act, 1955, s. 10 (1): "The Minister shall pay to every "local authority in respect of any "deficit incurred by that authority ". . . in connection with all requisi-"tioned houses of which they are for "the time being in possession under "this Act, and . . . any payments "falling to be made . . . under "section 4 of this Act, a contribution "at the following rate, that is to "say:—(*a*) 100 per cent. in respect of "any such deficit incurred and pay-"ments falling to be made in the "period ending with March 31, 1956; "(*b*) 75 per cent. in respect of any "such deficit incurred and payments "falling to be made in the years end-"ing with March 31, 1957 to 1960 "inclusive."

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March 31, 1956, within paragraph (*a*) of section 10 (1) of the Act. Accordingly, the authority was entitled to contribution at the rate of 100 per cent.

Adjourned summons.

Prior to June 6, 1955, possession of a dwelling-house, 49, Rixsen Road, Manor Park, E.12, was retained by the Minister of Housing for housing purposes under the Defence (General) Regulations, 1939, reg. 51. The house was in fact occupied by a licensee of the Minister and was managed by the plaintiffs, the East Ham Corporation, on behalf of the Minister. On June 6, 1955, the Requisitioned Houses and Housing (Amendment) Act, 1955, came into operation, and on the same day the right to possession of the house vested in the plaintiff corporation under section 1 of the Act. By letter dated January 28, 1956, the corporation served on the owner of the house an invitation, pursuant to section 4 (1) of the Act, to accord to the licensee thereof the status of a statutory tenant in consideration of the payment to him, the owner, of the sum of £91 5s. by way of compensation for the loss of the right to vacant possession. The invitation was in the following terms: "In accordance with section 4 of the "Requisitioned Houses and Housing (Amendment) Act, 1955, "the East Ham County Borough Council hereby invite you to "accord to . . . the licensee of the . . . dwelling, the status of a "statutory tenant in consideration of the payment to you by "them . . . of a sum equal to five times the amount of the rental "compensation payable to you. . . . If within three months from "the date of this notice, you accept the invitation in the form "set out attached, the dwelling will be released at the expiration "of one week from the next day on which rent is payable by the "licensee to the council . . . " the rent being payable weekly. That offer was accepted by the owner in the statutory form of acceptance on March 22, 1956, and the acceptance was received by the corporation on March 23.

The licensee of the house paid his rent weekly and the period referred to in section 4 (2) (*a*) of the Act expired on April 2, 1956, from which date the right of the corporation to retain possession of the house ceased and the licensee became the statutory tenant of the owner. On May 2, 1956, the plaintiffs paid to the owner the sum of £91 5s.

A dispute then arose between the plaintiffs and the Ministry concerning the construction of section 10 (1) of the Act and the rate of contribution which the Minister should pay. The corporation contended that the payment to the owner fell to be made in the period prior to March 31, 1956, and that accordingly the rate of contribution should be 100 per cent. The Minister contended that the payment fell to be made in the period after March 31, 1956, and that the contribution should be 75 per cent.

The corporation took out an originating summons, asking the court to determine whether, upon the true construction of section

10 of the Requisitioned Houses and Housing (Amendment) Act, 1955, and in the events that had happened, in particular the acceptance by the owner of the premises of the invitation to accord to the licensee of the premises the status of a statutory tenant, and the payment by them to the owner on May 2, 1956, of the amount of compensation due to him under section 4 (2) (*c*) of the Act, they were entitled to receive a contribution from the defendants, the Ministry of Housing and Local Government, in respect of such compensation under section 10 (1) (*a*) of the Act.

John Mills for the plaintiff corporation.

Denys B. Buckley for the Ministry of Housing and Local Government.

Danckwerts J. This is a summons for the construction of the provisions of the Requisitioned Houses and Housing (Amendment) Act, 1955, under which, in certain events, compensation is payable to the owner of a house which has been requisitioned. This compensation has to be paid by the local authority, who then become entitled to certain payments from the Minister of Housing and Local Government.

The Act of 1955 was intended, it appears, to bring to an end the requisitioning of houses, and, subject to certain conditions, return those houses to the owner.

Section 1 (1) provides: "On the commencement of this Act, "any power of the Minister to retain possession of requisitioned "houses shall be terminated, and the right to possession of every "such house shall vest in the appropriate authority." The effect of that provision is simply to take the houses which have been requisitioned away from the Minister, who had the right to requisition them, and to transfer them, or the right to them, to the local authority. Then subsection (2) provides for the date upon which requisitioning is intended to come to an end: "Subject to the provisions of this Part of this Act, the local "authority in whom the right to possession of a requisitioned "house is vested under this section may retain possession of "the house until March 31, 1960, and no longer." That is a definite date upon which the requisitioning is to come to an end.

Section 4, which is material for the purposes of this case, is intended to provide for the conversion of the position of a licensee, holding a house purely by virtue of the requisitioning, into the position of a statutory tenant. Subsection (1) is as follows: "Any local authority may, subject to such directions, if any, as "may be given by the Minister, and shall, if so required by the "Minister, serve on the owners of such requisitioned dwellings "as may be decided by the authority or specified by the Minister, "as the case may be (being dwellings of which possession is "retained under this Act) a notice inviting those owners to "accord to the licensees of the dwellings the status of statutory "tenants in consideration of payments to be made by the local

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"authority in accordance with this section by way of compensa-"tion for loss of the right to vacant possession on the release of "the dwellings." That provides for the offer. Subsection (2) provides for the effect of acceptance by the owner. It says: "If within the period specified in that behalf in any such notice "of invitation the owner gives to the local authority notice of "acceptance in such form as may be so specified, then" [the word "then" plainly means "thereupon"] "(*a*) the right of "the local authority to retain possession of the dwelling under "this Act shall be terminated at the expiration of a period of "one week beginning with the day on which the next instalment "of rent is payable by the licensee under the licence by virtue of "which he occupies the dwelling; (*b*) as from the expiration of "that period, the Rent Acts shall apply to the dwelling as if the "licensee had retained possession by virtue of those Acts after "the expiration of a tenancy at a rent equal to the standard rent "specified in subsection (3) of this section, upon the terms that "the landlord undertook to pay the rates and to provide such "services (if any) as were provided for the licensee as such "(whether by the local authority or by the owner in pursuance "of arrangements with the local authority) and otherwise upon "the like terms and conditions as the said licence; and (*c*) the "local authority shall pay to the owner compensation at such rate "as may be specified in the notice of invitation, being a rate "determined by the Minister with the consent of the Treasury "(such compensation to be calculated by reference to the aggre-"gate of the rental compensation payable in respect of the "dwelling for the year ending with the date on which the notice "of invitation was given, to the nature of the interest of the "owner in the dwelling and, in such cases as may be so deter-"mined, to the character of the dwelling)." I do not think that subsection (4) is really important, and I will pass it by.

Section 10 is the section upon which the question which I have to determine turns. That provides for contributions to the expenses of the local authority to be made by the Minister in certain events. Subsection (1) provides: "The Minister shall pay "to every local authority in respect of any deficit incurred by "that authority (as assessed by the Minister) in connection with "all requisitioned houses of which they are for the time being "in possession under this Act, and in respect of any payments "falling to be made by that authority under section 4 of this "Act, a contribution at the following rate, that is to say:— "(*a*) 100 per cent. in respect of any such deficit incurred and "payments falling to be made in the period ending with March 31, "1956; (*b*) 75 per cent. in respect of any such deficit incurred and "payments falling to be made in the years ending with March 31, "1957 to 1960 inclusive." It is claimed, in the present case, that the payment falls within (*a*) and not within (*b*), so that the contribution by the Minister is 100 per cent. and not merely 75 per cent. The material words which have to be applied are

"payments falling to be made in the period ending with "March 31, 1956."

[His Lordship then stated the facts and continued:] The corporation's offer was accepted by the owner in the statutory form of acceptance. It was dated March 23, 1956. The acceptance, therefore, plainly was before March 31, 1956; but the date upon which the occupation by the local authority came to an end, was April 2, 1956, and the compensation was eventually paid on May 2, 1956, although I think that the exact date is not really material.

It was contended on behalf of the plaintiff corporation that the material date was the date of the acceptance, namely, March 23, 1956. On the other hand, it was contended on behalf of the Minister that the date when the payment by way of compensation became payable was the date when the corporation went out of possession of the requisitioned house and the licensee under the requisitioning became a statutory tenant, so that he could not be turned out by the owner as his landlord, and the right to vacant possession thereupon determined. It is a question which is not at all easy to answer. There are certain things to be said in favour of the argument on behalf of the Minister. It has been pointed out that if, before the date when the local authority gave up possession under the Act, the licensee either died or went out of possession of his own accord, the right to vacant possession would never be lost by the owner under the provision of a statutory tenancy, which in that case would never apply at all, and that, therefore, if he received payment before that date, he would have been paid for something which he had never in fact lost. It may be that there would be certain conveniences if that were the method adopted, and, of course, from the point of view of the Minister it would have the advantage that, in the present case, he would only have to pay 75 per cent, of the deficit instead of 100 per cent. But I must see what the Act says and construe that phrase "payments falling to be made," before a certain date.

Section 4 (2) defines what is to happen as the result of the acceptance of the local authority's invitation. It is to be noticed that (*a*) is a paragraph which defines the date when the local authority is to give up possession. There is a definite date mentioned, that is to say, a date which is necessarily later than the date of the acceptance, which will depend upon the date when the payment of rent is payable by the licensee. I think once or twice he was referred to as a tenant, but, of course, at this date he is not a tenant. He does not become a tenant until he becomes a statutory tenant upon the date which is fixed by this paragraph in the Act, and that is a definite date which is ascertainable with regard to the terms of his licence from the local authority. It might well take place at a considerable time after the date when the invitation was accepted. If the local authority had licensed the individual to occupy on terms which made his

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rent payable yearly (which, perhaps, would be unlikely), or quarterly or at six-monthly intervals, obviously, the right to occupy under the licence and the possession of the local authority might continue for a considerable time after the date when the invitation by the local authority had been accepted by the owner. In the present case it was, in fact, only a little more than a week, because it was an occupation under which a rent was payable weekly by the licensee. The same date is named in paragraph (*b*), that is, upon the expiration of the period of the local authority's possession under the provisions of paragraph (*b*) the tenant thereupon becomes a statutory tenant. On the other hand, when we come to the provision providing for compensation under (*c*) no date is named at all; there is simply a provision that compensation at a certain rate is to be paid by the local authority. It has been contended by Mr. Mills that that shows that the ordinary rule should apply, and that upon the date when the offer is accepted the compensation becomes due and payable.

Mr. Buckley, on behalf of the Minister, argued that that was by no means conclusive, because the very nature of compensation is a payment to be made for a loss which has been suffered by the person to be compensated; and, as he said, in a case where there is a postponement of the acceptance as regards the determination of the occupation by the local authority, the loss might never be suffered if the licensee went out before determination of the period. He pointed to the concluding words of section 4 (1): "by way of compensation for loss of the right to vacant possession on the release of the dwellings." But I think that Mr. Mills was right when he said that Mr. Buckley was trying to give a twist to the language and a variation in the position of the words contained in that final provision in section 4 (1). It seems to me that what compensation is for under that provision is for the loss of the right to vacant possession on the release of the dwelling, and the owner has parted with it when he accepts the invitation by the local authority. By his acceptance he loses the right to vacant possession on release of the dwelling. If that be so, everything that the owner is required to do has been done, and it seems to me that thereupon he is entitled to compensation for the right he has given up. It is perfectly true that if, which is not very likely, the licensee goes out of occupation before the date of the determination of the local authority's right to possession, the owner would then never be subject to a statutory tenancy, and it might be said he had been paid compensation for something for which he had given no consideration. Whether that is so or not I do not think it necessary for me to determine, and it would not be right for me to determine it now. What he has done is to give up his right, whether in fact that right turn out to be less valuable than perhaps it might be if the normal process of conversion into a statutory tenancy had occurred.

In my view, therefore, the transaction so far as the owner was concerned was complete on March 23, 1956, and the compensation

became legally payable at that date. Whether it was paid or not immediately seems to me to be immaterial. Accordingly, the decision must be in favour of the plaintiff corporation.

Declaration accordingly.
Costs for the plaintiffs.

Solicitors: *Sharpe, Pritchard & Co. for R. H. Buckley, Town Clerk of East Ham; Solicitor, Ministry of Housing and Local Government.*

[CHANCERY DIVISION.]

* *In re* JOSEPH'S WILL TRUSTS.

1959
Oct. 7.
Vaisey J.

[1959 J. No. 2146.]

Trust and Trustee—Variation of trusts—Act of 1958—*Form of order—Variation not to be carried out immediately—Note of order to be indorsed on probate of will—Variation of Trusts Act,* 1958 (6 *&* 7 *Eliz.* 2, *c.* 53), *s.* 1.

An application was made to the court under the Variation of Trusts Act, 1958, to approve an arrangement varying the residuary trust in a will. None of the variations was to be carried out until after the death of the first tenant for life of the residuary estate:—

Held, that, since the variations were not to be carried out immediately, it was desirable to add to the order approving the variations a direction that the variations so approved should be carried into effect, and that a note of the order should be indorsed on the probate of the will.

ADJOURNED SUMMONS.

By his will dated June 28, 1944, Sir Samuel George Joseph, Bt., gave a life interest in his residuary estate to his wife and directed that after her death the income of the residuary estate was to be held on protective trusts for his son, Sir Keith Sinjohn Joseph, Bt., until he attained the age of 50 years. On the son's attaining that age a fund was to be set aside to constitute "Keith's Children's Fund" to be held on protective trusts for his son during his life and upon his death, subject to the payment of the whole or such part of the income as his son should by will or codicil appoint in favour of any widow him surviving, upon trust for the issue of the son who should be living at his death and attain the age of 21 as his son should by deed or deeds revocable or irrevocable or by will or codicil appoint, and in default and subject to any such appointment upon trust for the issue of the son who should survive him and attain 21 equally per stirpes. On the death of the son a legacy was bequeathed to the

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[Reported by Miss V. A. Moxon, Barrister-at-Law.]

1959

JOSEPH'S WILL TRUSTS, *In re.*

Court of the Mayor and Aldermen of the City of London on charitable trusts. Subject, as aforesaid, the residuary estate was left to the son absolutely.

By an originating summons dated April 24, 1959, the testator's son applied to the court under section 1 of the Variation of Trusts Act, 1958, to approve on behalf of the infant children and the unborn children and remoter issue of the testator's son, and all persons who had or might have any discretionary interest under the protective trusts declared by the will an arrangement whereby (1) the legacy to the Court of the Mayor and Aldermen of the City of London should take effect upon the death of the testator's widow leaving the testator's son surviving her as if he had died immediately before her; and (2) as regards "Keith's Children's "Fund," the protective trusts declared by the will for the benefit of the testator's son should not have effect, and after the death of the testator's widow the trustees should, during the life of the testator's son, pay or apply the income to the person or persons to whom or in the manner in which the income would, under the trusts of the will be payable or applicable if the testator's son were dead. The testator's son released the power conferred on him to appoint the income of "Keith's Children's Fund" to any widow him surviving, and his power of appointment among issue in relation to "Keith's Children's Fund" in so far only as it might be exercised by will or codicil.

At the date of the hearing the testator's widow was still living; and his son, who had not attained the age of 50 years, had two infant children.

Kenneth Elphinstone for the testator's son.

Raymond Walton for the testator's widow, one of the trustees of the will, and the testator's son's wife.

E. J. A. Freeman for the infant children of the testator's son.

D. C. Potter for the Court of the Mayor and Aldermen of the City of London.

No cases other than those referred to in the judgment were cited in argument.

VAISEY J. A short point of practice arises in this case on which I am asked to make a decision. The short point is this: I am asked to approve a variation under the Variation of Trusts Act, 1958, in the trusts of a certain will, and to approve that variation as being for the benefit of those absent persons and persons not sui juris, whose interests I have to consider.

It is a simple and easy case. There is no doubt at all that I can make an order under the Act to do what the Act contemplates, that is to say, to approve the arrangement. It is now suggested (in this case at any rate) that I should go on to put into the order a direction that the arrangement should be carried into effect, thereby clinching the matter, and precluding it being raised on

any future occasion. The Act itself does not contemplate an order in that form; but I am told that Lord Jenkins, when sitting as a judge of the Chancery Division, was asked to, and did in fact in one case [*In re Derby's Settlement Trusts* [1]] direct that such an addition be made to the order which he was making, but that in another case [*In re Savill's Will Trusts* [2]] (though I do not know the facts of either case) he thought that he ought not to make it.

Here the special point is this. There is nothing under this scheme to be dealt with immediately except the payment of costs—it is all in futuro. I do not think that it is desirable for the matter to be left in the air as would be the case of an approval of a variation not followed by any direction that that variation should be given effect to.

Quite apart from what the position would be if there were immediate variations to be carried out, I think, in this case in which there are no variations to be carried out immediately, it is desirable that I should add to my order approving the variation a direction that the variation so approved should be carried into effect. In this case, at any rate, I think such an addition is proper; and, although not expressly authorised by the Act of 1958, I think that it follows, inevitably, from the jurisdiction which is given me, that such an addition could and should be made to the form of the order, and I so direct.

The probate must, in the usual way, be indorsed with a note of the order.

Order accordingly.

Solicitors: *Linklaters & Paines; Comptroller and City Solicitor.*

[1] The Times, July 14, 1959. [2] July 24, 1959 (unreported).

[PROBATE, ETC., DIVISION.]

* HOOPER (ORSE. HARRISON) *v.* HOOPER.

1959
May 6.
Stevenson J.

Husband and Wife—Marriage—Validity—Church of England ceremony in Iraq—No publication of banns—Marriage Act, 1949 (12, 13 & 14 *Geo.* 6, *c.* 76), *s.* 25.

Husband and Wife—Practice (in matrimonial causes)—Declaration of nullity—Form—Void marriage ceremony.

The parties, both of whom were British subjects domiciled in England, went through a ceremony of marriage in the English church in Baghdad, which was performed according to the rites and ceremonies of the Church of England. To the knowledge of both parties no banns had been published. By Iraqi law, the validity of a marriage in Iraq between two persons of English nationality depended upon whether the marriage was celebrated in accordance with the forms and requirements of English law:—

Held, (1) that the validity of the ceremony fell to be determined by English law. The provisions of section 25 of the Marriage Act,

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1949, were accordingly applicable, and since the parties had knowingly and wilfully intermarried without banns having been duly published the marriage was accordingly null and void.

(2) That a declaration should be made accordingly.

UNDEFENDED PETITION for declaration of nullity.

The parties, both of whom were British subjects domiciled in England, agreed in correspondence passing between them whilst the petitioner was in England and the respondent was in Iraq, to intermarry in Baghdad. In pursuance of that agreement, the petitioner in July, 1954, shortly after she had passed her twenty-first birthday, gave notice at Harrow Register Office of her intention to marry the respondent at the British Embassy in Baghdad. The respondent, who was also of full age, gave notice at the British Embassy in Baghdad of his intention to marry the petitioner there. In August, 1954, the petitioner arrived in Baghdad. On September 2, 1954, the parties and their guests went to the British Embassy for the marriage ceremony, which was to be performed by the British consul. On arrival there they were told by the consul that the ceremony could not take place on that day because the notice of intended marriage had not arrived from England. Thereupon, an Anglican archdeacon, who was the priest-in-charge of St. George's Church—the English church in Baghdad dedicated in 1937 for worship and ministry according to the Church of England—and who was a guest at the intended ceremony, suggested to the parties that he should marry them that day in his church, and said that they would be married according to the law and in the eyes of the Church. The consul warned the parties that if they followed the archdeacon's suggestion it would still be necessary for them to have a civil ceremony of marriage, and that without such a ceremony he could not send particulars of the marriage to England for registration. The parties nevertheless went through a ceremony of marriage that day in St. George's Church, which was performed by the archdeacon, and which was in accordance with the rites of the Church of England. Both parties were aware that no banns had been published in that church, and there was no subsequent civil ceremony although such a ceremony was suggested by the consul a few days later when the relevant notice was received, the parties then accepting the assurance of the archdeacon that they were already legally married.

It was stated in the register of marriages at St. George's Church that the parties were married in that church "according "to the rites and ceremonies of the Church of England after "banns."

Evidence was given on affidavit by an Iraqi lawyer in which was stated:

"The original of the [duplicate certificate of marriage] would "be accepted as prima facie evidence of a valid marriage in the "courts of Iraq.

"On the assumption that the parties are of English "nationality the actual validity of the marriage in Iraq would "depend on whether the said marriage was in fact celebrated "in accordance with the forms and requirements of English law.

"In this context I [i.e., the deponent] quote article 19 of the "Iraqi Civil Code, which reads as follows: 'The fundamental "'conditions relating to the validity of marriage are governed "'by the national law of each of the two spouses, provided that "'a marriage between two foreigners or between an Iraqi and "'a foreigner is regarded as valid in form if it was concluded in "'accordance with the forms required by the country in which "'it was concluded, or if the form required by the law of each "'spouse has been observed.'"

J. Sarch for the petitioner.

The respondent did not appear and was not represented.

No cases were referred to in argument.

STEVENSON J. referred to section 25 of the Marriage Act, 1949,[1] stated the facts, and continued: I am satisfied on the evidence that these two persons knowingly and wilfully intermarried according to the rites of the Church of England without banns having been duly published. I am satisfied that the requirement that they did that knowingly and wilfully is evidenced by the warning which they received from the consul as to the necessity of a civil ceremony. I am satisfied that the wife knew in fact that no banns had been published duly, or at all, and I therefore grant the declaration that this marriage was null and void, in the terms of the prayer of the petition. The petition asks in the alternative that the marriage should be dissolved on the ground of the respondent's cruelty; but in view of the conclusion I have reached on the first part of the prayer of the petition the second part need not be considered.

Declaration of nullity accordingly.[2]

Solicitors: *W. G. R. Saunders, Sons and de Wolfe.*

J. B. G.

[1] Marriage Act, 1949, s. 25: "If "any persons knowingly and wilfully "intermarry according to the rites of "the Church of England (otherwise "than by special licence)— . . . "(*b*) without banns having been duly "published . . . the marriage shall "be void."

[2] The form of the decree was as follows: "The judge having taken "the evidence . . . etc. . . . declared "that the marriage in fact had and "solemnised on September 2, 1954, "at . . . between . . . was absolutely "null and void to all intents and "purposes whatsoever by reason that "at the date of the celebration thereof "there had been no due publication "of the banns in accordance with "the Marriage Act, 1949, and further "declared the said petitioner to have "been and to be free from all bond "of marriage with the said respon-"dent and condemned the said "respondent in the costs . . ."

[PROBATE, ETC., DIVISION.]

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June 22.

Lord Merriman P. and Phillimore J.

* CASSIDY *v.* CASSIDY.

Husband and Wife — Maintenance — Justices — Aggravated assault — Application by wife on ground that husband convicted summarily of an aggravated assault upon her—Husband conditionally discharged —Effect of conditional discharge upon wife's application—Summary Jurisdiction (Married Women) Act, 1895 (58 *&* 59 *Vict. c.* 39), *s.* 4—*Offences against the Person Act,* 1861 (24 *&* 25 *Vict. c.* 100), *ss.* 20, 43—*Criminal Justice Act,* 1948 (11 *&* 12 *Geo.* 6, *c.* 58), *s.* 7, 12.

The fact that justices, before whom a person is convicted of the offence of inflicting grievous bodily harm, make an order discharging him conditionally under section 7 of the Criminal Justice Act, 1948,[1] does not prevent such offence being treated as an aggravated assault within the meaning of section 43 of the Offences against the Person Act, 1861.[2]

Woods v. *Woods* (1884) 10 P.D. 172 and *Powell* v. *Powell* (1889) 14 P.D. 177 applied.

It does, however, prevent the conviction forming the basis of an application under section 4 of the Summary Jurisdiction (Married Women) Act, 1895,[3] since under section 12 (1) of the Criminal

[Reported by D. R. ELLISON, Esq., Barrister-at-Law.]

[1] Criminal Justice Act, 1948, s. 7 (1): "Where a court by or before "which a person is convicted of an "offence (not being an offence the "sentence for which is fixed by law) "is of opinion, having regard to the "circumstances including the nature "of the offence and the character of "the offender, that it is inexpedient "to inflict punishment and that a "probation order is not appropriate, "the court may make an order dis-"charging him absolutely, or, if the "court thinks fit, discharging him "subject to the condition that he "commits no offence during such "period, not exceeding twelve months "from the date of the order, as may "be specified therein."

S. 12 (1): "Subject as herein-"after provided, a conviction of an "offence for which an order is made ". . . placing the offender on proba-"tion or discharging him absolutely "or conditionally shall be deemed not "to be a conviction for any purpose "other than the purposes of the pro-"ceedings in which the order is "made and of any subsequent pro-"ceedings which may be taken "against the offender under the fore-"going provisions of this Act."

[2] Offences against the Person Act, 1861, s. 43 (as amended by the Criminal Justice Act, 1925, s. 39 (2)): "When any person shall be "charged before two justices of the "peace with an assault or battery ". . . upon any female, . . . the said "justices, if the assault or battery is "of such an aggravated nature that "it cannot in their opinion be suffi-"ciently punished under the provi-"sions hereinbefore contained as to "common assaults and batteries, may "proceed to hear and determine the "same in a summary way, and, if "the same be proved, may convict "the person accused; and every such "offender shall be liable to be "imprisoned . . . for any period not "exceeding six months, or to pay a "fine not exceeding the sum of fifty "pounds, and the offender shall in "addition be liable to pay any costs "which the court may order him to "pay. . . .",

[3] Summary Jurisdiction (Married Women) Act, 1895, s. 4: "Any "married woman whose husband "shall have been convicted summarily "of an aggravated assault upon her "within the meaning of section 43 "of the Offences against the Person "Act, 1861, or whose husband shall "have been convicted upon indict-"ment of an assault upon her, and "sentenced to pay a fine of more "than £5 or to a term of imprison-"ment exceeding two months . . . "may apply to any court of summary "jurisdiction . . . for an order or "orders under this Act . . ."

Justice Act, 1948, such a conviction "shall be deemed not to be a "conviction for any purpose other than the purposes of the "proceedings in which the order is made."

Rex v. *Harris* [1951] 1 K.B. 107 applied.

APPEAL from Newcastle-on-Tyne justices.

A husband pleaded guilty before justices to a charge of inflicting grievous bodily harm upon his wife, contrary to section 20 of the Offences against the Person Act, 1861, for which offence he was conditionally discharged. The wife subsequently complained to justices for an order under section 4 of the Summary Jurisdiction (Married Women) Act, 1895, on the ground that the husband had been convicted of an aggravated assault upon her within section 43 of the Offences against the Person Act, 1861. The justices dismissed her complaint on the grounds, first, that the offence of which the husband was convicted was not an aggravated assault within the meaning of section 43 of the Act of 1861, because the justices imposed only a conditional discharge, and secondly, that the conviction was not one which could form the basis of a complaint by the wife under section 4 of the Act of 1895, by reason of the provisions of section 12 (1) of the Criminal Justice Act, 1948. The wife appealed.

J. R. Johnson for the wife.
D. A. Orde for the husband.

The cases cited in argument are referred to in the judgments.

LORD MERRIMAN P. This is a wife's appeal from the dismissal by the magistrates for the City and County of Newcastle-on-Tyne on April 2, 1959, of her complaint for an order under section 4 of the Summary Jurisdiction (Married Women) Act, 1895. The particular ground upon which she complained was that her husband had been convicted summarily of an aggravated assault upon her within the meaning of section 43 of the Offences against the Person Act, 1861.

The magistrates found that section 4 was not complied with for two reasons. First, they say that the assault (I will, without prejudice, call it an "assault") committed upon the wife did not come within section 43 at all, because the magistrates who heard the assault charge against the husband chose only to impose a conditional discharge, and secondly, they say that it was not a conviction which could be regarded for the purposes of section 4 by reason of the provisions of section 12 of the Criminal Justice Act, 1948.

Those two points are quite distinct. I think the magistrates were completely wrong about the first and right about the second, but I must say shortly why I take that view. Either reason, of course, is sufficient to oblige us to dismiss this appeal.

[His Lordship read the material parts of section 43 and continued:] In fact, the husband was charged with the more serious

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offence of inflicting grievous bodily harm. It is very unfortunate that, no exhibits having been sent up, we have not seen, and, truly speaking, do not know whether the magistrates saw, the certificate of conviction. But the matter stands thus: The wife said in evidence that her husband had been convicted, on his own confession, of inflicting grievous bodily harm upon her. We do not know the precise detail of it, and I do not know that that matters, because, if a certificate to that effect had been produced, that, I think, would have been all that section 4 of the Act of 1895 demands. In my opinion section 4 does not demand a retrial of the circumstances in which the particular assault was committed. All that is required is that the man should have been convicted of an assault.

I ought to say in passing that it has been the law for a great number of years, ever since the decision of *Reg.* v. *Taylor*,[1] that it is open to a court, on indictment for grievous bodily harm, to find a common assault. The point is contained in the last sentence of the judgment in that case: "On an indictment for "a misdemeanour the jury may find the prisoner guilty of any "lesser misdemeanour that is necessarily included in the offence "as charged." Upon that basis it was held that an assault was necessarily included in the offence charged, and I should say without any hesitation that the offence of inflicting grievous bodily harm contains, as the lesser offence, an aggravated assault.

The magistrates have declined to act on that basis, although, having heard the husband's confession—and I ought to add that the conviction was admitted and the whole case proceeded, as this appeal has proceeded, on the footing that the justices had before them evidence of what otherwise should have been proved, that he was convicted on his own confession of the offence of inflicting grievous bodily harm—they had before them material from which, it is suggested, it could have been inferred, and should have been inferred as the almost inevitable inference, that he had pleaded guilty to something which could at least be described as an aggravated assault.

The law has been changed in one respect. Instead of that offence having necessarily to go to quarter sessions or assizes on indictment, and thus coming within the next sentence of section 4 of the Act of 1895, ". . . whose husband shall have been con-"victed upon indictment of an assault upon her, and sentenced "to pay a fine of more than £5 or to a term of imprisonment "exceeding two months," this offence has now been made one which can, with the consent of the accused person, be dealt with summarily. It is common ground, though the point was not proved as it should have been proved, that the husband did consent that the charge against him of inflicting grievous bodily harm should be dealt with summarily, and he pleaded guilty to that offence.

[1] (1869) L.R. 1 C.C.R. 194.

Accordingly, it is said that in accepting that plea the magistrates must at least have found the husband guilty of an aggravated assault, on the principle that the greater includes the less. But then they only imposed the penalty, if it can be called a penalty, of a conditional discharge, so that it is necessary to refer quite shortly to section 7 (1) of the Criminal Justice Act, 1948. [His Lordship read that subsection and continued:] Acting on that section, the magistrates gave the husband a conditional discharge, with the period, as I understand it, of 12 months.

Although the magistrates appear to have taken the view that there is the right to call an assault an aggravated assault and to deal with it accordingly by virtue of the words of section 43 of the Act of 1861, "... of such an aggravated nature that it cannot, "in their opinion, be sufficiently punished under the provisions "hereinbefore contained as to common assaults ...," they imposed a penalty which could perfectly well have been imposed in respect of a common assault, thereby, so it is suggested, negativing the condition precedent to regarding it as an aggravated assault.

That would have been a very interesting argument if it had been advanced for the first time, but unfortunately it was advanced in two cases to which we have been referred which are to precisely the opposite effect. In *Woods* v. *Woods* [2] it was decided—I am reading the short headnote: "If a husband has "been convicted of an aggravated assault the magistrates may "grant a judicial separation, even though they do not fine or "imprison him." Put the other way round, section 4 of the Act of 1895 applies because of the conviction for an aggravated assault, even though the penalty actually imposed was such as could have been imposed for a common assault. Butt J. said: "It seems to me that the reason of the thing is this. The man "was found guilty of an assault, and the magistrates thought "that the penalties under section 42 would by themselves be "inadequate. But inasmuch as they were going further to order "a weekly payment, and also to make an order about cohabita-"tion and the custody of children, they thought they need only "impose a nominal fine. The recital in the order seems to me "quite sufficient, and the appeal therefore will be dismissed."

It is perfectly true that in the present case, not having the order before us, we have not got the benefit of any such recital, but as I understand the law it certainly seems to me to follow from the decision of Cleasby B. in *Holden* v. *King* [3] that it is open to the subsequent tribunal (in that case it was a judge of the High Court) to say whether the conviction was or was not of an aggravated assault; at any rate that was the view adopted by Cleasby B. in that case. So, here, I think that we are in a position to say, for the reasons I have already given, that

[2] (1884) 10 P.D. 172.

[3] (1877) 46 L.J.Q.B. 75.

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the offence of inflicting grievous bodily harm ipso facto is an aggravated assault.

Woods v. *Woods* was followed by Butt J. in *Powell* v. *Powell*,[4] and I need only read one sentence from the argument and the judge's reply to it. "Finally," the argument ran, "the order "for separation was wrong, because the justices only inflicted "the penalty for a common assault under section 42," to which Butt J. replied: "That is answered by *Woods* v. *Woods* [5] "; and in a later decision still, *Lewin* v. *Lewin*,[6] Jeune J. said, in effect, that he was bound by the conviction. As a matter of fact he also held himself to be bound by *Woods* v. *Woods* [7] and *Powell* v. *Powell*.[8] In other words, the mere fact that the magistrates chose not to impose a higher penalty than they could perfectly well have imposed for a common assault is immaterial if the offence to which the accused pleaded guilty was, and ought to be held to be, an aggravated assault. If that were the only ground of appeal I should feel no hesitation in saying that that was not a ground for dismissing the wife's complaint; but, as I have already indicated, it is not the only ground of appeal.

On the contrary, we are confronted by another section of the Criminal Justice Act of 1948; that is section 12 (1). [His Lordship read the relevant parts of the subsection and continued:] These words, "shall be deemed not to be a conviction for any "purpose other than the purposes of the proceedings . . . ," are very clear and definite. The note to that section in Archbold, 34th ed., p. 267, reads as follows: "Section 12 absolves an "offender from legal consequences which would otherwise flow "from a conviction." I pause there to say that making a complaint under section 4 of the Act of 1895 is in terms "a legal "consequence which would otherwise flow from a conviction." I need not read the words of the section again. It is plain that the complaint is based upon a conviction, namely, the fact of a conviction by a court of summary jurisdiction for an aggravated assault within the meaning of section 43 of the Act of 1861.

The words "absolves the offender from legal consequences "which would otherwise flow from a conviction" are taken word for word from *Rex* v. *Harris*,[9] a decision of the Court of Criminal Appeal, to which we have been referred. The judgment was given by Humphreys J. Quoting from Morrison & Hughes on the Criminal Justice Act, 1948, p. 35, where, in a note to section 12, it is said "the section absolves the offender from legal conse-"quences which otherwise would flow from the conviction." Humphreys J. said [10]: "I think that is exactly what it does."

If that is so in this particular context, it follows that this wife cannot produce to the magistrates' court dealing with her complaint a conviction for an aggravated assault or an assault

[4] (1889) 14 P.D. 177.
[5] 10 P.D. 172.
[6] [1891] P. 254.
[7] 10 P.D. 172.
[8] 14 P.D. 177.
[9] [1951] 1 K.B. 107; 66 T.L.R. (Pt. 2) 739; [1950] 2 All E.R. 816.
[10] [1951] 1 K.B. 107, 113.

occasioning grievous bodily harm, because the document which theoretically she produces is one in which the husband is given a conditional discharge, which, by section 12, "shall be deemed "not to be a conviction." That being so, it seems to me that we have no option but to support the magistrates' decision on this ground, and to dismiss the appeal.

PHILLIMORE J. I agree. So far as the second point is concerned, it seems to me quite clear from the wording of section 7 (1) of the Criminal Justice Act, 1948, that the intention of Parliament was to provide that, where the court thinks it inexpedient to inflict punishment, it should be able to discharge a man conditionally on his committing no further offence within 12 months, and with the benefit that he should not be stigmatised as having been convicted.

That was the course which the justices took in this case. Having convicted this husband, on his own confession, of inflicting grievous bodily harm, they discharged him conditionally. It would be strange if in those circumstances he was exposed to the legal consequences which would flow from a conviction, namely, the consequence that his wife could obtain an order that she might live separate and apart from him and that he should be bound to maintain her. It seems to me that such a result would fly directly in the face of the intention of the Act of 1948. I would, accordingly, dismiss this appeal.

On the other point I would add a few words out of deference to the argument of Mr. Johnson and to the fact that we are differing from the justices. The justices, as I understand it, took the view that inasmuch as the conviction (assuming it was a conviction) of the husband was for inflicting grievous bodily harm, that was a conviction for an offence totally different from the offence of committing an aggravated assault.

I think it is quite clear from the authorities to which we were referred, *Crocker* v. *Raymond*[11] and *Holden* v. *King*,[12] that section 43 does not create an offence separate from the offence of common assault created by section 42. It merely enables the court, where it has found a person guilty of common assault, if it thinks that there were circumstances which were of an aggravating nature, to treat it accordingly and to inflict a heavier penalty. As the court found in *Crocker* v. *Raymond*,[13] the section of the statute did not make two specific offences, but simply gave power to the justices, if they thought an assault to be of an aggravated character, to inflict adequate punishment for it.

As Lord Merriman P. has already pointed out, the authority of *Woods* v. *Woods*,[14] and all the cases in which it has been followed, makes it clear that even if the justices do not choose to inflict a heavier penalty than they are able to do for a common

[11] (1886) 3 T.L.R. 181.
[12] 46 L.J.Q.B. 75.
[13] 3 T.L.R. 181.
[14] 10 P.D. 172.

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assault, nevertheless, if they choose to describe it as an aggravated assault, the conviction is sufficient for the purposes of section 4 of the Summary Jurisdiction (Married Women) Act, 1895.

This husband was in fact convicted on his own confession of inflicting grievous bodily harm under section 20 of the Offences against the Person Act, 1861, and we have the clear authority of *Reg.* v. *Taylor* [15] to show that where a man is charged under that section it is open to a court to convict him instead, if it thinks the matter not of any serious character, of a common assault. Here the justices did not take that course. They convicted of the full offence under section 20. It seems to me that it must follow as night follows day that their conviction was of an assault more serious than an ordinary common assault, and must at least have amounted to an aggravated assault within the meaning of section 43, and, for myself, if that point had stood alone, I should have felt unable to agree with the decision of the justices.

As it is, however, for the reasons which I have ventured to give to supplement those already given by Lord Merriman P. in regard to the question of whether this was a conviction, this appeal should be dismissed.

Appeal dismissed.

Solicitors: *Gibson & Weldon for L. Mulcahy, Gateshead; Robinson & Bradley for Smirk, Thompson & Craigs, Newcastle-upon-Tyne.*

[15] L.R. 1 C.C.R. 194.

[COURT OF PROTECTION.]

1959
Oct. 1.

* PRACTICE DIRECTION (COURT OF PROTECTION).

Practice—Court of Protection—Title of proceedings—Principles to be adopted.

Mental Deficiency—Court of Protection—Proceedings under the Trustee Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 19)—*Title to proceedings.*

The master has directed that paragraphs 1, 2, 3 and 7 of the Practice Direction relating to the title of proceedings in the Chancery Division and dated June 18, 1959,[1] shall, so far as applicable, be followed in the Court of Protection and applied accordingly.

E. F. ATKINSON,
Chief Clerk and Registrar.

October 1, 1959.

[1] [1959] 1 W.L.R. 743; [1959] 2 All E.R. 629.

[MANCHESTER ASSIZES.]

* NEWTON v. EDGERLEY.

1959
July 16, 17.

Lord Parker C.J.

[1957 N. No. 5286.]

Negligence—Child—Cause of injury—Firearm—Liability of parent—Shotgun.

The infant plaintiff received an injury to the right leg when a shotgun which the defendant's son, aged 12 years, was carrying under his arm was discharged by the act of a third boy whilst all three were walking in file through a wood. The defendant's son had bought the gun out of his savings, with his father's approval. The defendant had instructed his son in the use of the gun, but not as to the way to handle the weapon when others were present—in particular if he was walking with others in single file—since he had forbidden him to take the gun off the farm, and had told him not to use it, even on the farm, when other children were present. The son had taken the gun off the farm in disobedience to the defendant's instructions on the occasion of the accident.

Held, that the defendant was negligent in that he should either have forbidden the use of the gun at all, or else have ensured, by giving him very careful instructions as to the use of the weapon if others were present, that if the boy succumbed to temptation and went out he would not be a danger to others.

Donaldson v. *McNiven* [1952] W.N. 466; [1952] 2 All E.R. 691 distinguished.

ACTION.

The infant plaintiff, Harold James Newton, brought this action by his mother and next friend, claiming damages for personal injuries he sustained when a ·410 shotgun carried by the defendant's son, aged 12 years, was fired whilst the two boys, together with certain others, were on a shooting expedition in a wood near their homes. The defendant was alleged to be negligent in permitting his son to be in possession of, to carry or to use the gun at all; in failing to ensure that he did not carry or use the gun without adult supervision, or in the company of other children or young persons; in failing to take reasonable precautions to preclude the dangerous use of the gun by his son; and in failing adequately to instruct his son in the handling of a shotgun so as to minimise the risk of injury to other persons. The defendant denied any negligence on his part or any responsibility in law to the plaintiff, and further denied that he had permitted his son to be in possession of, to carry or to use the shotgun. The defendant said that he had expressly forbidden his son to carry or to use it outside his own farm premises, and that the accident had occurred when one Peter Antrobus suddenly reached out towards the shotgun which Stewart Edgerley was carrying under his arm, and pulled the trigger, without the permission of the defendant, who had no knowledge of the accident, or his son.

[Reported by DONALD HART, Esq., Barrister-at-Law.]

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The facts are more fully set out in the judgment.

Fenton Atkinson, Q.C., and *S. R. Baker* for the infant plaintiff.

Godfrey Heilpern for the defendant.

The following case was cited in argument, in addition to that referred to in the judgment: *Bebee* v. *Sales*.[1]

LORD PARKER C.J. In this action an infant, Harold James Newton, by his mother and next friend, is suing the father of another boy who on April 18, 1957, shot the infant plaintiff in the right leg. The matter arises in this way. The defendant is the father of a boy, Stuart, who in April, 1957, was 12 years of age. Earlier in the year, about February, Stuart out of his savings had bought a ·410 gun. It was bought from an uncle with the full approval and permission of the boy's father. Thereafter on two occasions the father took Stuart and instructed him in the use of the gun, and the boy himself went out on occasions —he thinks about twice a week—to shoot rats, pigeons, rabbits and the like on his father's farm. His father took the view that he was a careful and obedient boy and he gave him instructions that he was not to go with the gun off the farm. One reason for that, at any rate, was that he had not got a licence and so long as he was on the father's farm he did not require one. The father also gave instructions that the son when on the farm should not use his gun when other children were present, and he gave as his reason for that the very sensible reason that when boys of that age get together there may be larking and anything can happen with a gun.

On April 18, 1957, Stuart was approached by two other boys: Harrison, who was two years older, and the son of a neighbouring farmer and another child of 14, called Plant, to go shooting. He arranged to meet them in a wood, but on the way there his elder brother stopped him and reminded him of the father's instructions. On that occasion he withstood temptation and went back home, but a little later Harrison and Plant called for him and, succumbing to the temptation, he went out with them taking his gun, and they met two other boys, the infant plaintiff and another boy called Antrobus. They eventually lunched with Harrison's father at his farm and after lunch the five of them went off to see what they could get, and they went into a place called Clay Pits Woods. They, first of all, went to the pit which was full of water and which they thought to contain water fowl, and they stood on the bank two feet apart ready to shoot anything that got up. The boy, Harrison, also had a ·410, Plant had an air rifle, Antrobus had an air pistol, and the only one who had no firearm at all was the infant plaintiff. After a

[1] (1916) 32 T.L.R. 413.

while they gave up at the pit and turned to go through the wood in single file. Plant led the way. He was followed by Harrison, followed by the infant plaintiff, followed by the defendant's son, Stuart Edgerley, and last Antrobus, and they had only gone a matter of about three yards when Antrobus (who was older than Stuart Edgerley, he being also about 14) came up behind and tried to slip his arm under Stuart's arm in order to take the gun. At that time Stuart was carrying the gun under his right armpit in his right hand with the gun pointing at an angle towards the ground, but it was loaded and it was cocked. What Antrobus was trying to do was uncertain. He may have been trying to take the gun out of Stuart's hand; probably he wanted to have a try with it. At any rate, he, Antrobus, got his left hand on the trigger and pulled it and it went off. It shot the infant plaintiff, who was about two yards ahead, in the right heel.

In those circumstances, it is urged on behalf of the plaintiff, first of all, that a father exercising reasonable care ought not to allow a child of 12 to have, at any rate, a ·410 gun which can be a very lethal weapon. Alternatively it is said that if he is to be allowed to have a ·410 gun then he must either be supervised when using it or must be given very strict or very careful instructions as to its use. With regard to the first way in which the matter is put, the defendant says: "I see nothing wrong in allowing a boy of 12—certainly my boy of 12—to have a ·410 gun. All the farmers around who have small children allow their children to have guns." He did not specify the age of the children of those farmers around who have guns, but clearly, as this case shows, boys of 14, at any rate, are allowed by their fathers to go out with guns. He says further that he gave this boy the instructions I have already referred to, and his case is that the boy went out in every disobedience to those instructions and that accordingly, as he has done the best he could to supervise his son, he is under no liability in the matter.

It seems to me, that it must depend upon the exact facts of every case. Negligence is a failure to use reasonable care in all the circumstances. I have seen this small boy; he is now 14. I take the view that he is now young for his age and at 12 he must have been a very young, immature boy. I am not saying anything against him; he was probably exercising the best care he knew. Added to which there is evidence of neighbouring farmers who had small children and allowed their children to use guns. Accordingly, this father himself must have realised the enormous temptation for any boy to go out and join other boys in shooting. True, he gave instructions that he was not to, but they were instructions which he, the father, could not possibly see were always obeyed, and as this case shows, the boy eventually succumbed to the temptation of going out with others.

In those circumstances, I take the view that in the exercise of reasonable care this father either ought to have prevented the son from having this gun at all or, if the son did have the gun,

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he ought to have realised that the boy would sooner or later go out with others and, accordingly, have given him very careful instructions as to the use of the weapon if others were present. This father never did instruct the boy as to the way to handle the weapon when others were present and, in particular, if he was walking with others in single file, for the very good reason that the father had forbidden him to go out with others. The boy at the time was obeying his father's instructions which were, when the gun is loaded and cocked it should be either pointed towards the ground or pointed up in the air. What the father had never told the boy was that if he was walking in single file, he should not only point it to the ground or up in the air but uncock it at least—if not open the barrel. In those circumstances the father either ought to have forbidden the use of the gun at all or else have ensured that if the boy succumbed to temptation and went out he would not be a danger to others.

It has been pressed upon me very strongly that this case is really on all fours with a case decided in the Court of Appeal of *Donaldson* v. *McNiven*.[1] In that case a father allowed a boy of 13 years of age living in the populous district of Liverpool to have an air rifle and he put the boy on his honour never to use the air rifle except in the cellar of the house. There again, the boy succumbed in time to temptation and took the air rifle out into an alleyway and an accident occurred in which somebody had his eye put out. It was held, affirming the trial judge, Pearson J., that there was no evidence of any lack of supervision by the defendant of his son's activities such as would constitute negligence on the father's part. But the first thing I would observe about it is that each case must depend upon its exact facts. There was there a boy of 13; for all that is known he was a very mature boy of 13. Secondly, the weapon in question was an air rifle which, though a dangerous instrument, is, I think, nothing like as lethal as a ·410 gun. Finally, the point was never taken in that case that it was, itself, negligent on the part of the father to allow the 13 year old son to have an air rifle at all. It is true that in the course of the leading judgment Lord Goddard C.J., who was presiding, said[2]: "It "might have been contended, but it was not, that it was negli- "gent of him, [the father] to let his son have the air-gun "at all, but that was not the case that was made at the trial, "and, therefore, Pearson J. dealt with the matter on the footing "that it was not negligent or wrong for the defendant to permit "his son to have possession of the gun." A little later on he said[3]: "If there was nothing wrong in the defendant allowing his "son to have an air-gun (and I am far from saying there was any- "thing wrong), I cannot see that he could do more than extract a "promise from his son never to use the air-gun in the street."

[1] [1952] W.N. 466; [1952] 2 All E.R. 691.

[2] [1952] 2 All E.R. 691.

[3] Ibid. 692.

The parenthesis of Lord Goddard, which, of course, is quite rightly relied on, is purely obiter and in relation to the facts of that case.

This case on its facts is quite different, and I hold that it was a failure to use reasonable care to prevent this boy using a gun at all, or alternatively, if he was to be allowed to use it, to instruct him as to its use if the boy succumbed to temptation and went out with others.

Finally, I should add that the point was taken that the action of Antrobus was in all the circumstances novus actus interveniens which broke the chain of causation, but Mr. Heilpern pointed out at the end of the case, having regard to the father's very frank evidence that the instructions he had given to the boy not to go out with others was because he realised that boys would lark about, that this was just the sort of thing that might then happen. Accordingly, I find in this case that liability is made out.

Judgment for the plaintiff.

Solicitors: *Henry Greenall & Co., Warrington; Cobbett, Wheeler & Cobbett, Manchester, agents for Joseph Keogh, Northwich.*

[COURT OF APPEAL.]

* SHARMA *v.* SHARMA AND DAVIS.

C. A.
1959
July 1, 2, 5.
Lord Jenkins, Hodson and Sellers L.JJ.

Husband and Wife—Divorce—Discretion—Exercise—Previous petition dismissed—Degree of regard to be paid to adverse observations in previous judgment—Matrimonial Causes Act, 1950 (14 *Geo.* 6, *c.* 25), *s.* 4.

When trying an undefended petition for divorce brought by a petitioner seeking discretion whose previous undefended petition before another judge has been dismissed, a judge may consider the previous judgment and the views expressed therein about the persons concerned and the propriety or otherwise of the exercise of discretion; he is, however, not bound by such views, but should deal with the case on the evidence before him and base his judgment on that evidence.

Unless he is able to reject it, he should, if the evidence is such as to justify the exercise of his discretion in accordance with the principles set out in *Blunt* v. *Blunt* (infra), exercise his discretion and pronounce the decree nisi; if, however, he is in some doubt, in view of the previous judgment, whether the case has been fully presented, he should at the same time refer the case to the Queen's Proctor for further investigation, as was done in *Coleman* v. *Coleman* (infra).

Blunt v. *Blunt* [1943] A.C. 517; 59 T.L.R. 315; [1943] 2 All E.R. 76, and *Coleman* v. *Coleman* [1955] 1 W.L.R. 1235; [1955] 3 All E.R. 617 considered.

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SHARMA v. SHARMA AND DAVIS.

APPEAL from Sir Reginald Sharpe Q.C., sitting as a special commissioner.

A husband petitioned for divorce on the ground of his wife's adultery with a named co-respondent; in his discretion statement he admitted acts of adultery; the case was undefended. The commissioner found the adultery alleged had been proved, but refused to exercise his discretion.

The husband appealed; the facts are fully set out in the judgment of Hodson L.J.

Gerald Gardiner Q.C. and *M. P. Picard* for the husband.

The wife and co-respondent did not appear.

LORD JENKINS. I will ask Hodson L.J. to deliver the first judgment.

HODSON L.J. This is an appeal from a decision of Commissioner Sir Reginald Sharpe who, on March 25, 1959, dismissed the appellant's petition for divorce. The commissioner refused to exercise his discretion in favour of the petitioner in respect of his adultery.

The parties were married on November 30, 1950, being then aged 34 and 27 respectively. Both had been previously married. A boy child was born to the parties on November 22, 1951. This child has been a ward of court since April, 1958, and is at present at a boarding school. In 1951 after the conception of the child all intercourse ceased between the parties, but they continued to live together under the same roof, the wife accepting the shelter and support of her husband and the husband accepting such services as the wife was willing to render to him. This situation continued until March 31, 1958, when a suit for divorce was heard by Wrangham J. In that suit the husband charged his wife with adultery with two men called Thomas and Boyce Davis, and the wife counter-charged adultery by the husband with a Mrs. Roberts, and also cruelty. Wrangham J. did not find cruelty to have been proved; he found no adultery had been proved against the man Thomas, and that the wife's adultery with Boyce Davis, which had been admitted by her, had been condoned by the parties living together in the circumstances which I have briefly mentioned. He also found that the husband's adultery had similarly been condoned. He found further that neither party had connived at the adultery of the other but that the wife had by her conduct conduced not to the inception but to the continuance of the husband's adultery. He, therefore, having found condonation on both sides, dismissed the petition as he was bound to do and no question of the exercise of discretion arose. Wrangham J. did, however, express in strong language his opinion of the parties concerned, including Mrs. Roberts who had given evidence before him, and said that if he

had been called upon to do so, he would not have exercised his discretion in favour of either.

After the dismissal of the petition and the rejection of the prayer in the wife's answer, the parties returned to the same house as before but lived separate lives. The husband, however (and in this he was corroborated by one Money, a clerk in the employment of the firm of solicitors acting for him, who gave evidence on his behalf), said that he was prepared to accept the finding of Wrangham J. and through his solicitors to arrange an interview with his wife at their office. [His Lordship referred to evidence regarding an interview at a solicitors' office between the husband and the wife, in which the husband stated that he informed the wife that he and Mrs. Roberts had agreed to part; that he required the wife to have no more to do with Davis, and that he made an offer to resume cohabitation, to which she never replied.] She never accepted that offer and the husband made inquiries and found subsequently in that summer that she was living in adultery with the co-respondent, Boyce Davis. The husband thereupon instructed his solicitors and instituted the present proceedings.

The commissioner found the adultery alleged had been proved and that it had never been connived at or condoned, but he refused to exercise his discretion in the husband's favour. He was, I think, embarrassed by the attitude taken by Wrangham J., whose judgment he read. It was clearly right for him to see that judgment in order to ascertain the findings of fact of Wrangham J. leading up to the conclusion which he reached, but I am of opinion that he was unnecessarily embarrassed by the fact that Wrangham J. expressed his opinion about the petitioner and Mrs. Roberts in the way in which he did. The latter had not given evidence before the commissioner although she had before Wrangham J. It was for the commissioner to assess the evidence given before him and to base his judgment upon that evidence.

It will be remembered that the observations which Wrangham J. had made about the exercise of discretion were obiter because the matter of discretion was not before him. The commissioner in refusing discretion disclaimed any intention of being fettered by the opinion expressed by Wrangham J. Nevertheless he did say this in his judgment: "Now I myself do not doubt for a "single moment that in the present case the exercise of the "court's discretion is entirely at large, and that if I think on "the facts that it is proper for me to do so, I have power to "exercise the court's discretion in favour of the petitioner and "to grant him a decree. But the difficulty which I have felt is "this: how am I to ascertain the true facts which it is necessary "for me to know in order to be in a position to decide the "question of the exercise of the court's discretion? The case "before me is an undefended one, how can I test anything which "the petitioner has told me? I know what view Wrangham J.

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"formed about him in the previous proceedings, where he was "cross-examined, and so on. Wrangham J. said this about the "petitioner: 'In the witness box'—referring of course to the "petitioner's evidence—' (which he occupied for a considerable "'period) he was found out in a number of deliberate falsehoods "'and showed himself in my judgment to be a smug and "'plausible liar.' 'He was in addition, I think, unscrupulous,' "added Wrangham J. a little further on, and later in the judg-"ment there is a reference to the petitioner having deliberately "invented some of his evidence while he was in the witness-box. "Wrangham J. described Mrs. Roberts, the husband's mistress, "as an immoral and untruthful woman whose evidence could be "disregarded. I mention his view about Mrs. Roberts because "of course the whole object of the present case, as appears from "the petitioner's present discretion statement, is that he should "be free to marry Mrs. Roberts."

A little later the commissioner said: "I cannot even be sure "that what the petitioner has told me in evidence is true, "except, of course, where he is corroborated. It is abundantly "clear from the judgment of Wrangham J. that there is a great "deal more in this case than superficially appears in this present "undefended cause. That is why I have, to a certain extent, "considered the previous proceedings and read the judgment of "Wrangham J. which Mr. Picard very properly invited me to do. "Manifestly, as it seems to me, I must take account of what "Wrangham J. said at the end of his judgment on the question "of the exercise of the court's discretion, even though in view "of his findings he was dealing with a hypothetical situation. "I do not consider myself in any way bound by what Wrangham "J. there said, but I do consider that I must take those observa-"tions of his into consideration; they are necessarily, in my "judgment, material which I am bound to consider."

The commissioner thus expressed himself in doubt as to the true facts. I sympathise with him in this respect. Indeed, in many undefended cases a situation of this kind is likely to arise. Nevertheless, I think, unless the court is in a position to reject the evidence of the witness at the hearing, in a question of this kind the right course is to pronounce a decree nisi if the case otherwise merits the exercise of the discretion sought and send the papers to the Queen's Proctor for investigation.

I would refer to what was said in this court in *Coleman* v. *Coleman*.[1] That case differed from this in that there what happened was that the respondent, while making no counter allegations against the petitioning wife, made a statement, which got into the possession of the court, making accusations of an informal nature alleging adultery against her. Denning L.J., in considering that matter, said[2]: "In my judgment, in view of the

[1] [1955] 1 W.L.R. 1235; [1955] 3 All E.R. 617.

[2] [1955] 1 W.L.R. 1235, 1237.

"one admitted act of adultery, the court should exercise its "discretion and a decree nisi should be pronounced on the "grounds of the husband's adultery, which has been clearly "established, but, nevertheless, the court should send the matter "to the Queen's Proctor so that he can look into it and see if "there are any steps which he thinks he ought to take." In my judgment I said[3]: "One does not wish to say anything "which would lead any trial judge to suppose that it was not "for him to ascertain the facts and make up his mind as to whether "or not a witness is telling the truth, and to see, so far as he is able "(difficult though it is, and must necessarily be, in these unde-"fended cases) that the court is not deceived. Yet in this case, "in the state of the evidence as it stands, I feel that the com-"missioner, the husband not having given evidence in support "of his charge of adultery, should have pronounced a decree in "the exercise of the court's discretion and sent the matter to the "Queen's Proctor for investigation, and I think that that is the "course which the court ought to take."

The commissioner also said that the adultery with Boyce Davis was a continuation of the wife's previous adultery. I think, with all respect to him, that this is not a correct approach. The old adultery had been condoned and the husband had taken steps (and his evidence was corroborated as to this) to re-establish the marriage and prevent the adultery with Boyce Davis continuing. There was thus, I think, a change in the situation from that which existed when the case was heard before Wrangham J. which was not sufficiently recognised by the commissioner although he did appreciate that the earlier adultery had been condoned. There was this further matter which depends on the petitioner's evidence, namely, that at the instigation of Mrs. Roberts' family he had ceased adulterous relationship with her since the hearing before Wrangham J., although he expressed his desire to marry her if free to do so. He was corroborated to this extent by Money in that he said he told his wife in Money's presence that he had finished with Mrs. Roberts. I have not referred in detail to Money's evidence, but he said that he was present during the interview and in substance what the petitioner said was correct.

The present position is that the wife through her solicitors during the pendency of this appeal has communicated with the petitioner's solicitors and they have written a letter dated June 18, 1959, in support of an application to expedite this appeal made by the petitioner, to this effect: "Our client, Mrs. M. "Sharma, has handed to us the enclosed medical certificate from "which you will see that she is expecting the birth of a child "about the first week in August next. Mrs. Sharma has asked "us to inquire whether in all the circumstances you would be "prepared to apply to the Court of Appeal for the expediting of

[3] [1955] 1 W.L.R. 1235, 1238.

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"the appeal against the judgment of Commissioner Sir Reginald "Sharpe, Q.C." The medical certificate enclosed was dated June 17, 1959, signed by a Dr. Chesser: "I certify that in my "opinion Mrs. M. Sharma is pregnant. Expected date of "delivery about August 8, 1959." We have now received an affidavit from the co-respondent Boyce Davis dated July 7 since the hearing of this appeal to this effect: "I am a bachelor and "were the above named Mary Sharma free to marry me now "there would be no impediment on my part to such marriage. "If the Court of Appeal see fit to grant a decree of divorce to "the above named petitioner and if in due course the said Mary "Sharma is free to marry me then it is my intention to marry "her."

So far as the question of the exercise of discretion is concerned, the matter is governed by what was said by Lord Simon in *Blunt* v. *Blunt* [4] where he stated four points for the consideration of the court: "(a) the position and interest of any children of the "marriage; (b) the interest of the party with whom the petitioner "has been guilty of misconduct, with special regard to the pros-"pect of their future marriage; (c) the question whether, if the "marriage is not dissolved, there is a prospect of reconciliation "between husband and wife; and (d) the interest of the peti-"tioner, and, in particular, the interest that the petitioner should "be able to remarry and live respectably. To these four con-"siderations I would add a fifth of a more general character, "which must, indeed, be regarded as of primary importance, "namely, the interest of the community at large, to be judged by "maintaining a true balance between respect for the binding "sanctity of marriage and the social considerations which make it "contrary to public policy to insist on the maintenance of a "union which has utterly broken down."

The interests of the child of the parties would seem to be in favour of a decree being pronounced. If the husband and Mrs. Roberts marry, as he says they intend to do, there will at least be one regular home in which the child can live. It seems to me that the Chancery Division would be in a better position to decide the future of this child if this situation can be brought about than if the court is left with the position that both parties are leading irregular lives.

On the facts as proved, the petitioner's early adultery has been condoned and there was no further adultery on his part after the hearing before Wrangham J., and the wife has, in face of the husband's prohibition, resumed her adulterous association with the co-respondent whom she (and, indeed, the co-respondent supports her in this) desires to marry before the birth of this child which is expected next month. In my view, the court shall prima facie be ready on those facts to exercise its discretion in favour of the husband on the basis of all those matters which I have

[4] [1943] A.C. 517, 525; 59 T.L.R. 315; [1943] 2 All E.R. 76.

enumerated from the speech of Lord Simon which I have read. I put first the interests of the child, but all the other matters for consideration I think have application to this case.

I would, therefore, allow the appeal.

In order to expedite the decree absolute, it will be necessary to give notice to the Queen's Proctor, who will thus have an opportunity of investigating this case so far as it is possible to do so.

SELLERS L.J. I agree with the judgment my Lord has just delivered.

LORD JENKINS. I also am in complete agreement with the judgment delivered by my Lord, to which I cannot usefully add anything.

Appeal allowed.
Costs in the court below awarded against the co-respondent.

Solicitors: *Buckeridge & Braune.*

F. R. D.

[QUEEN'S BENCH DIVISION.]

* REGINA *v.* BURNHAM, BUCKS JUSTICES. *Ex parte* ANSORGE.

1959
Oct. 5, 6.

Lord Parker C.J., Ashworth and Hinchcliffe JJ.

Justices—Plea—Plea of guilty in absence of accused—Two informations—Plea referable only to second information—Non-appearance of accused—Conviction on both informations—Certiorari—Magistrates' Courts Act, 1957 (5 *&* 6 *Eliz.* 2, *c.* 29), *s.* 1 (1)—*Magistrates' Courts Rules,* 1957 (*S.I.* 1957, *No.* 1429), *s.* 1, *Sch.*

Nemo bis vexare debet—Certiorari—Two convictions on same facts—Applicant put in peril twice—Whether certiorari will lie.

The applicant was served with two informations which alleged (1) that she had allowed her car to cause an unnecessary obstruction contrary to regulation 89 of the Motor Vehicles (Construction and Use) Regulations, 1955, and (2) that she had contravened the London Traffic (Restriction on Waiting) (Station Parade, Gerrard's Cross) Regulations, 1952. Accompanying the informations were forms pursuant to the Magistrates' Courts Act, 1957, s. 1 (1), and the Magistrates' Courts Rules, 1958. One was headed "Statement "of facts"; it set out that if the applicant wished to plead guilty the matter could be dealt with without her appearing at court, and that in that event the statement of facts therein set out would be, in effect, the evidence adduced against her, and it set out the two offences alleged by the two informations. A second form, which was headed "Notice of plea of guilty," was for the applicant to fill

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[Reported by Miss EIRA CARYL-THOMAS, Barrister-at-Law.]

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up if she chose to plead guilty, and in which she should set out the mitigating circumstances to be read out to the court. In completing the second form, the applicant only referred to the offence alleged by the second information, and made no reference to causing unnecessary obstruction, which was the subject of the first information. When the matter came up before the magistrates the applicant did not appear. The magistrates treated her plea of guilty as a plea to both informations, and fined her on each. She applied for an order of certiorari to quash the two convictions contending, inter alia, in relation to the second conviction, that to convict on the first information and then to deal with and convict on the second put her in peril twice on the facts of the case:—

Held, (1) that the provisions of section 1 of the Magistrates' Courts Act, 1957, must be complied with strictly. In regard to the first information, therefore, as there was no express plea of guilty the magistrates had found the applicant guilty and fined her in her absence and without any evidence, and that conviction must be quashed.

(2) That certiorari would not lie for want of jurisdiction in relation to the conviction on the second information, because before magistrates could decide whether or not to convict they must inquire into the matter to see what were the facts; neither would it lie for error of law on the face of the record because the two offences might have taken place at different times on the same day; discretion should not be exercised where an applicant deliberately pleaded guilty, and the second conviction should stand.

Dicta of Lord Goddard C.J. in *Reg.* v. *Campbell, Ex parte Nomikos* [1956] 1 W.L.R. 622; [1956] 2 All E.R. 280 applied.

Welton v. *Taneborne* (1908) 72 J.P. 419 distinguished.

APPLICATION FOR CERTIORARI.

On September 1, 1958, the applicant, Lady Ansorge, left her motor-car in Station Parade, Gerrard's Cross. She was served with two informations, the first alleging that in allowing the car to stand there she had caused unnecessary obstruction contrary to regulation 89 of the Motor Vehicles (Construction and Use) Regulation, 1955 (S.I. 1955, No. 482), and the second alleging that she had contravened the London Traffic (Restriction on Waiting) (Station Parade, Gerrard's Cross) Regulations, 1952 (S.I. 1952, No. 1249). The two informations were accompanied by forms to be used if the applicant wished to plead guilty and to have the matter dealt with without her appearing at court, one of which was headed "Statement of facts," in which the two offences were set out; a second was headed "Notice of plea "of guilty." In completing the second form the applicant made no reference to causing unnecessary obstruction, which was the subject of the first information. The magistrates, on October 14, treated her plea of guilty as a plea to both informations. In her absence they fined her £5 on the first, and £2 on the second information. She applied for an order of certiorari to quash the two convictions.

Henry Summerfield for the applicant.

The respondents did not appear and were not represented.

The following cases were cited in argument in addition to those referred to in the judgment: *Reg.* v. *Oldham Justices, Ex parte Morrissey* [1]; *Solomon* v. *Durbridge* [2]; *Rex* v. *Wandsworth Justices, Ex parte Read* [3]; *Rex* v. *Kelly.* [4]

LORD PARKER C.J. In this case Mr. Summerfield moves on behalf of the applicant, Lady Ansorge, for an order of certiorari to quash two convictions entered in the magistrates' court records for the Petty Sessional Division of Burnham sitting at Beaconsfield on October 14, 1958, under which the applicant was fined in one case £5 and in the other case £2. The informations arose out of an incident which occurred on September 1, 1958, when the applicant left her motor-car in Station Parade, Gerrard's Cross. It was alleged by the first information that in allowing the car to stand there the applicant had caused an unnecessary obstruction contrary to regulation 89 of the Motor Vehicles (Construction and Use) Regulations, 1955. Regulation 89 provides that no person in charge of a motor-vehicle or trailer shall cause or permit the motor-vehicle or trailer to stand on a road so as to cause any unnecessary obstruction thereof.

By the second information it was alleged that she had at the same time contravened another set of regulations, namely, the London Traffic (Restriction on Waiting) (Station Parade, Gerrard's Cross) Regulations, 1952, which regulations in effect provide for parking regulations on different sides of the road and specifying the periods for which a car might be left there.

Those two informations were served on the applicant, and they were accompanied by forms pursuant to the Magistrates' Courts Act, 1957, s. 1 (1). One of the documents was headed "Statement of Facts," and it set out that if the applicant wished to plead guilty the matter could be dealt with without her appearing at the court, and that in that event the statement of facts therein set out would be the evidence, as it were, adduced against her. That form set out the offences in this way: "If you inform the clerk of the court that you wish to plead guilty to the charge of motor-car (*a*) causing unnecessary obstruction"—that was clearly referring to the information under the Motor Vehicles (Construction and Use) Regulations, 1955—"(*b*) waiting in a restricted area," which was clearly referring to the information in regard to the contravention of the parking regulations. Accompanying that was another form which the applicant could fill up if she chose to plead guilty and could set out the mitigating circumstances which would have to be read out to the court before the court dealt finally with the matter. In that second form, which is headed "Notice of Plea of Guilty," it is to be observed that it reads in this way: "I have read the statement," and in brackets, "s," "of facts relating to the charge(s) of"—

[1] [1958] 1 W.L.R. 58; [1958] 3 All E.R. 559.
[2] (1956) 120 J.P. 231.
[3] [1942] 1 K.B. 281; [1942] 1 All E.R. 56.
[4] (1929) 21 Cr.App. R. 151.

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and then the applicant did not repeat the two offences which had been set out in the statement of facts but only the second one because it says "relating to the charge of motor-car waiting in "a restricted area." That again is clearly referring to the second information, and she never made any reference to causing unnecessary obstruction, which was the subject of the first information.

When the matter came before the magistrates on October 14 they treated that plea of guilty—and I have every sympathy with them—as a plea of guilty to both the informations. I say that I have sympathy with them because for one thing the applicant did not turn up at all, which would be what one would expect on a plea of guilty under this section of the Magistrates' Courts Act, 1957. Secondly, the mitigating circumstances she set out were all circumstances common to both informations, and thirdly, I very much doubt that the applicant, in filling up this form in the way she did, really was intending to convey: "I am pleading "guilty to one of them and not guilty to the other." The magistrates treated the plea as a plea of guilty to both, and accordingly, having gone through the necessary machinery under the Act of having the mitigating circumstances read out, they fined her £5 on the first information. They then went on to deal with the second information, to which she had undoubtedly pleaded guilty, and on that fined her £2.

While I have every sympathy with the magistrates, the provisions of section 1 of the Magistrates' Courts Act, 1957, have to be complied with strictly, as this court has already said on more than one occasion, and here the only express plea of guilty before them was in regard to that second information. Accordingly, so far as the first information is concerned, they in fact found her guilty and fined her in her absence and without any evidence whatsoever, and in my judgment the conviction on the first information must be quashed.

But the matter does not rest there, because Mr. Summerfield goes further and urges that the second conviction ought also to be quashed. As I understand the way he puts it is this: True these are two separate offences; they are in different terms; they attract different penalties; they are under different statutory provisions, but if one convicted on the first information and then went on to deal with and convict on the second information, it would on the facts of this case be putting the applicant in peril twice. I say "on the facts of this case" because it seems clear that the offence with which the applicant was charged under the parking regulations of 1952 would also amount to unreasonable obstruction under the construction and use regulations of 1955. Accordingly, Mr. Summerfield relies, and strongly relies, on the general principle in such cases which I think in the case of a conviction otherwise than on indictment is really to be found in the nemo bis vexari debet principle, and as to that he refers the court to *Welton* v. *Taneborne*.[1] In that case the respondent was

[1] (1908) 72 J.P. 419.

convicted of driving a motor-car in a manner dangerous to the public, and he was fined. It was then sought to charge him with an offence against what was then section 9 (1) of the Motor Car Act, 1903, which was driving the car at over 20 miles an hour. It appeared that the magistrates in convicting of the dangerous driving had taken the speed into consideration, and, accordingly, in those circumstances, the court by a majority decision held that it would be wrong to try the respondent again on the same facts, albeit on a different statute.

The matter, however, does not rest there, because, broadly speaking, certiorari only lies where there is lack of jurisdiction or where there is an error of law on the face of the record. Before the magistrates can decide whether to convict or not on the second information they must inquire into the matter to see what are the facts. If, having inquired into the matter, they find that the facts are the very facts which have given rise to the conviction on the first information, their proper course would be to proceed no further and, if they did proceed to convict and sentence, an appeal would lie to quarter sessions. But that they have jurisdiction to enter into the matter, and ascertain what are the facts, there can be no doubt, and, accordingly, certiorari would not lie for want of jurisdiction. If and so far as they went wrong in law, certiorari would only lie if there was an error of law on the face of the record and, looking at the record in this case, the two offences under the two different regulations might, for all this court could tell, have taken place at quite different times albeit on the same day.

In addition to that there remains the question whether this is a case in which the court should exercise its discretion to grant an order. A very similar situation arose in a case to which Mr. Summerfield quite rightly referred the court of *Reg.* v. *Campbell, Ex parte Nomikos.*[2] In that case it was said that the master of a cargo ship had contravened certain timber carrying regulations in regard to the height of the stowage on deck. In fact two informations were preferred, one in regard to the timber on the fore deck and one in regard to the timber on the quarterdeck. The court held that there was only one offence; you could not divide it up according to the different parts of the ship. It was argued that, that being so, the conviction and the fine on the second information should be quashed. In dealing with that, Lord Goddard C.J. refers specifically to the question whether certiorari would lie in such a case, and points to the fact that the magistrates there, as I think here, would have had to go into the matter to ascertain that the same offence was involved in both cases. As regards discretion, he said[3]: "Another ground "for refusing certiorari in the present case is that I know of no "case where a plea of guilty has been entered and certiorari has "been granted. No one can suggest that the magistrate did

[2] [1956] 1 W.L.R. 622; [1956] 2 All E.R. 280.

[3] [1956] 1 W.L.R. 627.

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Lord Parker C.J.

"anything wrong. She has filed an affidavit explaining exactly "what happened. She was not asked to construe these regula- "tions. As competent counsel was before her and entered a plea "of guilty for his client, she naturally proceeded to record a "conviction and to consider what penalty should be imposed. In "my opinion it would be quite wrong to issue certiorari after that "has been done, and also in my view the court has no power to "order certiorari in this case. Certiorari is always, it should be "remembered, a discretionary remedy. Although, in the history "of that writ, the courts were inclined at one time rather to "depart from the view that certiorari is a discretionary remedy, "in *Rex* v. *Stafford Justices*,[4] to which Mr. Summerfield referred, "the Court of Appeal were, if I may say so, on the right lines "in getting certiorari back to a matter of discretion. It may "very often be that the facts are such that the discretion can "be exercised in only one way, that is to say, it would not be "a judicial exercise of discretion if one decided the other way."

It seems to me that every word Lord Goddard said there applies in the present case. It would be very novel to grant certiorari in a case where an applicant has deliberately pleaded guilty, and for those reasons I have come to the conclusion that the second conviction should stand. Accordingly, the effect of this momentous case is that the first conviction will be quashed, the second will remain, and the applicant will only be fined £2.

ASHWORTH J. I agree.

HINCHCLIFFE J. I also agree.

Application for order to quash first conviction granted. Application for order to quash second conviction refused.

Solicitors: *Amery-Parkes & Co.*

[4] [1940] 2 K.B. 33; 56 T.L.A. 623.

[QUEEN'S BENCH DIVISION.]

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Oct. 14, 15.

Diplock J.

* RIORDAN *v.* WAR OFFICE.

[1958 R. No. 73.]

Crown—Servant—Dismissal—Civil servant—Temporary civil servant employed by War Office—Terms of employment laid down by regulations made by Army Council under letters patent—Purported exclusion of Crown's right to dismiss at pleasure—War Department (Outstations) Civilian Staff Regulations, 1950, *regs.* 16, 437, 438.

Crown — Servant — Authority — Resignation of inferior civil servant — Authority to accept.

Master and Servant—Resignation of servant—Whether revocable—Authority to accept resignation.

The War Department (Outstations) Civilian Staff Regulations, 1950, made by the Army Council under letters patent, which regulate the terms of employment of civilian employees, provide, by regulation 16, that all employees engaged shall be required to sign a statement that they understand they will be serving under the conditions laid down by the regulations; by regulation 437 that specified periods of notice shall be given to employees on discharge, and by regulation 438 that an unestablished employee wishing to terminate his employment shall be required to give notice in writing.

On Friday, April 13, 1956, the plaintiff, a civilian employee at a War Office outstation, after a dispute at his work, told his superior officer he wished to resign and handed to him a typewritten form of resignation prescribed by regulation 438 on which the plaintiff had filled in his name and address and which he had addressed to the commanding officer, but which he had not signed or dated. An hour later he sought to withdraw it, but as it had already been handed to a senior officer to await the return of the commanding officer the following Monday (the 16th), he was told that it was too late to do so. On April 16 the commanding officer, on receipt of the form, decided to accept the resignation and wrote to the plaintiff informing him of his decision, telling him that his service would terminate the following Friday, April 20. Under regulation 437 the plaintiff was entitled to 14 days' notice. The plaintiff, who denied that he had resigned, claimed damages from the War Office for wrongful dismissal. The War Office contended that the plaintiff had no cause of action as he was not employed under a contract of employment but at the will of the Sovereign and so could be dismissed at pleasure; alternatively, that he had terminated his own employment:—

Held, (1) that the regulations purported to lay down mutually binding terms of employment between the Crown and the employee to which, under regulation 16, the assent of the employee had to be obtained upon entering the service of the Crown, and were sufficiently analogous to a contractual relationship to be construed in the same way as the terms of a contract of employment. As they included a regulation providing for a specified period of notice of termination of employment to be given to an employee by the Crown they purported to exclude the Crown's right to terminate the employee's service at pleasure. In so far, therefore, as the regulations purported to take away the Crown's right to dismiss the plaintiff summarily by way of contract or otherwise they were void.

Dicta of Lord Halsbury L.C. in *De Dohsé* v. *The Queen* (1886) 3 T.L.R. 114, 115; of Tucker J. in *Rodwell* v. *Thomas* [1944] 1 K.B. 596, 602; 60 T.L.R. 431; [1944] 1 All E.R. 700; of Lord Goddard C.J. in *Terrell* v. *Secretary of State for the Colonies* [1953] 2 Q.B. 482, 497; [1953] 3 W.L.R. 331; [1953] 2 All E.R. 490; and *Dunn* v. *The Queen* [1896] 1 Q.B. 116; 12 T.L.R. 101 applied.

(2) That it was immaterial that the regulations purported to oust the Crown's right to dispense with the plaintiff's services at pleasure as they were in law no more than instructions by the Army Council on behalf of the Sovereign as to the terms upon which civilian employees were to be engaged, and there was no express provision in the letters patent authorising the Army Council to abandon the Crown's prerogative to dispense with the plaintiff's services at pleasure. Accordingly, the plaintiff had no cause of action arising out of the termination of his employment.

(3) That, in any event, the form of resignation handed in by the plaintiff on April 13, 1956, had been effective as it had been handed to his superior officer and been received by him as agent for the

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commanding officer, and could only be revoked with the consent of that officer. Accordingly, the action would be dismissed.

ACTION.

The plaintiff, Leo James Riordan, an unestablished industrial civil servant, was employed as a civilian employee at an outstation of the War Department at Bordon, Hants, where he had been employed for nine years. The plaintiff was an employee to whom the War Department (Outstations) Civilian Staff Regulations, 1950, applied. The regulations which, so far as relevant, are fully set out in the judgment, were made by the Army Council pursuant to letters patent, and set out the terms under which civilian employees were to be employed. They contained, inter alia, specific regulations relating to recruitment and engagement, pay, conduct and discipline, and termination of service. The head of the establishment, at which the plaintiff was employed, for the purpose of the regulations, was the commanding officer, Major Turton.

In the afternoon of Friday, April 13, 1956, some trouble arose between the plaintiff and his immediate superior, the stores foreman. There was no allegation of misconduct against the plaintiff, but an interview took place between him, the stores foreman and the stores superintendent at 4 o'clock that afternoon in the stores office. Before the interview took place the plaintiff had obtained a blank typewritten form of termination of employment, as prescribed by regulation 438, and in his own hand had filled in most of the blank space so that it read as follows: "To Major C. E. N. "Turton, R.A.O.C. Notice of termination of employment "(Civilian Staff Regs. 1950 para. 438 (a) (iii)) O.C.N.T. Stores "Sub-Depot, Bordon, Hants. L. J. Riordan. Tank Tracks "Department. I wish to resign with effect from — Reason, see "copy of typewritten letter to Director of Civil Employment, War "Office and J.I.C. at War Office." He also filled in his address in the space provided but did not sign or date the form. He handed the form of resignation to the stores superintendent and said that he wanted to resign. When asked more than once whether he wanted the resignation put to the commanding officer he insisted that he did and the interview terminated on that note. The stores superintendent passed on the notice to the officer in charge of the outstation in the absence of the commanding officer, and, on his instructions, at 4.30 p.m. that same afternoon, gave it to the chief civil officer, who stamped it with the time and date of receipt and locked it away to await the return of the commanding officer, to whom it was handed the following Monday morning, April 16, between 9 and 10 a.m. Meanwhile, at 4.55 on Friday afternoon, April 13, the plaintiff telephoned the stores superintendent and asked him to withdraw the form of resignation but was told that it was too late to do so as it had already been handed in. On April 16, the commanding officer, on receipt of the resignation, decided to accept it notwithstanding that the

plaintiff had attempted to withdraw it. He accordingly wrote to the plaintiff, referring to his notice of termination of employment under Civilian Staff Regulations, 1950, para. 438 (a) (iii), stating that his resignation had been accepted and that his last day of duty would be Friday, April 20, 1956. That date was seven days from the date when the form of resignation was received in the office. The plaintiff, who received the letter by hand later on April 16, wrote to the commanding officer asserting that he had withdrawn what he described as his offer to resign but his services were dispensed with on April 20, 1956.

In this action the plaintiff, who claimed that he had not resigned, brought an action for damages for wrongful dismissal against the War Office. By their defence the War Office, while admitting that the plaintiff had served that office as a temporary civil servant from August, 1947, to April 20, 1956, denied that he had been employed under any contract of employment. They claimed that he was not entitled contractually or at all to require the War Office or the Crown to continue to employ him, and that he was in law liable to be dismissed at any time at the will of the Crown. They further contended that by writing out and handing the notice of termination of employment to the stores superintendent on April 13, 1956, the plaintiff had tendered his resignation from his employment.

The plaintiff in person.
J. R. Cumming-Bruce for the War Office.

The cases cited in argument are referred to in the judgment.

DIPLOCK J. stated the facts and said that he was satisfied that at the time the plaintiff handed the form of resignation to the stores superintendent he intended to resign, and that he intended the document to be a notice of termination of his employment. His Lordship continued: The plaintiff was in the service of the Crown. That service terminated on April 20, 1956, and it was so terminated either by the operation of his own notice of termination handed to the stores superintendent in writing at about 4 p.m. on April 13, 1956, and given orally at the same time, or by his actual dismissal by the commanding officer on April 20, 1956. If the former is the true view the plaintiff clearly has no cause of action for wrongful dismissal since he was not dismissed, but even if the latter is the true view, it is well established law that the Sovereign, through her officers (in this case the commanding officer), can terminate at pleasure the employment of any person in the public service except in special cases where it is otherwise provided by law: *per* Lord Goddard C.J. in *Inland Revenue Commissioners* v. *Hambrook*,[1] where the early authorities are examined. Therefore, unless the plaintiff can show that

[1] [1956] 2 Q.B. 641, 649; [1956] 2 W.L.R. 919; [1956] 1 All E.R. 807; affd. [1956] 3 W.L.R. 643; [1956] 3 All E.R. 338.

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his is a special case where it is otherwise provided by law, he can have no cause of action, even if his employment was determined summarily by the commanding officer on behalf of the Crown without the plaintiff's consent.

The plaintiff, who appeared in person, did not draw my attention to any provision, statutory or otherwise, upon which he relied as making the conditions of his service an exception to the general rule, or, in Lord Goddard's words, as otherwise providing by law. Mr. Cumming-Bruce, in accordance with the traditions of the Bar when a litigant appears in person, has drawn my attention to what seems to be the only material upon which the plaintiff can rely to show that the conditions of his service were as otherwise provided by law, namely, the War Department (Outstations) Civilian Staff Regulations, 1950, made by the Army Council. These regulations are not made under any statutory power but by virtue of powers delegated to the Army Council by the Sovereign by letters patent, which confer upon them such power and authority as were formerly exercised under the prerogative by the Secretary of State, Commander-in-Chief, and other principal officers commanding under the Secretary of State, and also full power and authority from time to time to appoint such officers conducting the business of the civil departments of our military services entrusted to them as shall seem necessary to them, and to revoke the appointment of any such officers as they shall see fit and appoint others in their place. There is no virtue in the word "regulations"; they are no more than instructions by the Army Council on behalf of the Sovereign of the terms upon which civilian employees are to be engaged.

Regulation 1 provides that the regulations shall apply to civilian employees of the outstation establishments of the War Department, of which the plaintiff was one, with certain exceptions, of which the plaintiff was not one. It goes on: "Such employees "are subject also to any additions and amendments made to the "regulations by War Office authority." Regulation 2 contains provisions to ensure that employees shall have access to copies of the regulations. Regulation 9 (*a*), relating to the engagement of staff, provides that heads of establishments will be responsible for the engagement of staff in the position of the plaintiff. Regulation 16 is important. It provides, so far as it is relevant: "(*a*) An employee will be informed on engagement that the terms "of his service are subject to these regulations and to any "additions or amendments that may be made thereto by War "Office authority, including those made during his service. All "candidates engaged will be required to sign the following state-"ment: 'I understand that I shall be serving under the conditions "'of Civilian Staff Regulations, which are generally applicable to "'all grades of civilian employees in W.D. outstation establish-"'ments.'" Paragraph (*b*) states: "In particular, all new "entrants will be clearly told on engagement what their position "is with regard to hours of attendance, overtime and sick pay,"

and provides that their attention should be specially drawn to certain paragraphs in the regulations. The last sentence is important: "Any applicant engaged as a purely casual employee "(see para. 437 (*c*)) will be informed that his employment is "liable to be terminated without notice."

There follow a large number of regulations concerning conduct, hours of work, pay, etc. Section XXV of the regulations deals with termination of service, and regulation 435, the first in that section, with authority for discharge. Paragraph (*b*) (iii), which applies to the plaintiff, provides that the head of the establishment will deal with the discharge of employees in the plaintiff's position. Regulation 436 concerns dismissal, that is to say, the termination of employment. I quote from the definition of the paragraph: "(*a*) . . . dismissal means termination of "employment (normally without notice) as a disciplinary "measure in consequence of the employee's misconduct." With that regulation I am not concerned, because there is no suggestion here that the plaintiff was dismissed for misconduct. Regulation 437 deals with the notice to be given to the employee on discharge, that is to say, the notice to be given by the Crown to the employee. So far as it is relevant, that regulation reads as follows: "(*a*) When an unestablished employee is to be dis-"charged, his services being no longer required, notice will be "formally given to him in writing as follows . . ." Provision is then given for various lengths of notice according to the grade in which the employee is serving, and the relevant grade in which the plaintiff was serving was (v), "Industrial employees except those casually employed" and the length of notice is a fortnight. Paragraph (*c*) provides: "No notice on discharge is required for "a casual employee (see para. 6 (*g*) (v)) provided that it has "been made clear to him on engagement that such are the terms "of his employment. In no case will a casual employee receive "longer notice than one week."

Finally, regulation 438 deals with notice of termination of employment to be given by employees. Paragraph (*a*) provides as follows: "An unestablished employee wishing to terminate "his employment will be required to give notice in writing as "follows . . ." There follow provisions for the length of notice to be given by other grades, and sub-paragraph (iii), which refers to the plaintiff, reads: "All other employees except those "casually employed—one week." By paragraph (*c*): "In "default of the due notice required by (*a*) or (*b*) above, such "sum as the G.O.C.-in-C. may determine, not exceeding the "amount of pay which would have been issued to the employee "for the period of notice, may be recovered from him, or "deducted from any sums due to him, by way of liquidated "damages for the loss and inconvenience to which the War "Department may have been subjected by reason of such "default of notice."

Assuming in the plaintiff's favour first, that regulation 437 is

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part of a contract of employment between the Crown and the plaintiff and, secondly, that he did not himself terminate his own employment, the notice to which he would have been entitled from the Crown would have been fourteen days. That which he was given by the commanding officer's letter of April 16, unless he had himself terminated his employment, was four days' notice, and his measure of damages would not in any event exceed ten days' wages. The cash amount at stake in this action is therefore in any event trivial, but the principle is an important one.

Mr. Cumming-Bruce, while hinting tactfully but firmly that I should not embarrass the Crown by adding my own to the many obiter dicta on the question of whether there exists a contract of employment in the strict sense between the Crown and those in its employment, contends that these regulations, and in particular regulations 436 and 437, in no way restrict the Crown's right to terminate the plaintiff's services at pleasure at any moment and without notice. He further contends in the alternative that the plaintiff himself in fact gave notice of termination of his own employment in accordance with regulation 438.

In order to decide whether either of those contentions is right, I have first to determine what the regulations purport to do. I think it is plain from regulation 16, and the statement which every employee is required by that regulation to sign, that they purport to define the terms and conditions of the employee's employment and to require the employee's express assent to them. (I am not committing myself in using the words "employee" and "employment"; they are the words used in the regulations.) These regulations are quite different from the regulations which were referred to by the Judicial Committee of the Privy Council in *Shenton* v. *Smith*,[2] which were expressed to be for the information and guidance of Colonial Governors and other of Her Majesty's officers in the Colonies. Mr. Cumming-Bruce's contention that these regulations are no more than instructions to senior officers as to the way in which this particular service of the Crown is to be administered seems to me to be quite inconsistent with regulation 16, with numerous regulations regarding conduct, discipline, hours of work, and pay, and with regulation 438 which purports not only to impose a duty upon employees as to notice of termination of employment, but also to provide for the recovery from an employee of liquidated damages for its breach. These regulations seem to me to purport to lay down mutually binding terms of employment between the Crown and the employee, to which the assent of the employee has to be obtained upon his entering into the service of the Crown. Whether this involves what is strictly a contractual relationship between the Crown and persons who have assented to serve subject to the regulations (as the Judicial Committee of the Privy Council appears to have thought it might

[2] [1895] A.C. 229, 235.

in the case of *Reilly* v. *The King*[3]) or not, it seems to me that it is at least sufficiently analogous to a contractual relationship to make it proper for me to construe the regulations in the same way as I would the terms of a contract of employment.

Applying these canons of construction, it seems clear that regulation 437, by providing for a specified period of notice of termination of his employment to be given to an employee by the Crown except in the specific case of casual employees, purports to exclude the Crown's right to terminate the employee's service at pleasure, that is to say, at any time and without any previous notice; but in so far as the regulations do purport to take away the Crown's right to dismiss the plaintiff summarily, whether by way of contract or otherwise, they are in my view void: *per* Lord Halsbury L.C. (obiter) in *De Dohsé* v. *The Queen*[4]; Tucker J. in *Rodwell* v. *Thomas*[5]; and Lord Goddard C.J. in *Terrell* v. *Secretary of State for the Colonies*.[6]

These cases were based (if Mr. Cumming-Bruce will forgive my using the expression) upon contract, as was *Dunn* v. *The Queen*,[7] which is a direct authority binding upon me, that such a provision purporting to exclude the Crown's power to terminate services at pleasure, if purporting to be made by way of contract as distinct from statute, is ultra vires and so void: see also *Gould* v. *Stuart*.[8]

It does not seem to me to make any difference that in the present case the provisions purporting to oust the Crown's right to dispense with the plaintiff's services at pleasure are called "regulations." The regulations are made by the Army Council and, in law, as I have already held, are no more than instructions by the Army Council on behalf of the Sovereign as to the terms upon which civilian employees are to be engaged. In so far as they purport to be binding upon the plaintiff, it is in my view by virtue of his assent to be employed upon their terms—see regulation 16; and there is no express provision in the letters patent authorising the Army Council, by whom the regulations are made, to abandon the Crown's prerogative right to dispense with his services at pleasure, even if, contrary to the view expressed by Fry L.J.,[9] which is reported in Robertson, Civil Proceedings by and against the Crown (1908), p. 357, the Queen herself could abandon such prerogative by letters patent. In my view the law is correctly stated by Mr. George Stuart Robertson at page 359 of that book, where he says: "the Crown's absolute power of dismissal can "only be restricted by statute, and anything, short of a statute, "which purports to restrict it, is void as contrary to public

[3] [1934] A.C. 176, 180; 50 T.L.R. 212.
[4] (1886) 3 T.L.R. 114, 115.
[5] [1944] 1 K.B. 596, 602; 60 T.L.R. 431; [1944] 1 All E.R. 700.
[6] [1953] 2 Q.B. 482, 497; [1953] 3 W.L.R. 331; [1953] 2 All E.R. 490.
[7] [1896] 1 Q.B. 116; 12 T.L.R. 101.
[8] [1896] A.C. 575; 12 T.L.R. 595.
[9] *Mitchell* v. *Reg.* [1896] 1 Q.B. 121, n.; 6 T.L.R. 332.

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"policy." I hold, therefore, that the plaintiff can have no cause of action arising out of termination of his employment.

This makes it strictly unnecessary to consider Mr. Cumming-Bruce's alternative submission that the plaintiff was not dismissed but himself terminated his employment. However, as the matter has been argued and as much of the evidence has been directed to this point, I express my finding upon it. For the reasons I have indicated, I think the regulations relating to the termination of employment, must be regarded when assented to by the employee, if not as the terms of a contract of employment, at least as analogous to the terms of such a contract. The giving of a notice terminating a contractual employment, whether by employee or employer, is the exercise of the right under the contract of employment to bring the contract to an end, either immediately or in the future. It is a unilateral act, requiring no acceptance by the other party, and, like a notice to quit a tenancy, once given it cannot in my view be withdrawn save by mutual consent.

The plaintiff handed to the stores superintendent at 4 p.m. on April 13, 1956, a written notice of termination of his employment addressed to the commanding officer, the head of the establishment at which the plaintiff was employed. It gave no date of termination, but referred expressly to regulation 438 (*a*) (iii), which specifies one week's notice. It was not signed. I think this was a sufficient notice given by the plaintiff terminating his employment one week from the date on which it was given. Once given it could not be withdrawn save by the mutual consent of the plaintiff and the Crown, through its appropriate officer, namely, in this case the head of the establishment. If it was given when it was handed by the plaintiff to the stores superintendent at 4 o'clock on April 13, or when it was handed by the stores superintendent to the chief civil officer at 4.30 p.m. on the same day, then the plaintiff's attempted withdrawal of it at 4.55 p.m. was non-effective. If it was only given when the commanding officer received it on April 16, then in my view the plaintiff was entitled to withdraw it up to that time. The regulation under which the notice purported to be given does not say to whom the notice was to be given, although the form provided by the War Office is addressed to the officer commanding.

The question turns upon whether the stores superintendent received it as agent for the commanding officer or whether he received it from the plaintiff to transmit it to the commanding officer on the plaintiff's behalf; and, in the latter event, whether the stores superintendent acted beyond the scope of his authority in handing it to the chief civil officer and whether the latter received it as agent for the commanding officer. It seems to me that the notice must have been received by the stores superintendent as an agent for the commanding officer, and the plaintiff in handing it to him intended to give it to him in that capacity.

He was the plaintiff's superior officer and the natural person to whom such notice would be given by an employee in the plaintiff's position. If the plaintiff had kept to his intention to terminate his employment on the expiration of a week from the date of his notice to the stores superintendent, but the stores superintendent had delayed for some days in passing it on, such delay in passing on the notice to the commanding officer would not have interfered with its effect to terminate the plaintiff's employment on April 20, nor would the plaintiff have been in breach of his terms of employment in ceasing to work after that day. Even if I were wrong as to this, it was, I think, within the scope of the stores superintendent's authority to hand the notice to the chief civil officer who received it at 4.30 p.m. as agent for the commanding officer and not as agent for the plaintiff. In my opinion the plaintiff's notice was voluntarily given under the regulations at 4 p.m. on April 13, 1956, when he handed it to the stores superintendent, or at the latest at 4.30 p.m. when the latter handed it to the chief civil officer. At 4.55 p.m., when the plaintiff purported orally to withdraw it, it was too late for him to do so, save with the consent of the appropriate officer and no such consent to its withdrawal was given. I hold, therefore, that the plaintiff himself terminated his employment on April 20 by notice expiring on that date. For these reasons it follows that this action fails.

Judgment for defendants with costs.

Solicitor: *Treasury Solicitor.*

E. M. W.

[COURT OF APPEAL.]

* CRESTA HOLDINGS LTD. *v.* KARLIN AND OTHERS.

C. A.
1959
Oct. 27, 28.
Hodson and Ormerod L.JJ.

[1958 C. No. 1703.]

Practice and Procedure — Pleadings — Particulars — "Knowledge" — "Notice" — R.S.C., Ord. 19, *rr.* 22, 23.

The plaintiff company brought an action of fraud against a number of defendants, alleging conversion of a number of cheques drawn fraudulently and without authority on the plaintiffs' account with H. Ltd., bankers, and credited to the accounts of certain of the defendants with that bank. As against H. Ltd. the plaintiffs alleged that the cheques in question and the proceeds thereof "being the property of the plaintiffs traceable in equity were "received by H. H. did not receive the same as purchasers for "value without notice that the plaintiffs' said property was so "dealt with without the authority of the plaintiffs." H. Ltd. applied for particulars of the allegation that they had not received the said property without notice that it was dealt with without the plaintiffs' authority. The plaintiffs objected to giving the

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particulars demanded, claiming that what was alleged against H. Ltd. was in effect "knowledge," which by reason of Order 19, r. 22,[1] need not be particularised; or, alternatively, if it were "notice" within rule 23 it did not need to be particularised. Salmon J. ordered that the particulars be given. On appeal:—

Held, dismissing the appeal, that "notice" and "knowledge" were not synonymous; and that, in view of the relationship between the parties of banker and customer, it was right that H. Ltd. should receive particulars of the notice alleged against them pursuant to rule 23.

APPEAL from Salmon J. in chambers.

The plaintiff company brought an action for fraud, claiming some £300,000 against one Karlin and one Albert, a number of companies said to be controlled by these defendants, and Heller and Partners Ltd., a firm of bankers who were bankers to the plaintiffs and a number of the defendants. The plaintiffs alleged that a number of cheques were drawn in an unauthorised manner on the plaintiffs' account at Heller's and paid in to several of the defendants' accounts at the same bank, thereby substantially reducing the debit balance of such accounts, which were all overdrawn. By paragraph 12 the plaintiffs pleaded that these cheques and the proceeds thereof "being the property of the "plaintiffs traceable in equity were received by Hellers. Hellers "did not receive the same as purchasers for value without notice "that the plaintiffs' said property was so dealt with as aforesaid "without the authority of the plaintiffs." Salmon J. ordered the plaintiffs to give particulars of the alleged "notice," which are set out in the judgment of Hodson L.J. The plaintiffs appealed.

Ian Warren for the plaintiffs.

Maurice Lyell Q.C., *John Shaw* and *John Rankin* for the defendants, Hellers.

The following cases cited in argument are not referred to in the judgments: *Nelson* v. *Larholt*[2]; *G. L. Baker Ltd.* v. *Medway Building and Supplies Ltd.*[3]; *Joachimson* v. *Swiss Bank Corporation.*[4]

HODSON L.J. This is an interlocutory appeal by the plaintiffs from an order of Salmon J. made in chambers on July 27, 1959, upon an application for particulars. The action by the plaintiffs, Cresta Holdings Ltd., is one against 12 defendants in respect of

[1] R.S.C., Ord. 19, r. 22: "Wherever "it is material to allege malice, "fraudulent intention, knowledge, or "other condition of the mind of any "person, it shall be sufficient to allege "the same as a fact without setting "out the circumstances from which "the same is to be inferred."

R. 23: "Wherever it is material to "allege notice to any person of any "fact, matter, or thing, it shall be "sufficient to allege such notice as a "fact, unless the form or the precise "terms of such notice, or the circum-"stances from which such notice is to "be inferred, be material."

[2] [1948] 1 K.B. 339; 64 T.L.R. 1; [1947] 2 All E.R. 751.

[3] [1958] 1 W.L.R. 1216; [1958] 3 All E.R. 540.

[4] [1921] 3 K.B. 110; 37 T.L.R. 534.

a large sum of money, some £300,000, of which the plaintiff company claims to have been defrauded. The allegation of fraud is made against the first two named defendants. The eleventh named defendant is Heller and Partners Ltd., a firm of merchant bankers; and the claim, so far as it affects the merchant bankers, is set out in paragraph 12 of the amended statement of claim as follows: "As a result of the transactions aforesaid"—that is to say, the fraudulent transactions—"the cheques referred to in "paragraphs 2, 5, 7 and 9 hereof and the proceeds thereof being "the property of the plaintiffs traceable in equity were received "by Hellers. Hellers did not receive the same as purchasers for "value without notice that the plaintiffs' said property was so "dealt with as aforesaid without the authority of the plaintiffs."

The judge has ordered the plaintiffs to give particulars of paragraph 12 of the statement of claim, directing them to give particulars after discovery: "Of the allegation that Hellers "received the plaintiffs' said property with notice that it was "dealt with without the authority of the plaintiffs stating whether "it is alleged that the said notice to Hellers was express or was "to be inferred; if express, whether oral or in writing; if oral, "the date or dates when and by whom and to whom on behalf of "Hellers it was given; if in writing, identifying the relevant docu-"ments; if inferred, the circumstances relied upon from which "such notice is to be inferred."

The plaintiffs seek to resist the request, and to appeal against the order for particulars on the ground that, although they admit that they are making a positive allegation that Hellers had notice of the lack of authority of the plaintiffs, they are protected by the rules from any obligation to give any further particulars. Order 19, rule 22 of the Rules of the Supreme Court deals with allegations of knowledge in this way: "Wherever it is material "to allege malice, fraudulent intention, knowledge, or other "condition of the mind of any person, it shall be sufficient to "allege the same as a fact without setting out the circumstances "from which the same is to be inferred."

That rule was not always strictly applied, but this court in *Burgess* v. *Beethoven Electric Equipment Ltd.*,[1] pointed out that the rule must be strictly followed. Lord Greene M.R. said[2]: "Rule 22 seems to me to lay down as clearly as anything can be "laid down that a pleading which alleges a condition of mind as a "fact is a sufficient pleading, and, therefore, is one in respect of "which particulars cannot be ordered."

Mr. Warren's first argument on behalf of the plaintiffs is that this is really an allegation of knowledge, a condition of the mind, and is controlled by rule 22. That submission, I think, must be rejected, as it was rejected by the judge. I do not myself regard the word "notice" as a synonym for the word "knowledge." Notice is a word which involves that knowledge may be imparted

[1] [1943] 1 K.B. 96; [1942] 2 All E.R. 540.

[2] [1943] 1 K.B. 96, 100.

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by notice, but "notice" and "knowledge" are not the same thing, although loosely one sometimes talks as if to act with notice and to act with knowledge were indeed the same. So that, in order to consider the position here, one must consider Order 19, rule 23. That rule reads as follows: "Wherever it is material to "allege notice to any person of any fact, matter, or thing, it shall "be sufficient to allege such notice as a fact, unless the form or "the precise terms of such notice, or the circumstances from "which such notice is to be inferred, be material."

Mr. Warren argues that, even if he is wrong in his first submission that he is covered by rule 22, nevertheless in the circumstances of this case he has pleaded sufficiently by alleging notice, and that the last words of the rule—"unless the form or the precise "terms of such notice, or the circumstances from which such "notice is to be inferred, be material"—do not, he submits, apply to this case.

It is necessary, therefore, to consider the legal position which bankers such as the eleventh named defendants occupy. They are bound by the Bills of Exchange Act to honour cheques which have been drawn by their customers unless there is a countermand of payment, or the customer dies. Mr. Lyell, on behalf of the bankers, does not contend that the countermand of payment would necessarily be in the form of a direct countermand by the customer himself. The countermand may come about by other circumstances, such, for example, as fraud coming to the knowledge of the bankers in circumstances casting a duty upon them, at any rate to make inquiry before carrying out the order of their principal, which on the face of it is good in form.

The question then arises whether it is right, as the judge thought, to apply the proviso beginning with the word "unless," and direct the plaintiffs to give the particulars asked for. I do not accept the contention that the word "notice" in rule 23 can be construed, as it were, in the sense of knowledge, as I have indicated previously. But the question still remains whether the form, or the precise terms of notice, or the circumstances from which notice is to be inferred, are material.

I agree with the judge that it is only right, in the way in which this case is pleaded, to give the defendants an opportunity of knowing how it is said that they have had notice at all. The notice, if it is a notice which is couched in precise terms, must be material for the bankers to know about in order that they may understand the case they have to meet. Similarly, if it is only said that there are circumstances of suspicion here from which the bankers ought to have inferred a notice, to my mind it is clearly right that those circumstances should be set out and particularised. The plaintiffs, no doubt, are in a difficulty at the present time in framing such particulars. Their knowledge must, I suppose, be very limited; but they have by this order the opportunity given them to consider all the relevant documents

which have been disclosed upon discovery before tying themselves to particulars.

I think that the order of the judge was right, and that this appeal should be dismissed.

ORMEROD L.J. I agree. On the first point which was argued by Mr. Warren I have nothing to add to the remarks that have fallen from my Lord, except to say that it appears to be clear that the pleader, in drawing the amended paragraph 12 of the statement of claim, had used the word "notice" deliberately, and, it would appear, in distinction to the word "knowledge" which appears in paragraphs 6 and 8 of the statement of claim. In the circumstances of the statement of claim as it is drawn, I see no reason why this should not be considered under rule 23 of Order 19, and not under rule 22, as Mr. Warren submits should be the case.

In regard to the second part of Mr. Warren's argument—that even though rule 23 be the proper rule for consideration in this matter, the second part of the rule should not apply—in my judgment, the view which the judge took was the correct one. Reading from his judgment, he says this: "I think in this case, "having regard to the fact that in effect it is said, or the pleading "as framed leaves it open to the plaintiffs to say, that Hellers "were parties to the alleged frauds of Mr. Karlin and Mr. Albert, "it is only fair that Hellers should have a little more information "regarding the case they have to meet."

What the judge is saying there is that fraud was alleged on the part of Karlin and Albert, and that the defendants, Hellers, had notice either of the fraud or of the transactions in such a way as to amount to a countermanding of their mandate. In such circumstances it is material that they should have the information for which they ask. I am bound to say that I agree with that view, and that the particulars should be delivered as ordered.

I agree that the appeal should be dismissed.

Appeal dismissed with costs.

Solicitors: *Richards, Butler & Co.; Franks, Charlesly & Co.*

F. R. D.

[QUEEN'S BENCH DIVISION.]

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Oct. 12, 13.

His Honour Percy Lamb Q.C., Official Referee.

* SILVESTER *v.* OSTROWSKA.

[1958 S. No. 3642.]

Landlord and Tenant—Covenant—Notice of breach—Form—Whether insertion of allegation of breach of non-existent covenant invalidates notice—Claim for damages—Law of Property Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 20), *s.* 146 (1)—*Leasehold Property* (*Repairs*) *Act,* 1938 (1 *&* 2 *Geo.* 6, *c.* 34), *s.* 1 (1) (*as amended by the Landlord and Tenant Act,* 1954 (2 *&* 3 *Eliz.* 2, *c.* 56), *s.* 51).

A lease dated February 8, 1932, for a term of 31 years from December 25, 1931, contained a repairing covenant on the part of the tenant and gave the landlord a right of entry if the tenant failed to pay damages and costs awarded for breach of this covenant for three months after judgment. On November 6, 1956, the landlord served on the tenant a notice under section 146 of the Law of Property Act, 1925,[1] and section 1 of the Leasehold Property (Repairs) Act, 1938,[2] alleging breaches of the covenant to repair as specified in a schedule of dilapidations, and breach of a covenant against subletting. The lease contained no covenant against subletting. On a reference to an official referee to ascertain whether this notice was a valid notice:—

Held, that no particular form of notice was provided by the Act of 1925, and that the notice was valid and the reference to a non-existent covenant in no way reduced or destroyed the efficacy of the notice.

Dictum of Lord Buckmaster L.C. in *Fox* v. *Jolly* [1916] 1 A.C. 1, 12 applied.

Guillemard v. *Silverthorne* (1908) 99 L.T. 584 distinguished.

[Reported by Miss MARGARET THOMAS, Barrister-at-Law.]

[1] Law of Property Act, 1925, s. 146: "(1) A right of re-entry or "forfeiture under any proviso or "stipulation in a lease for a breach "of any covenant or condition in the "lease shall not be enforceable by "action or otherwise, unless and until "the lessor serves on the lessee a "notice—(*a*) specifying the particular "breach complained of; and (*b*) if "the breach is capable of remedy, "requiring the lessee to remedy the "breach; and (*c*) in any case, requiring the lessee to make compensation "in money for the breach."

[2] Leasehold Property (Repairs) Act, 1938, s. 1 (1), as amended by the Landlord and Tenant Act, 1954, s. 51: "Where a lessor serves on "a lessee under subsection (1) of "section 146 of the Law of Property "Act, 1925, a notice that relates to a "breach of a covenant or agreement to "keep or put in repair during the "currency of the lease all or any of "the property comprised in the lease, "and at the date of the service of "the notice three years or more of "the term of the lease remain unexpired, the lessee may within 28 "days from that date serve on the "lessor a counter-notice to the effect "that he claims the benefit of this Act. "(2) A right to damages for a breach "of such a covenant as aforesaid "shall not be enforceable by action "commenced at any time at which "three years or more of the term of "the lease remain unexpired unless "the lessor has served on the lessee "not less than one month before the "commencement of the action such a "notice as is specified in subsection "(1) of section 146 of the Law of "Property Act, 1925. . . ."

REFERENCE to ascertain validity of notice.

The following statement of the facts is taken from the judgment.

By a lease dated February 8, 1932, and made between Robert Wilson Black, the predecessor in title of the plaintiff landlord, Rose Mary Silvester, and Mark Frederick North, the predecessor in title of the defendant tenant, Leokadia Ostrowska, the landlord demised to the tenant premises known as No. 272, Fulham Road, London, S.W.10, for a term of 31 years less three days from December 25, 1931, at an annual rent of £65. The lease gave the reversioner a right of re-entry if the rent remained unpaid for 21 days after it became due or if the tenant failed to perform any of his other covenants, provided that no breach of any covenant save the covenants as to payment of rent and fire insurance was to occasion a forfeiture or give a right of re-entry unless judgment had been obtained for such a breach and the damages awarded and costs of such action remained unpaid for three months after judgment. The lease contained covenants on the part of the tenant to repair and insure the premises, against carrying on offensive trades, and to inform the lessor of any assignment by him of his interest. On November 6, 1956, the landlord's solicitors served on the tenant a notice stating the following: "Notice under the Law of Property Act, 1925, sec-"tion 146, and the Leasehold Property (Repairs) Act, 1938, as "amended. We, the undersigned, as solicitors for and on behalf "of Rose Mary Silvester, your landlord of the above premises, "give you notice as follows: (1) There have been breaches of "the covenants mentioned in the lease dated February 8, 1932, "made between Robert Wilson Black of the one part and Mark "Frederick North of the other part. (2) The breaches complained "of are (a) Those comprised in the particulars which in the "schedule of dilapidations hereto annexed are specified as "required to be remedied and made good and the said premises "are defective because what is required by the schedule to be "done has not been done. (b) The subletting of the premises "into three dwellings and one shop . . ." No counter-notice in accordance with the Leasehold Property (Repairs) Act, 1938, was served by the tenant.

On November 13, 1958, the landlord issued a writ claiming damages for breach of the repairing covenant. Judgment in default of defence was obtained against the tenant but by an order dated April 15, 1959, it was set aside and the tenant was given leave to defend the action. The proceedings were then transferred to the official referee under the terms of the order for directions under R.S.C., Ord. 36A, r. 1.

Peter Alchin for the landlord.
George Dobry for the tenant.

The cases cited in argument are referred to in the judgment.

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HIS HONOUR PERCY LAMB Q.C. stated the facts and continued: Counsel have agreed that no oral evidence can be relevant to assist me to resolve this part of the case. Counsel for the tenant submits that the notice which must, by statute, precede this action must be clear and certain and must enable the tenant readily to appreciate what is required of her. He submits that the inclusion in that notice of a reference to a covenant against subletting, when there is no such covenant in the lease, is fatal to the efficacy of the notice and he cites in support of that submission the decision of Ridley J. in *Guillemard* v. *Silverthorne*.[1] Counsel for the landlord submits that the inclusion of a reference to a non-existing covenant, particularly when the schedule to repair, which in the present case I hold to be accurate, is silent as to that covenant, does not affect the efficacy of the notice, and he cites *Pannell* v. *City of London Brewery Co.*[2] and *Fox* v. *Jolly*[3] in support of his submission. Having regard to the peculiar form of this lease and to the fact that this is not a claim for forfeiture but for damages for breach of covenant to repair, I am at liberty to approach this matter res integra; neither counsel, who have been very industrious, has been able to discover any authority dealing with such a claim or giving any decision as to the form of notice required before such a claim can be brought.

I must, in my judgment, approach this problem on the clear understanding that this action makes no inroads into the rights of the tenant in her property. Suppose she is found in breach of the repairing covenant, no forfeiture can follow unless she fails to pay damages and costs awarded for three months after judgment is given. Thus, while no doubt the court will always examine a notice affecting the rights of property with great care and will always require strict observance of the statutory requirements relating to such notice, as has been said repeatedly in cases relating to compulsory acquisition of land and planning restrictions on the use of land, a notice such as the present does not affect rights of property. Apart from authority I should have no hesitation in holding that this notice is valid and that the reference to a non-existent covenant in no way reduces or destroys its efficacy, but out of respect to the able and careful arguments of counsel, for which I am grateful, I feel it proper to refer to the authorities they cite. The first of those is *Guillemard* v. *Silverthorne*,[4] the headnote of which is as follows: "A notice "under section 14 of the Conveyancing and Law of Property Act, "1881, which set out the general covenant to repair contained "in a lease, and then set out two further special painting "covenants which the lease did not contain at all, comprised a "schedule of work required to be done generally, some at least

[1] (1908) 99 L.T. 584.
[2] [1900] 1 Ch. 496; 16 T.L.R. 152.
[3] [1916] 1 A.C. 1; 31 T.L.R. 579.
[4] 99 L.T. 584.

" of which was not properly referable to the general covenant: " Held, that the notice was invalid."

I have been referred to the submissions on behalf of the parties in that case, particularly that of Mr. Foà, the well-known expert on landlord and tenant, for the defendant, where he said the notice was bad [5]: " Although the first part of the notice setting " out the general covenant to repair is in order, the second and " third parts specify obligations which the defendant is not liable " for at all; and the schedule of dilapidations and repairs annexed " to the notice lumps the dilapidations all together, so that it is " impossible for the defendant to know what the work is which " he ought to perform. Moreover, some of the work required in " the schedule, such as varnishing and other decorative work, is " not attributable to the general covenant to repair, and can only " be referred to those parts which were wrongly comprised in the " notice. The notice, therefore, does not comply with the require- " ment laid down by the Court of Appeal " in three authorities to which Mr. Foà referred.

Ridley J. referred to the facts, mentioned the matter which Mr. Foà argued, and said [6]: " The statement as to the existence " of the two last-mentioned covenants in the lease was due to " some mistake. Some other lease had apparently been looked " at, for the only covenant specially referring to painting in the " present lease was the one to which I have already referred— " namely, to paint the outside wood and iron work every fourth " year of the term. The notice contained a schedule of work " required to be done which included matters—such as varnish- " ing, etc.—apparently not referable to the general covenant " alone. In these circumstances it was objected on the part of " the defendant that the notice did not satisfy the requirements " of the Conveyancing Act, 1881. The plaintiff's counsel, in " answer to that objection, relied on the decisions in *Lock* v. " *Pearce* [7] and *Pannell* v. *City of London Brewery Co.*,[8] but I " think that those cases do not govern the present case. In both " of them the notice, so far as setting out the covenants was " concerned, did agree with the terms of the lease. In the " former, the notice merely contained a claim—in respect of " surveyor's fees and solicitor's charges—which was not justified " in law; and the Court of Appeal held that that circumstance in " itself did not render the notice invalid. In the latter case the " notice relied inter alia on breaches of a covenant to paint, " which had not in fact been committed; and there again it was " held by Buckley J. that the notice was not thereby necessarily " rendered altogether ineffective. The notice in both cases was " good in some respects; and it was decided that the part which " was valid might be separated from the part which was invalid, " and that the latter might be rejected as surplusage. But here " the notice does not agree with the terms of the lease; and I

[5] 99 L.T. 584, 585.
[6] Ibid. 588.
[7] [1893] 2 Ch. 271; 9 T.L.R. 363.
[8] [1900] 1 Ch. 496.

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"think that the tenant has a right to insist that the Act is not "complied with unless it does. The work required to be done "under this notice is not necessarily the same as the work which "would have been required if the covenants in the lease had been "properly set out, and the tenant, in my opinion, is entitled to "say that the notice is invalid."

In my judgment that case is clearly distinguishable because, first, it was an action for forfeiture while this is not, and secondly, the schedule of repairs included matters not referable to the general covenant to repair, but referable to the particular covenant which, although alleged, did not in fact appear in the lease. This seems to me, as far as I know, to be the only authority dealing with a notice containing references to non-existing covenants.

Pannell v. *City of London Brewery Co.*[9] deals with different matters, but I find it most helpful because Buckley J. surveyed the matter historically and his survey and his decision was expressly approved by the House of Lords in *Fox* v. *Jolly.*[10] In his judgment Buckley J. refers to the facts and he says[11]: "I find that the plaintiff has failed to prove that there was any "breach of the covenant to paint once in every four years. On "the contrary, I find that the defendants have proved that the "premises have been properly painted during the last four years. "One of the matters included in the notice given on January 31, "1899, was this: 'rub down, repair, and paint, with two coats, "'all external wood, iron and other work.' I find as a fact that "the lessor was wrong in requiring the lessee to do that, because "there had been no breach of that covenant. Then Mr. Astbury, "for the defendant, argued that the notice, having been bad in "one particular, was bad altogether.

"The argument on this part of the case amounts to this—"that if a lessor gives his lessee notice of say, three breaches, "as to two of which he is right and as to the third of which he "is wrong, any proceedings which he may take upon that notice "must be defeated because the notice is bad as a whole. The "first observation on that is, that if that were the law it would "be very inconvenient, as the result would be that every lessor "must, for his own protection in case of several breaches of "covenant, serve a separate notice with regard to each breach." Then Buckley J. goes on to discuss that point, and continues[12]: "Again, this occurs to me—that before the Act of 1881, under "the old law, when a lessor was bringing his action of ejectment "for breach of covenant, the first thing the defendant was "entitled to was to have particulars of the breaches alleged. "And if the lessor gave particulars of three alleged breaches, "and if two were breaches and the third was not, what would "have been the result? At the trial of the action the defendant

[9] [1900] 1 Ch. 496.
[10] [1916] 1 A.C. 1.
[11] [1900] 1 Ch. 496, 498.
[12] Ibid. 499.

"would succeed as regards number three; but the lessor, succeeding as to numbers one and two, would, of course, be entitled to his judgment for ejectment. One would suppose that the statute passed in that state of things operated in favour of the tenant to this extent—that the tenant is now entitled, not only to particulars of breaches in an action brought, but also to particulars of breaches long before action brought. The Act of 1881 gives him this benefit—that if within a reasonable time he remedies the breaches which are the subject of the notice, then he defeats the lessor's right to re-enter. But suppose the notice contains particulars of an alleged breach which is not a breach, why should that be more than matter of defence? Why should it go to defeat the notice as a whole? There does not seem to be any obvious reason why that should be so, and therefore prima facie I should have thought that if the notice required by the statute was good as to part, and sustained as to that part, and was bad as to the rest, the lessor would be entitled to succeed in his action. That being what one would suppose to be reasonable, let us see what the Act says." His Lordship then cited section 14 (1) of the Conveyancing Act, 1881, and continued [13]: "If a lessor gives a notice specifying two breaches, and specifying a third thing which is not a breach, he has given notice specifying the breach complained of. He has done that and more. He has not only done that which the statute says he must do, but he has done something in addition. He is, therefore, within the words of the Act; and, for the reasons I have given, it seems to me that a notice which contains too much is within the reasoning of the Act."

Reference should be made to *Fox* v. *Jolly*,[14] from which I have obtained great assistance. The headnote is as follows: "A notice was served under section 14 of the Conveyancing and Law of Property Act, 1881, by the lessor of six small houses, stating that the repairing covenants as therein set out had been broken and that the particular breaches complained of were the committing or allowing the dilapidations mentioned in the schedule annexed to the notice. The schedule indicated under general headings repairs which were required to be done in all the houses, and in a few instances only specified repairs to be done in particular houses. In some instances it required the lessee to 'examine and repair' specified parts of the houses. The schedule concluded with the words 'And note that the completion of the items mentioned in this schedule does not excuse the execution of other repairs if found necessary':—*Held*, that the notice sufficiently specified the particular breaches complained of, and that it was not vitiated by the addition of the general clause at the end." Lord Buckmaster L.C. said [15]: "My Lords, in this case it is not necessary to

[13] [1900] 1 Ch. 496, 500.
[14] [1916] 1 A.C. 1.
[15] Ibid. 7.

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"consider the rights of a landlord to re-enter on premises for non-"payment of rent, although some reference was made to the "subject in the arguments addressed to your Lordships. Such "rights are unaffected by the provisions of the Conveyancing Act "of 1881, and it is only with the terms of that statute that this "appeal is concerned. The question that is raised is very simple, "involving the consideration of only a few facts and but one "section of an Act of Parliament; it is, however, of undoubted "importance to landlords and tenants, and consequently it may "be desirable to state their relative position in some detail. "Before the passing of the Conveyancing Act of 1881, a right "of re-entry reserved in a lease conditional upon breach of a "covenant to repair could be enforced by the landlord at common "law without the tenant having opportunity to meet the com-"plaint, and often without his knowing that the breach had in "fact occurred. It is true that the courts of equity attempted to "mitigate the harshness of this procedure, and in several reported "cases restrained the landlords from exercising their rights where "the breach was one which, by accident or surprise, the tenant "had been unable to rectify. There was, however, no general "rule relating to such relief on which reliance could be placed. "In these circumstances the Conveyancing Act of 1881 was "passed, and it was to extend and render certain the rights of "tenants in such cases that section 14 of that statute was "framed." His Lordship then read the section, and continued:

"The effect of this subsection is plain. The right of re-entry "which the lessor enjoys on the breach of a covenant is not "capable of being exercised against the lessee until the conditions "in that subsection have been satisfied. If such condition were "not satisfied and entry were attempted at common law, such "entry would be a trespass; if proceedings were instituted to "obtain possession they would be instantly demurrable. That is "the meaning of the phrase 'shall not be enforceable by action "'or otherwise.' Now the conditions precedent which the lessor "must perform are these: He must serve a notice, and that "notice must specify the breach of covenant which is the subject "of complaint. That is, he must point out the covenant which "he says is broken, and he must specify the breach of which "he complains. He must also call upon the lessee to remedy "the breach, and if he requires compensation in money he must "ask for it. After this has been done a reasonable time must "elapse in which the lessee has the opportunity of complying "with the requirements of the notice. It is only when this has "been done, when the time has expired, and the work is incom-"plete, that the landlord can proceed to the assertion of his "rights. All this is common and familiar ground, and I do not "know that it is in any way disputed by the appellants in this "case, whose real complaint is that in the particular circum-"stances in which they stand no sufficient notice specifying the "breach of contract was served upon them within the meaning

"of the section. This leads me to examine the facts that have "given rise to the present dispute." His Lordship examined the facts, and continued [16]: "This notice has unquestionably "complied with the first condition referred to in section 14 of "the Act. It has plainly set out the covenants which it is alleged "are broken, and the schedule contains what is alleged by the "respondent to be a sufficient specification of the breach. The "work mentioned in this schedule was not done within a reason-"able time, and the present proceedings were accordingly "instituted by the respondent against the people who were in "actual occupation of the premises, claiming that he was entitled "to enforce his right of re-entry." Then followed a reference to the pleadings and to the history of the trial, and his Lordship continued [17]: "Thus the only question for consideration here is "whether paragraph 3 of the defence"—which stated the notice is invalid—"to which I have referred was substantiated, and this "depends solely upon the adequacy of the schedule to the "notice. . . .

"Now the schedule is attacked on several grounds. It is said "that it does not tell the tenant what it is he ought to do in "order to remedy the breach of which the complaint is made. "I am not prepared to accede to that view of the schedule. But "even if it did not, I can find nowhere in the section any words "which cast upon the landlord the obligation of telling the tenant "what it is that he must do. All that the landlord is bound to "do is to state particulars of the breaches of covenants of which "he complains and call upon the lessee to remedy them. The "means by which the breach is to be remedied is a matter for "the lessee and not for the lessor. In many cases specification "of the breach will of itself suggest the only possible remedy. "For example, complaint that a covenant to paint or to paper "has been broken can only be met by painting and papering. But "it does not follow that this is always so. A particular covenant "to keep the roof watertight, if broken, would be sufficiently "defined by a reference to the covenant, a statement that the "roof had not been kept watertight, and that the tenant was "required to remedy the omission; the means by which this could "be accomplished would be for the tenant to determine.

"It was further urged that the schedule called upon the "tenant to make examination on his own account of certain "parts of the premises, and that this was a request to survey "rather than a request to repair. It is true that in two cases, "that of the roof and the drains, the schedule contains the "following directions: 'Examine, repair, and reinstate all broken "'or loose tiles to main and w.c. roofs. Examine and repair "'and put in good sanitary condition all sinks, cisterns, water-"'closets, supply and waste pipes, ball valves and taps. . . .'"

[16] [1916] 1 A.C. 1, 10. [17] Ibid. 11.

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Then Lord Buckmaster continues [18]: "I do not think the description in the schedule is too general in its nature, nor am I able to see that the addition of the general phrase at the foot can possibly destroy the efficacy of the schedule as a whole. No form whatever is provided by the statute as the form in which the notice is to be given. It might be associated with useless and irrelevant matter, and it would none the less be a notice under the section if it was clear from its terms that it was so intended, and if, in fact, it contained in plain language the information the section required." Lord Buckmaster then referred to two authorities, *Lock* v. *Pearce* [19] and *Fletcher* v. *Nokes*,[20] and continued [21]:

"Even, however, if this were accepted, it should be remembered that the particulars which would be required in an action that merely claimed possession for breach of a covenant to repair would not necessarily be as detailed and minute as the particulars that would be wanted where a claim was being made for damages for breach of the covenant, and it is rather in comparison with this latter class of particulars that the appellant seeks to have the notice tested." Then the Lord Chancellor referred to *Penton* v. *Barnett*,[22] *Horsey Estate Ltd.* v. *Steiger* [23] and *In re Serle*,[24] which we have looked at in this discussion, and continued: "the last case is that of *Pannell* v. *City of London Brewery Company*,[25] where it was decided that a notice which specified two breaches and something else which was not a breach was none the less good since the breach complained of had been specified together with the addition of something which was immaterial.

"I regard this view as the correct interpretation of the section. The notice must state with sufficient particularity the breach of which the landlord complains, and that breach the tenant must satisfy within a reasonable time. If he does satisfy it, it would not be open to the landlord to allege that there was another breach of another covenant, which had been referred to in the notice, but had not been sufficiently specified, which had not been remedied.

"In the present case I think the notice sufficiently specified the landlord's complaints. It gave the tenant adequate notice of what he was required to do, and it provided full and sufficient information upon which he could determine what course of action he should adopt. For these reasons I think this appeal should fail."

The result is that I find that the schedule gives ample particulars of the breach of the covenant to repair. It contained no reference at all to the breach of the alleged covenant against

[18] [1916] 1 A.C. 1, 12.
[19] [1893] 2 Ch. 271.
[20] [1897] 1 Ch. 271; 13 T.L.R. 171.
[21] [1916] 1 A.C. 1, 14.
[22] [1898] 1 Q.B. 276; 14 T.L.R. 11.
[23] [1899] 2 Q.B. 79; 15 T.L.R. 367.
[24] [1898] 1 Ch. 652.
[25] [1900] 1 Ch. 496.

subletting. There was nothing in the notice which could possibly be construed by the defendant to refer to the alleged covenant of subletting and, although it is quite obviously obiter dictum, I respectfully adopt and follow that part of Lord Buckmaster's speech in *Fox* v. *Jolly*, where he said [26]: "No form whatever is "provided by the statute as the form in which the notice is to "be given. It might be associated with useless and irrelevant "matter, and it would none the less be a notice under the "section."

I find that this notice is a valid notice and the contention that has been put forward by the tenant fails. The result is that this action will now have to be heard; I shall have to ascertain if there are any breaches of covenant, and I shall have to ascertain, if there are, what the damages are to be.

Judgment for the plaintiff.

Solicitors: *Wedlake, Letts & Birds; S. Z. Kmiecik & Co.*

[26] [1916] 1 A.C. 1, 12.

[HOUSE OF LORDS.]

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Oct. 7, 8; *Nov.* 4.

* LONDON COUNTY COUNCIL . . . APPELLANTS;
AND
HENRY BOOT & SONS LTD. . . . RESPONDENTS.

Building—Contract—London County Council standard contract—"Rise-"and-fall" clause—"Rates of wages payable"—Holiday credits included in rates of wages.
Master and Servant — Wages — Holidays with pay — Whether weekly credits "wages" within meaning of building contract.

In 1952 and 1953 the plaintiffs, building contractors, entered into contracts with the defendant council to erect blocks of flats. The contracts were in the standard form issued by the defendants, which contained a "rise-and-fall" clause, providing that if during the currency of a contract "the rates of wages payable for any "labour employed in the execution of the works" should in conformity with agreements between associations of employers and trades unions or with the decisions of a competent authority be increased above or decreased below the corresponding rates in force at the date of the contractor's tender, increasing or decreasing the cost to the contractor in carrying out the works, then an allowance equivalent to the net increase or decrease should form an addition to or deduction from the amount otherwise payable to the contractor. The plaintiffs were parties to schemes arranged by the building trade under which they, as employers, made weekly payments by way of credits for providing holidays with pay for the workmen.

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† *Present*: VISCOUNT SIMONDS, LORD RADCLIFFE, LORD COHEN, LORD KEITH OF AVONHOLM and LORD DENNING.

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The schemes were operated by a management company to which employers made their contributions. During the currency of the contracts increases were made in the payments or credits and the plaintiffs contended that these holiday payments or credits fell within the words in the "rise-and-fall" clause—"rates of wages "payable." The council rejected the plaintiffs' claim:—

Held, that the holiday credits were not rates of wages within the meaning of the clause since it is an essential element of a wage that it should be paid to the workman for work done by him, and the contributions were neither paid by the employer nor related to the work which the workman did for him.

Decision of the Court of Appeal [1959] 1 W.L.R. 133; [1959] 1 All E.R. 77 reversed.

APPEAL from the Court of Appeal (Lord Somervell, Morris and Pearce L.JJ.).

This was an appeal by the defendants, the London County Council, from an order of the Court of Appeal dated November 18, 1958, setting aside the judgment and order of Pilcher J. in an action in the Queen's Bench Division of the High Court of Justice dated respectively November 27, 1957, and December 17, 1957, whereby it was adjudged and ordered that two questions of law raised for the opinion of the court by means of a special case agreed between the parties pursuant to R.S.C., Ord. 34, be answered in the negative, and that the action be dismissed with costs, and ordering that the questions be answered in the affirmative and that judgment be entered in the action for the plaintiffs, Henry Boot & Sons Ltd., against the defendants for the sum of £1,112 2s. 9d. with costs, and that the costs of the appeal be paid by the defendants to the plaintiffs.

The facts are set out in the opinion of Viscount Simonds.

Sir Milner Holland Q.C. and *J. M. Hoare* for the appellants.

R. D. Stewart-Brown Q.C. and *David Gardam* for the respondents.

The following cases were cited in argument: *Bank of New Zealand* v. *Simpson* [1]; *Charrington & Co. Ltd.* v. *Wooder* [2]; *Hewlett* v. *Allen* [3] and *Hartog* v. *Colin & Shields.* [4]

Their Lordships took time for consideration.

November 4. VISCOUNT SIMONDS. My Lords, in the action out of which this appeal arises, the respondents, who carry on the business of building contractors, claimed from the appellants, the London County Council, sums amounting to £1,112 2s. 9d. They alleged that these sums were due to them under three building contracts, each of which contained a clause, commonly known as "an up and down clause," which I must set out in full. It was numbered clause 23A and was in these terms: "If during

[1] [1900] A.C. 182; 16 T.L.R. 211.
[2] [1914] A.C. 71; 30 T.L.R. 176.
[3] [1894] A.C. 383; 10 T.L.R. 464.
[4] [1939] 3 All E.R. 566.

"the currency of this contract: (A) the rates of wages payable "for any labour employed in the execution of the works shall in "conformity with agreements between associations of employers "and trade unions, or with the decisions of a competent authority, "be increased above or decreased below the corresponding rates "in force at the date of the contractor's tender . . . and the "increase or decrease shall result in an increase or decrease of "cost to the contractor in carrying out the works, then an allow-"ance equivalent to the net increase or decrease of cost (after "deduction of all cash and other discount, and without any "addition for overhead charges, profit or otherwise) as certified "by the architect shall, subject to the provisions hereinafter "contained, form an addition to or deduction from the amount "otherwise payable under this contract and be paid to or allowed "by the contractor accordingly as the case may require."

The single question for your Lordships' decision is whether this clause is apt to cover certain payments which the respondents were constrained to make for the benefit of their workmen under agreements now to be described. They were agreements concerning what may be compendiously called "holiday pay," and I take this description of them from the special case which was agreed by the parties:

"9. By an agreement in writing dated October 28, 1942, and "made between the said national federations and two other parties "representing the civil engineering industry it was agreed that "the parties thereto would co-operate and use their best "endeavours to procure all employers and operatives to co-operate "in putting into operation and operating and carrying into effect "a scheme (hereinafter called the 'annual holidays scheme') "for providing holidays with pay in the building and civil "engineering contracting industries.

"10. The annual holidays scheme was subsequently to the "coming into effect of the said agreement revised by the parties "thereto so that at December 17, 1951, the scheme as then in "force provided (inter alia)

"(i) that each operative covered by the annual holidays "scheme should, from the calendar week beginning on Monday, "April 2, 1951, be credited by the employer first employing him "in that calendar week, and by the employer first employing him "in each subsequent calendar week, with the sum of 2s. 3d. "(two shillings and three pence) except in the case of persons "(male or female) under the age of 18 years, when the sum "should be 1s. 9d. (one shilling and nine pence);

"(ii) that each employer operating the annual holidays scheme "should each year obtain from Building and Civil Engineering "Holidays Scheme Management Ltd. (a company limited by "guarantee), which is hereinafter called 'the management com-"'pany,' a numbered holiday card in respect of each operative "in his employment;

"(iii) that the making of holiday credits as provided for in the

"said agreement should be done by the employer affixing stamps "purchased by him from the management company in the spaces "provided therefor in the operative's holiday cards;

"(iv) that each operative covered by the annual holidays "scheme should be entitled to an annual holiday of 6 consecu- "tive working days which should so far as possible be granted at "the recognised summer holiday period and that a sum equivalent "to the total amount of holiday credits made to the operative for "the relevant accounting period less the appropriate administra- "tive charge of the management company for that period should "be paid to the operative by the employer in whose employment "he was at the date of the annual holiday. The relevant "accounting period for any annual holiday was the year ending "on the preceding April 1;

"(v) that reimbursement should be made by the management "company to any employer of all annual holiday credits properly "paid by him.

"11. By a further agreement in writing dated June 25, 1947, "and made between the said national federation and the said "other parties it was agreed that the parties thereto should "operate a further scheme (hereinafter called 'the public holidays "'scheme') under which the operatives engaged in the building "and civil engineering contracting industries would secure pay- "ment in respect of such public holidays as are generally or "locally recognised as such in those industries.

"12. Subsequently to the coming into effect of the said further "agreement the public holidays scheme was revised by the "parties thereto so that at December 17, 1951, the scheme as "then in force provided (inter alia)

"(i) that each operative covered by the public holidays scheme "should from the calendar week beginning on Monday April 2, "1951, be credited by the employer first employing him in that "calendar week and by the employer first employing him in each "subsequent calendar week during the ensuing year with the "sum of 2s. 3d. (two shillings and three pence) except in the "case of operatives under the age of 18 years when the sum "should be 1s. 9d. (one shilling and nine pence);

"(ii) that each employer operating the public holidays scheme "should obtain from the management company a numbered public "holidays book containing public holidays cards in respect of each "operative in his employment;

"(iii) that the making of public holiday credits should be "effected by the employer affixing stamps purchased by him from "the management company in the spaces provided therefor in the "public holidays cards in the said books;

"(iv) that a sum equivalent to the value of the stamps on the "operative's public holidays card referable to the public holiday "in question (less the management company's administrative "charge) up to and including the calendar week preceding the

" holiday should be paid to the operative by his employer on the " pay day in respect of the week in which the holiday occurred;

" (v) that reimbursement should be made by the management " company to any employer of all public holidays credits properly " paid by him.

" 13. The said national federations are parties to the National " Joint Council for the Building Industry. The Working Rule " Agreement for Building Trade Operatives in the London District " as approved by the London Regional Joint Committee of the " said National Joint Council on behalf of the council in force on " December 17, 1951, provided (inter alia) as follows:

" By Rule 1 (Wages) that the hourly rate of wages payable to " operatives working on sites within the London district should be " as therein stated and that annual holiday credits and public " holiday credits should be due weekly to operatives from each " employer on the conditions set out in the agreements herein- " before mentioned, but that the amounts of such credits should " not be variable under the Working Rule Agreement.

" 14. The plaintiffs are members of the National Federation of " Building Trades Employers and of the London Master Builders " Association which Federation and Association are and were at " all material times represented on the said London Regional Joint " Committee. The plaintiffs operated both the annual holiday " and public holiday schemes in respect of operatives employed " by them upon each of the said contracts.

" 15. After December 17, 1951, the weekly credits payable " under the said schemes were by agreement of the parties to the " relevant agreements increased as follows:

" (i) Annual holiday scheme—

" Date	Operatives over 18	Operatives under 18
	s. d.	s. d.
" from April 7, 1952	2 3 to 2 9	1 9 to 2 3
" from April 6, 1953, when the " annual holiday period for the " following year was increased " to two weeks	2 9 to 5 6	2 3 to 4 6

" (ii) Public holidays scheme—

" Date	Operatives over 18	Operatives under 18
	s. d.	s. d.
" from April 14, 1952	2 3 to 2 9	1 9 to 2 3 "

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Here, then, is the question: Are these payments, which I will hereafter call "holiday credits," rates of wages within clause 23A of the contracts? If they are, then the appellants are liable to the respondents. The Court of Appeal, reversing the decision of Pilcher J., has held that they are, but to me the conclusion of the learned judge is preferable, though I do not at all points adopt his reasoning. In the consideration of this question it is no doubt proper to have regard not only to clause 23A but to other clauses also of the contracts, and to the relevant specifications which are incorporated in them, and also to the so-called Working Rule Agreement by which the parties were bound. But I will say at once that I do not find anything in them to displace what I regard as the clear prima facie meaning and scope of the relevant words. Rather do they confirm that meaning.

My Lords, there is, I suppose, no doubt that what the workman gets from the operation of the holidays agreements is a benefit to him. It might perhaps be loosely called part of his remuneration. But to me it seems an essential element in a "wage" that it should be paid to the workman for work done by him, and it is just this element which is lacking in the holidays credit. It is neither paid by the employer to him nor related to the work which he does for the employer. I would say emphatically that it would not occur to an employer, being asked what wages he paid his workmen, or to a workman, being asked what wages he was paid, to refer in his answer to the holidays credit. They might, indeed, say that in addition to his wage he got the benefit of the holidays credit. But that would no more be a wage than would the benefit of a payment by the employer to a pension, superannuation, or sick fund. Further, the payment, to come within clause 23A, must not only be properly described as a wage: it must satisfy the compound expression "rates of "wage." There may, of course, be many different rates of wages payable to workmen employed on a building contract; there may be more than one rate payable to a single workman, e.g., normal time and overtime. It is therefore appropriate that the plural "rates of wages" should be used. But from this it does not follow that whatever is paid to or for the benefit of workmen in addition to what I will call his ordinary wage is also a wage, and, though I am conscious that it is little more than a repetition of the same argument, I would find it even more difficult to describe contributions of varying amounts to a management company in accordance with a holidays scheme as different rates of wages.

I do not then accept the view of the learned judge that the relevant words in clause 23A provide an ambiguity which is to be resolved by a reference to other clauses of the contracts or of documents that must be read with them. But I do not dissent from the view that such a reference will confirm the meaning at which I have arrived. For instance, I find in clause 27 (G) of the contract a strong indication that the rates of wages referred

to in clause 27 (A) connote wages of which it can be predicated that the actual amount is shown in wages books and pay sheets as being paid to the workmen. There is the same indication in clause 28. Upon clause 59 of the specification on which much reliance was placed I prefer the view of the learned judge to that of the Court of Appeal. It seems to me reasonably clear that in that clause "rates of wages" does not include holidays credits, and I should therefore be predisposed to give the same meaning to the words where they occur in the body of the contract. I doubt with respect whether any help can be got from a consideration of the so-called Working Rule Agreement. It is not an artistically drawn document, and any inference which might be drawn from it as to the meaning of "rates of wages" can easily be matched by an inference in the contrary sense.

The appellants sought, if their primary argument on construction, failed, to adduce evidence to the effect that the respondents were well aware of the meaning which they (the appellants) put upon clause 23A and knowingly entered into the agreement. It is unnecessary in the event to deal with this argument, but I think fit to say that I am wholly satisfied with the way in which Lord Somervell disposed of it.

I move, therefore, that the appeal be allowed and the order of the Court of Appeal discharged except so far as it dealt with costs, and that the order of Pilcher J. be restored. There will be no costs of the appeal in this House.

Lord Radcliffe. My Lords, I agree and do not think it necessary to add anything.

Lord Cohen. My Lords, I also agree.

Lord Keith of Avonholm. My Lords, I agree.

Lord Denning. My Lords, workmen in the building industry change their employment very frequently. One man may be employed by several different employers in the course of a year. In order to give them holidays with pay, a scheme has been devised by which each man has a holiday card. Each employer buys holiday stamps from the management company which cost 2s. 9d. each (afterwards increased to 5s. 6d. each). Each employer sticks a stamp every week on the card of every man working for him in that week. The card covers the period from April 5 in one year to April 5 in the next year. Thereafter the man keeps his card, with the stamps affixed, until the time when he wants to take his holiday, say August or September. Then he goes to his then employer who pays him the money's worth of the stamps affixed on the card. And that employer, in due course, is reimbursed by the management company. So each employer only pays the cost of the stamps, not the cost of the holiday.

Your Lordships are concerned here with the increase in the

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cost of the holiday stamps from 2s. 9d. each to 5s. 6d. each. You are not concerned with the amount which the man draws for his holiday pay. The question is whether the increase in cost of the holiday stamps is an increase in the "rates of wages" within the rise-and-fall clause in the building contract: for if it is, then the employer is entitled to add this increased cost on to the sum payable to him under the contract by the London County Council.

The case turns on the meaning of the phrase in the rise-and-fall clause: "The rates of wages payable for any labour employed in "the execution of the works." Some things are clear enough. This phrase includes the standard rate of 3s. an hour (or whatever the figure may be) payable for work done by the men. If that is increased, the builder can get the increased cost from the London County Council. So also it includes the rates payable to apprentices, youths and women for their work. And it includes the rates payable for overtime. But it does not include such payments as tool allowances, travelling allowances or the employer's contribution to an insurance fund or a superannuation fund. The reason is because those are not payments "for "labour." They are, it is true, payments to or for the benefit of a workman—and maybe they are payments made under the contract of service—but they are not payments for work done by him. The phrase "labour employed" in the clause does not, to my mind, mean "labourers employed." It means "labour done by "workmen employed" in the execution of the works.

So interpreted, it is clear to my mind that the phrase does not include the cost of these holiday stamps. They are not payable for work done. That is shown by taking a case where a man works for one employer on the first day or two of a week and then for another employer on the last two or three days of the same week. The first employer has to buy the holiday stamp and stick it on his card. The second employer pays nothing. The truth is that the stamps are bought by the employer for the benefit of a workman—just like an employer's contribution to a superannuation fund—but they are not payments made for labour done by him in the execution of the works, and do not come within the rise-and-fall clause. The builder cannot, therefore, pass on the increase to the London County Council.

This interpretation of the phrase is borne out by the other places in the agreement where it is used, such as clause 27 (G) of the contract and clause 59 of the specification.

I may add, perhaps, a word on the correspondence which took place before the contract was executed. The London County Council there made it clear that they did not regard holiday credits as coming within the rise-and-fall clause; but the builders' association took a different view. Neither side inserted any words in the contract so as to clear up the difference between them. They left the rise-and-fall clause as it was. It was suggested that on this account there was no consensus ad idem: Your Lordships rejected this suggestion without wishing to hear further argument

upon it. There was, to all outward appearances, agreement by the parties on the one thing that really mattered—on the terms that should bind them. In case of difference as to the meaning of those terms, it was for the court to determine it. It does not matter what the parties, in their inmost states of mind, thought the terms meant. They may each have meant different things. But still the contract is binding according to its terms—as interpreted by the court.

In my opinion, on the true interpretation of clause 23A, holidays credits do not come within it. I would therefore allow the appeal.

Appeal allowed.

Solicitors: *J. C. Barr; Masons.*

F. C.

[COURT OF APPEAL.]

* ROYAL COLLEGE OF NURSING *v.* ST. MARYLEBONE BOROUGH COUNCIL.

Charity—Profession—Nursing—Rates and rating—Royal College of Nursing—Claim for rating relief—Two main objects—Object "advance of nursing as a profession"—Whether charitable—Meaning—Rating and Valuation (Miscellaneous Provisions) Act, 1955 (4 *&* 5 *Eliz.* 2, *c.* 9), *s.* 8.

The Royal College of Nursing, an organisation incorporated by Royal Charter in 1928, claimed to be entitled to rating relief under section 8 (2) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, in respect of the premises occupied by the college as hall and offices, as an organisation "not established or conducted "for profit and whose main objects are charitable or otherwise "concerned with the advancement of . . . education or social "welfare," within section 8 (1). Quarter sessions found (1) that the main objects of the college were those specified in article II (B) (*a*) and (*b*) of its charter as follows: (*a*) to promote the science and art of nursing and the better education and training of nurses and their efficiency in the profession of nursing, and (*b*) to promote the advance of nursing as a profession in all or any of its branches; (2) that the first of those two objects was admitted to be charitable and the second was either charitable or otherwise concerned with the advancement of social welfare, as both objects were directed to a single end, namely, the raising of the standard of nursing for the benefit of the community rather than the promotion of the professional interests of nurses as an end in itself. On appeal by the rating authority:—

Held, that on its true construction in its context object (*b*) was directed to the advance of nursing for "the relief of the sick," and was charitable; and as object (*a*) was admittedly so, the college was entitled to relief under section 8; the fact that the advance of nursing as a profession might advance the professional interests of nurses in the trade union sense was incidental, and the organisation did not cease to be charitable because incidentally, and

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in order to carry out the charitable object, it was both necessary and desirable to confer special benefits on the members.

General Nursing Council for England and Wales v. *St. Marylebone Borough Council* [1959] 2 W.L.R. 308; [1959] 1 All E.R. 325; *Royal College of Surgeons of England* v. *National Provincial Bank Ltd.* [1952] A.C. 631; [1952] 1 T.L.R. 978; [1952] 1 All E.R. 984; and *Geologists' Association* v. *Inland Revenue Commissioners* (1928) 14 T.C. 271 applied.

Decision of Divisional Court [1958] 1 W.L.R. 95; [1958] 1 All E.R. 129 affirmed.

APPEAL from the Queen's Bench Divisional Court [1] on a case stated by County of London Quarter Sessions Appeals Committee.

On February 11, 1957, the Royal College of Nursing appealed to the County of London Quarter Sessions against the refusal of the St. Marylebone Borough Council to allow them the relief against rates prescribed by section 8 (2) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, in respect of their hall, offices and premises at Henrietta Place, London W.

The appeals committee heard the appeal on April 12, 1957, and found the following facts: The college was incorporated by Royal Charter granted on July 28, 1928. The premises were occupied for the purposes prescribed in article II of the charter which was annexed to and formed part of the case. Article II was as follows: "The purposes for which the college is established and incorporated are as follows: . . . (B) To promote "the purposes hereinafter set out and in particular (*a*) To "promote the science and art of nursing and the better education "and training of nurses and their efficiency in the profession of "nursing. (*b*) To promote the advance of nursing as a profession "in all or any of its branches. (*c*) To assist nurses who by "reason of adversity ill-health or otherwise are in need of "assistance of any nature. (*d*) To maintain a roll of members "of the college. (*e*) To institute and conduct examinations in "all branches of women's work conducive to the efficient conduct "of the nursing profession and to grant certificates and diplomas "to those who pass prescribed examinations. (*f*) To provide "establish and maintain for the purposes herein mentioned in "London and elsewhere offices, examination halls and lecture "rooms, with all requisite equipment, and to institute and provide courses of lectures and demonstrations. . . . (*j*) To do "all other lawful things as may from time to time be conducive "to the attainment and furtherance of the above objects or any "of them."

Out of a total of approximately 180,000 nurses in the United Kingdom between 42,000 and 43,000 were members of the college. Of the total income in the year ending December 31, 1955, amounting to £85,000 some £40,000 consisted of subscriptions of such members. The activities of the college included (i) the provision of educational facilities designed to improve the

[1] [1958] 1 W.L.R. 95; [1958] 1 All E.R. 129.

knowledge and skill of the nursing profession; (ii) the giving of advice and making of representations to government departments on all matters relating to the profession; (iii) the obtaining of good and equitable working conditions for the nursing profession, and (iv) the assistance of nurses who by reason of adversity, ill-health or otherwise were in need of assistance. It was admitted that the college was not established or conducted for profit.

It was contended by the rating authority that each of the objects stated in article II (B) of the charter under subparagraphs (*a*), (*b*) and (*c*) respectively was a main object of the college; that whereas the objects stated in (*a*) and (*c*) were charitable, that in (*b*) was neither charitable nor concerned with the advancement of social welfare; and that, accordingly, the college was not an organisation of the kind contemplated by section 8 (1) (*a*) of the Act of 1955.

It was contended by the college that the purpose stated in article II (B) of the charter under subparagraph (*a*) was the main object of the college and the other purposes stated were ancillary thereto; that the main objects of the college were charitable or otherwise concerned with the advancement of social welfare; and that, accordingly, the college was an organisation of the kind contemplated by section 8 (1) (*a*) of the Act of 1955.

The appeals committee were of opinion that the main objects of the college were such as to attract the application of section 8 (1) (*a*) of the Act. The rating authority appealed.

On October 16 the Divisional Court remitted the case to the appeals committee to answer the following questions: (1) What is or are the main object or objects of the college? (2) In the case of such object or objects is it (a) charitable; (b) if not, is it otherwise concerned with the advancement of education; (c) is it otherwise concerned with the advancement of social welfare? The answers returned by the appeals committee were: (1) That the main objects of the college were those set out in article II (B) (*a*) and (*b*) of its charter. (2) The objects in article II (B) (*a*) were admitted to be charitable. They were further of the opinion that the object in article II (B) (*b*) was either charitable or otherwise concerned with the advancement of social welfare, for they were satisfied on the evidence, written and oral, that the objects in article II (B) (*a*) and (*b*) were mutually complementary in that both were directed to a single end, namely, the raising of the standard of nursing for the benefit of the community rather than the promotion of the professional interests of nurses as an end in itself.

The Divisional Court on December 13, 1957, held, on the footing that there were two main objects, that "the advance of "nursing as a profession" meant improving the quality and range of the services which nurses gave, and therefore the enhancement of the stature and importance of the nursing profession and the esteem in which it was held, and that, accordingly,

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object (*b*), on its true construction, was directed to the advance of nursing and not to advancing the professional interests of nurses and was charitable; and as object (*a*) was admittedly so, the college was entitled to relief under section 8.

The appeal of the rating authority to the Court of Appeal was delayed in order that the court might have the advantage of the decision of the House of Lords in *General Nursing Council for England and Wales* v. *St. Marylebone Borough Council*,[2] which was given on January 28, 1959.

J. P. Widgery Q.C. and *J. Blanshard Stamp* for the rating authority.

L. G. Scarman Q.C., *Eric Blain* and *Michael Mann* for the college.

The following cases were cited in argument in addition to those referred to in the judgment of the court: *Derbyshire Miners' Welfare Committee* v. *Skegness Urban District Council*[3]; *Berry* v. *St. Marylebone Borough Council*[4]; *National Deposit Friendly Society Trustees* v. *Skegness Urban District Council*[5]; *General Nursing Council for England and Wales* v. *St. Marylebone Borough Council*[6]; *Waterson* v. *Hendon Borough Council*.[7]

Cur. adv. vult.

Oct. 27. ROMER L.J. read the following judgment of the court: This is an appeal by the St. Marylebone Corporation against an order of the Divisional Court dismissing the corporation's appeal by way of case stated by the Appeals Committee of the Court of Quarter Sessions for the County of London. The question at issue is whether the Royal College of Nursing (hereinafter referred to as "the college") are entitled to rating relief under section 8 of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, in respect of certain hereditaments occupied by the college, being 1 and 1A, Henrietta Place, London W. In January, 1957, the corporation rejected the college's claim to relief, but an appeal from that rejection to quarter sessions was successful, and the Divisional Court upheld the decision of quarter sessions.

So far as material, section 8 of the Act of 1955 provides: "(1) This section applies to the following hereditaments, that is "to say—(*a*) any hereditament occupied for the purposes of an "organisation (whether corporate or unincorporate) which is not "established or conducted for profit and whose main objects are

[2] [1959] 2 W.L.R. 308; [1959] 1 All E.R. 325.

[3] [1958] 1 Q.B. 298; [1957] 3 W.L.R. 1049; [1957] 3 All E.R. 692.

[4] [1958] Ch. 406; [1957] 3 W.L.R. 1029; [1957] 3 All E.R. 677.

[5] [1959] A.C. 293; [1958] 3 W.L.R. 172; [1958] 2 All E.R. 601.

[6] [1958] Ch. 421; [1957] 3 W.L.R. 1039; [1957] 3 All E.R. 685, C.A.

[7] [1959] 1 W.L.R. 985.

"charitable or are otherwise concerned with the advancement "of religion, education or social welfare." Then the subdivisions of the section give a certain measure of relief from rates to those hereditaments.

The college, which is admittedly not conducted for profit, was incorporated by Royal Charter in 1928. The following provisions of the charter are or may be material. It begins with the recital: "Whereas 'The College of Nursing, Ltd.,' herein-"after referred to as the 'the said company,' a company "incorporated under the Companies Acts, 1908 and 1913, has "presented to us in our council a humble petition setting forth:

"That the said company was so incorporated for the purposes "set forth and mentioned in its memorandum of association, and "that it was thereby provided (inter alia) that the income and "property of the company should be applied solely towards the "promotion of those purposes:

"That the said company has during the last ten years created "an organisation, acquired premises and property, and promoted "reforms directed to the said purposes:

"That the said company proposes to place at the disposal of, "and to transfer to, and vest in, the proposed corporation, when "incorporated under our charter, the said premises and other "property and existing organisation:

"That the said company believes that the incorporation under "our charter of the proposed corporation will be for the public "advantage, and will tend to the advancement of the science "and art of nursing, and further to improve the education of "nurses in the said science and art:

"And most humbly praying us in our council to grant our "charter of incorporation to the president and other members "for the time being of the proposed corporation under the name "and style of 'The College of Nursing' and with such powers and "privileges and in such manner in all respects as to us in our "council may seem fit."

By the first article the president and other members for the time being of the corporation were constituted and created one body corporate with the name "The College" and "The College "of Nursing." By article II it is provided: "The purposes for "which the college is established and incorporated are as "follows: (A) To acquire and take over all the assets, property, "possessions, effects, and liabilities of the said company. (B) To "promote, by means of such assets and otherwise, the purposes "hereinafter set out and in particular": [His Lordship read paragraphs (*a*), (*b*), (*e*), (*f*) and (*j*), as set out above, stated the decision of quarter sessions, the questions to quarter sessions on remission by the Divisional Court, and their answers, as set out above, and continued:] It is to be observed in passing that quarter sessions did not specifically answer the question whether the main object or objects, if not charitable, was or were mainly concerned with the advancement of education, but it is, we

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think, implicit in the answers which they did give that they did not think that the question should be answered affirmatively. The supplementary answers given by quarter sessions are, perhaps, expressed a little ambiguously, and Mr. Scarman suggested before us that their finding that the objects in article II (B) (*a*) and (*b*) "were mutually complementary in that "both were directed to a single end" was intended to qualify the earlier finding "that the main objects of the college were "those set out in article II (B) (*a*) and (*b*) of its charter."

Mr. Scarman relied in this connection on the observation of A. L. Smith L.J. (referred to in the judgment of the Divisional Court) in *Art Union of London Ltd.* v. *Overseers of the Savoy*[1] that "If the other object be only a means to the one end . . . "then the society has a sole and exclusive object and not another "object subsidiary thereto." Applying this, Mr. Scarman submitted that reading the answers of quarter sessions as a whole they were intending to find that the college had only one main object, which they described as a single end. We agree, however, with the view of the Divisional Court that the effect of the answers of quarter sessions is that they were intending to find that the college, under its charter, had two main objects and not one. It seems to us that this is reasonably clear if the answers are read in conjunction with the arguments which had been addressed to quarter sessions by the respective parties which are set out in the case.

On the footing, then, that the college has two main objects, it is now established by authority that each of them must comply with the requirements of section 8 of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, if the college is to qualify for the relief from rates which the section provides. It is also established that once the main objects of a body such as the college have been determined the question whether such objects do so comply is purely one of construction, unaffected by the actual activities in which the body engages. Nor is the court concerned with the results of such activities. "It is," said Lord Keith in *General Nursing Council for England and Wales* v. *St. Marylebone Borough Council*,[2] "the objects for which the council "was immediately and directly constituted that we are, in my "opinion, concerned, and not with the results of its activities at "second or third hand." The question cannot, however, be decided by taking the language in which a main object is expressed, and by asking what that language means if construed by itself; the language has to be construed in its context and with reference to all other relevant provisions of the document.

The object expressed in article II (B) (*a*) is admittedly charitable, and, accordingly, the first question to be considered is whether the purpose expressed in article II (B) (*b*) of the charter —"to promote the advance of nursing as a profession in all or

[1] [1894] 2 Q.B. 609, 627; 10 T.L.R. 576.

[2] [1959] 2 W.L.R. 308, 318: [1959] 1 All E.R. 325.

"any of its branches"—is, in its context and in the light of the charter as a whole, also a charitable object. The answer to this question depends, in our judgment, on whether the true view of the object is (in the words of Donovan J. who delivered the judgment of the Divisional Court) "the advancement of nursing "or the advancement of the interests of nurses." If it is the former, then Mr. Widgery for the appellants rightly concedes that the object is undoubtedly charitable. If, however, the object is to advance the interests of the members of the nursing profession it cannot be said to be charitable in the sense in which that word is known to our law (see the *General Nursing Council* case supra [2]; and *General Medical Council* v. *Inland Revenue Commissioners* [3]).

The question is a difficult one, but the Divisional Court decided it in favour of the college, and we have come to the conclusion on the whole that they were right in doing so. The difficulty arises from the presence in article II (B) (*b*) of the words "as a "profession." Had those words been absent and the expressed object been "to promote the advance of nursing in all or any "of its branches" it would clearly have been charitable as promoting (in the words of Lord Morton of Henryton in *Royal College of Surgeons of England* v. *National Provincial Bank Ltd.*[4]) "the relief of human suffering." Mr. Widgery, however, for the St. Marylebone Corporation, naturally relies on the words "as a profession" as showing that the real object of the provision was to promote the interests of the nurses as distinct from the nursed. His argument in essence is that the object of (*b*) was either to provide a trade union protection for the nursing profession or to increase the status of the profession and its members. Mr. Widgery contended that the interests of the sick were fully covered by article II (B) (*a*), and that (*b*) is directed to promoting the interests of the nurses, which is not the subject of any other provision in the charter. (B) (*a*), says Mr. Widgery, having fully covered the promotion of nursing for the benefit of the community, one would expect (*b*) to be concerned with something else; and the only reasonable meaning to attribute to (*b*), and one which is indicated by the words "as a profession," is an intention to promote and safeguard the interests of those who administer the nursing.

It cannot be disputed, we think, that there is considerable force in Mr. Widgery's submission. Although it is true, as Donovan J. pointed out, that tautology is by no means unusual in documents such as the college's charter, we agree with Mr. Widgery that on ordinary principles of construction one should try to attribute some significance of its own to each separate provision. It is at this point, however, that we diverge from Mr. Widgery. In our opinion, the relief of human suffering

[2] [1959] 2 W.L.R. 308.
[3] (1928) 97 L.J.K.B. 578; 44 T.L.R. 439.
[4] [1952] A.C. 631, 654; [1952] 1 T.L.R. 978; [1952] 1 All E.R. 984.

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through nursing is not covered in all its aspects by (B) (*a*). For example, (*a*) does not cover, or at all events does not clearly cover, the advance of nursing in the sense of increasing the quality and range of services offered to the public, or of enhancing the number and standard of those joining the profession. We respectfully adopt and are unable to improve upon the language of Donovan J. where he said[5]: "What is meant by the advance "of some particular calling as a profession? If, for example, one "says that in the last 50 years there has been a striking advance "in the profession of accountancy, what idea is conveyed? Pre-"sumably this, that the profession had greatly increased in "stature, importance, membership and general esteem, not "simply that the fees have gone up, although that might be "assumed as a consequence. How then is a profession to be "'advanced' in this sense? The answer is, by service. Demands "for more pay and better conditions for those engaged, however "loud and persistent, and even successful, will not 'advance' "the profession in the sense we have defined. But improvement "in the quality and range of services rendered, and the spectacle "of constant endeavour to do better, will certainly have that "effect. If, then, one finds an organisation one of whose objects "is to advance nursing as a profession, there is no great difficulty "in interpreting this as meaning to improve the quality and "range of the services which nurses give, and so to enhance the "stature and importance of the nursing profession and the esteem "in which it is held. It may well be, of course, that in order to "improve nursing services you must attract more entrants into "the profession, which in time will mean improvements in pay "and conditions. But such improvements will be means, not "ends."

We agree with those views of the Divisional Court as expressed by Donovan J., and the rejection of the corporation's contention is, we think, supported by certain other considerations. First, it seems to us that the words "in all or any of its "branches," which appear in article II (B) (*b*), are by no means apt if the intention of the provision was to promote the interests of the profession in a trade union sense, or to increase the status of its members and the esteem in which they are held. Secondly, the whole tenor of the charter appears to us to show that the object of the college was to promote the interests of the sick in all the ways that efficient and extensive nursing can achieve. In this connection we would refer again to the fourth statement in the recital in the charter. Thirdly, there is nowhere in the charter any clear statement indicative of an intention to promote the interests of nurses as members of the nursing profession—a point to which Lord Morton attached importance in the *Royal College of Surgeons* case.[6]

[5] [1958] 1 W.L.R. 95, 106; [1958] 1 All E.R. 129.

[6] [1952] A.C. 631, 654.

It may well be, and it is indeed probable, that (to borrow the language of Donovan J. in the passage above cited) the improvement in the quality and range of the services which nurses give will benefit the nurses and their profession in the ways which he indicated. It is clear, however, from such cases as the *Institute of Civil Engineers* v. *Inland Revenue Commissioners* [7] and other cases, that this resulting benefit to the nurses is irrelevant for the purpose now in question, provided that the main object as expressed in (B) (*b*) is to promote the advance of nursing. We have no doubt that under this provision those who administer the affairs of the college can (as in fact they do) take care of the interests of the nursing profession and its members. But in the words of Greer L.J. in *Geologists' Association* v. *Inland Revenue Commissioners* [8]: "if you come to the conclusion, as "you may in many cases, that one of the ways in which the "public objects of an association can be served is by giving "special advantages to the members of the association, then "the association does not cease to be an association with a "charitable object because, incidentally, and in order to carry "out the charitable object, it is both necessary and desirable to "confer special benefits upon the members."

As we have come to the conclusion that article II (B) (*b*) had as its main object the advancement of nursing and not the advancement of the nursing profession in the ways suggested by Mr. Widgery, it follows that, in our judgment, the college are entitled to the relief from rates which they claim on the ground that their main objects are charitable. On this view it becomes unnecessary to consider the alternative submission advanced by Mr. Scarman that the main objects are otherwise concerned with the advancement of education or social welfare, and we express no opinion upon that question. In our judgment the appeal must be dismissed.

Appeal dismissed with costs.
Leave to appeal to the House of Lords granted on the terms that orders as to costs made in the Court of Appeal and the Divisional Court were not disturbed.

Solicitors: *Sharpe, Pritchard & Co.; Charles Russell & Co.*

M. M. H.

[7] [1932] 1 K.B. 149; 47 T.L.R. 466.

[8] (1928) 14 T.C. 271, 283.

[COURT OF CRIMINAL APPEAL.]

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Oct. 2, 5.

Lord Parker C.J., Ashworth and Hinchcliffe JJ.

* REGINA *v.* THOMAS.

Criminal Law—Court of Criminal Appeal—Fresh evidence—Facts coming to light after conviction—Whether receivable by court—Criminal Appeal Act, 1907 (7 *Edw.* 7, *c.* 23), *s.* 9.

Criminal Law — Evidence — Corroboration — Indecent assault on girl under sixteen—Misdirection as to matters which could constitute corroboration of girl's story.

The appellant was convicted of child stealing, abduction and indecent assault on a girl of thirteen. At nine o'clock one evening he invited the girl to go with him in his car to show him the way to a certain address which she said she knew. At five o'clock the next morning both were found asleep in the car some eight miles away. The girl alleged that the appellant had indecently assaulted her on at least two occasions. The appellant denied the allegations. The trial judge, who gave the proper warning to the jury as to the danger of convicting without corroboration of the girl's story, directed them that two matters, namely, that an empty whisky bottle was found in the car and that when found by the police the girl had her knickers in her lap, could be regarded as corroboration.

On appeal against conviction the appellant sought to call fresh evidence, some of which related to matters which had come to light since his conviction, to show that the girl's story was false and that she had admitted it to be false. He also alleged misdirection on the question of corroboration.

Held, that the two matters which the judge had directed could be regarded as corroboration could not be so regarded; accordingly he had misdirected the jury and the conviction must be quashed.

Semble that as section 9 of the Criminal Appeal Act, 1907 [1] (which expressly provides for the reception by the Court of Criminal Appeal of evidence relating to matters said to have occurred before the trial) makes no such express provision in relation to matters said to have occurred since conviction. When a convicted person desires to rely on such evidence his proper course is probably to lodge a petition with the Home Secretary so that, if thought fit, action may be taken in accordance with section 19 of the Act.

Rex v. *Robinson* [1917] 2 K.B. 108; 12 Cr.App.R. 226 not followed.

APPEAL against conviction.

The appellant, Anthony Hogarth Thomas, was charged at Dorset Assizes on January 24, 1959, on an indictment containing three counts, the first being that on November 22, 1958, in Bournemouth he unlawfully by fraud took away Beatrice Evelyn

[1] Criminal Appeal Act, 1907, s. 9: "For the purposes of this Act the "Court of Criminal Appeal may, if "they think it necessary or expedient "in the interest of justice—. . . (*c*) "if they think fit receive the evi- "dence, if tendered, of any witness ". . . who is a competent but not "compellable witness . . . and exer- "cise in relation to the proceedings "of the court any other powers which "may . . . be exercised by the Court "of Appeal on appeals in civil mat- "ters . . .: Provided that in no case "shall any sentence be increased by "reason of or in consideration of any "evidence that was not given at the "trial."

Osborne, a child under the age of 14 years, with intent to deprive her father of the possession of such child; the second, that on the same date without lawful authority or excuse he took the girl out of the possession of her father against his will, and the third, that on a day between November 21 and 24 he indecently assaulted her.

The case against the appellant was that at about 9 o'clock on Saturday night, November 22, 1958, the appellant, when driving along a road in the Wheatley Road area outside Bournemouth, came upon the girl who was walking home after carrying out an errand for her mother. The appellant was seeking to find the address of a prospective purchaser for a television set. He said that he had already been misdirected more than once. He pulled up and asked the girl if she knew where Wheatley Road was, and when she said she did, invited her to get into the car and take him there. At 5 o'clock the following morning the appellant and the girl were found by the police some eight miles away asleep in the car. The girl had her knickers in her lap and there was an empty whisky bottle in the car which smelled of drink. She stated in evidence that she had removed her knickers when relieving herself and had not put them on again. According to the girl, she had been the subject of an indecent assault on at least two occasions during the interval. She said that the car stopped more than once, and it was common ground that the battery needed charging. On one occasion assistance was obtained from a passer-by and on the second occasion both the appellant and the girl spent some hours trying to restart it. According to the appellant he eventually abandoned the attempt to drive the girl home. He had lost his way and thought it suitable to stay where they were till dawn came. The appellant denied the allegations made by the girl or that he had attempted to remove her from her home.

In his summing-up, the trial judge gave the proper warning to the jury as to the danger of convicting on the girl's story unless it was corroborated on some material particular, but later he said that the fact that the girl's knickers were on her lap when she and the appellant were found, and the presence of the whisky bottle in the car, would constitute possible corroboration of her story. The appellant was convicted on all three counts and sentenced to concurrent terms of 18 months' imprisonment.

Leave to appeal against conviction was granted by the Court of Criminal Appeal and, at the hearing of the appeal, the appellant applied for leave to call further evidence, some of which related to matters which had come to light since his conviction, in order to show that the girl's story was false and that she knew it to be false. He also appealed on the ground of misdirection by the judge on the question of corroboration. The court heard the fresh evidence de bene esse.

N. R. Blaker for the appellant.
Raymond Stock for the Crown.

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The following cases were cited in argument: *Rex* v. *Robinson* [2]; *Rex* v. *Greenberg*.[3]

Cur. adv. vult.

October 5. LORD PARKER C.J. Ashworth J. will give the judgment of the court.

ASHWORTH J. stated the facts and continued: The evidence was conflicting and the girl's own story contained manifest discrepancies. It was on any view an unusual and, in some respects, a discreditable story so far as the appellant was concerned, but from first to last he stoutly maintained that at no time had he been guilty of any indecency towards the girl nor had he intended to remove her from her home. He was convicted on all three counts and sent to prison for 18 months concurrent on each. By leave of this court he has appealed, and the appeal was heard on Friday last, when we intimated that it would be allowed and that the reasons would be given today.

The two main grounds on which the appellant relied were as follows. First, he applied for leave to call additional evidence which, if accepted, would establish (inter alia) that the evidence given by the girl at the trial was false and had been admitted by her to be false. Secondly, it was contended that the jury had wrongly been invited to consider as possible corroboration matters which could not properly be so regarded. These two grounds are quite distinct, and it is convenient to deal with them separately.

We deal first with the question of additional evidence. It became clear at an early stage of the hearing before us that part of this evidence related to matters which were said to have occurred after the appellant's conviction and sentence; such evidence could not therefore have been laid before the jury at the appellant's trial. On the other hand, the other part of the proposed evidence related to matters which were said to have occurred before the appellant's trial. So far as the latter part of the proposed evidence was concerned, no procedural difficulty arose: section 9 of the Criminal Appeal Act, 1907, expressly provides for the reception of such evidence. But in regard to evidence relating to matters which have occurred since an appellant's conviction the Act contains no express provision and, notwithstanding the decision in *Rex* v. *Robinson*,[1] we are inclined to think that, when a convicted person desires to rely upon such evidence, his proper course is to lodge a petition with the Home Secretary so that, if thought fit, action may be taken in accordance with the provisions of section 19 of the Act. In the present case we decided to hear the evidence de bene esse and to postpone any ruling as to the court's power or discretion to receive it. Having heard the evidence we were of opinion that it was not

[2] (1917) 12 Cr.App.R. 226.
[3] (1922) 17 Cr.App.R. 107.
[1] (1917) 12 Cr.App.R. 226.

of sufficient weight or reliability to be acceptable and that, in so far as it could have been laid before the jury at the appellant's trial, it would not have affected their conclusion. Accordingly, it is unnecessary to express any further opinion as to the circumstances in which this court either can or should receive evidence of events occurring after a conviction.

The second main ground relied on by the appellant related to the question of corroboration. The case was clearly one in which the jury should be warned of the danger of acting on the girl's evidence unless it were corroborated in some material particular, and the requisite warning was duly given in general terms early in the summing-up. At that stage the jury's attention was not directed to any specific matters, but at a later stage two matters were mentioned as constituting possible corroboration, namely, the bottle of whisky and the girl's knickers. We do not think it necessary to deal with either of these matters in any detail. It is sufficient to say that in our view the whisky bottle was not capable of constituting corroboration in respect of any of the three charges on which the appellant was tried and, in regard to the knickers, the girl's own explanation of the way in which she came to take them off negatived any indecency on the part of the appellant at that stage of the proceedings. It follows, therefore, that the jury were invited to regard two matters as capable of constituting corroboration which could not properly be so regarded. This court has had occasion to consider this type of problem on many occasions in the past, and the decided cases show that in such circumstances the conviction will as a rule be quashed unless the proviso to section 4 (1) of the Act is held to be applicable: see, for example, *Rex* v. *Coulthread*.[2] In the present case counsel for the Crown urged that, quite apart from the whisky bottle and the knickers, there were other matters which might have been relied on as constituting corroboration, and that we should therefore apply the proviso. We did not think it right to do so. The evidence given at the trial showed that there were several unusual features in the case and a careful study of that evidence aroused in the mind of the court serious misgivings as to the appellant's guilt.

In the result, therefore, the appeal must be allowed and the conviction quashed.

Appeal allowed.

Solicitors: *Registrar, Court of Criminal Appeal; Sharpe, Pritchard & Co. for C. P. Brutton, Dorchester.*

E. M. W.

[2] (1933) 24 Cr.App.R. 44.

[COURT OF CRIMINAL APPEAL.]

C.C.A.

1959
Oct. 19.

Lord Parker C.J., Ashworth and Edmund Davies JJ.

* PRACTICE DIRECTION (COSTS IN CRIMINAL CASES).

Criminal Law — Costs — Acquittal — Discretion — Matters upon which exercise of discretion may be based—Costs in Criminal Cases Act, 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 48), *s.* 1.

LORD PARKER C.J. The court desires to make a statement on costs in criminal cases.

The court's attention has been drawn to the difficult question as to the lines on which the discretion to award costs to an acquitted person should be exercised. This discretion, so far as courts of assize and quarter sessions are concerned, is now given by section 1 (1) of the Costs in Criminal Cases Act, 1952, under which the court "may, if the accused is acquitted, order the "payment out of local funds of the costs of the defence." The discretion is in terms completely unfettered, and there is no presumption one way or the other as to the manner of its exercise.

In a statement issued on March 24, 1952,[1] this court, while emphasising that every case should be considered on its merits, said that it was only in exceptional cases that costs should be awarded. That statement referred to a circular issued by Lord Goddard C.J., after consultation with the judges of the Queen's Bench Division, approving a Home Office circular issued in connection with section 44 of the Criminal Justice Act, 1948, which is now replaced by the section above referred to. While no attempt was there made to catalogue the exceptional cases in which costs might be awarded, such illustrations as were given were cases where the prosecution could be said to be in some way at fault. On the other hand, a suggestion has been canvassed that the mere fact of an acquittal should carry with it the expectation that the discretion would be exercised in favour of the acquitted person.

Were either of these views correct, the effect would be to impose a fetter upon the exercise of the absolute discretion conferred by the statute. As we have said, there is no presumption one way or the other as to its exercise. Each case must be considered on its own facts as a whole, and costs may and should be awarded in all cases where the court thinks it right to do so. It is impossible to catalogue all the factors which should be weighed. Clearly, however, matters such as whether the prosecution have acted unreasonably in starting or continuing proceedings, and whether the accused by his conduct has, in effect, brought the proceedings, or their continuation, upon himself, are among the matters to be taken into consideration. On the other hand,

[Reported by GROVE HULL, Esq., Barrister-at-Law.]

[1] [1952] 1 T.L.R. 1131; 36 Cr.App.R. 13.

the court desires to make it plain that they entirely dissociate themselves from the view that the judge is entitled to base his refusal to award costs on the ground that he thinks that the verdict of the jury was perverse or unduly benevolent. The mere fact that the judge disagrees with the verdict of the jury is no more a ground for refusing to award costs to the acquitted person than the mere fact of his acquittal is a ground for awarding them.

[SOMERSET ASSIZES.]

* REGINA *v.* SANSBURY.

1959
Oct. 21.
Devlin J.

Criminal Law—Costs—Acquittal—Discretion—Costs in Criminal Cases Act, 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 48), *s.* 1.

An award of costs against local funds does not necessarily involve some reflection on the conduct of the prosecution or on the propriety of its being brought.

In considering such award it would be wrong to be influenced by the bare fact without more that the accused might be guilty of an offence with which he was not charged (such as careless driving when he was charged with causing death by dangerous driving).

Practice Direction, ante, p. 1090; [1959] 3 All E.R. 471 considered.

TRIAL ON INDICTMENT.

The accused, Roger Leonard Sansbury, was charged on an indictment with causing death, on June 21, 1959, by driving a vehicle on a road in a manner dangerous to the public, contrary to section 8 of the Road Traffic Act, 1956. The charge arose out of a collision between a car, driven by the accused, and a motorcycle which was being ridden by the deceased in the opposite direction to the car, and at the trial it was sought to prove that at the time of the collision the accused was on his wrong side of the road. The prosecution, however, were unable to adduce any reliable evidence showing that the accused was in fact driving on his wrong side of the road at the time of the collision. The jury returned a verdict of Not Guilty without hearing any evidence for the defence. Application was made on behalf of the accused that the costs of his defence should be paid out of local funds.

The case is only reported on the decision of Devlin J. on the application by the defence for costs.

L. Herrick Collins for the Crown.

N. J. Skelhorn Q.C. and *F. Cyril Williams* for the accused.

[Reported by A. D. RAWLEY, Esq., Barrister-at-Law.]

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DEVLIN J. In this case I have had to consider an application by counsel for the defence that the costs of the defence should be paid out of local funds. The jury returned a verdict of Not Guilty after they had heard all the relevant evidence for the prosecution, but before they had heard any evidence for the defence. In my view, there was not sufficient evidence upon which the jury could have convicted even if they had been disposed to do so, and I indicated that that would probably be my view, but I desired in a case of this sort to be fortified by ascertaining the view of the jury; and this they gave me. The question is whether in these circumstances it would be proper to make the order for which counsel for the defence has asked.

The recent pronouncement by Lord Parker C.J. in the Court of Criminal Appeal on this subject [1] has not, I think, laid down any new law, but it has perhaps made it clear that the judge's discretion to award costs is rather wider than has hitherto been thought; and, in particular, I think it has now been made quite clear that the notion, which was very generally entertained, that an award of costs against the prosecution necessarily involved some reflection on the conduct of the prosecution or on the propriety of its being brought is quite wrong.

In the present case the prosecution was properly brought. The investigations made by the police revealed what was apparently a prima facie case. But after a thorough and careful cross-examination by counsel for the defence it became clear that there was no reliable evidence that at the time of the collision the accused was on his wrong side of the road, and counsel for the prosecution rightly conceded that without such evidence he could not ask for a conviction.

Counsel for the prosecution, in resisting the application for costs, has argued that the police would be put in an impossible position if they had to constitute themselves as arbiters or quasi-judges in deciding whether to prosecute or not. I think they would be put in an impossible position if that was really their duty, but I think it is quite wrong to think that they are placed in that position. If the order which I am being invited to make involved any censure or criticism of the police, then they might be. But, as I have said, it is not so, and I expect the police to continue to prosecute in this type of case, as in any other type of case, wherever they think it right to do so in the future just as they have done in the past; and I think it would be wrong if, in making their decision whether to prosecute or not, they were to be influenced by any speculation about how the judge at the trial might be likely to exercise his discretion on this question of costs.

I am not dealing with the facts as a reasonable police officer would see them at the time of the decision to prosecute, but as they have emerged after the trial, or so much of the trial as has been found necessary to bring about a verdict of Not Guilty. I

[1] *Practice Direction*, ante, p. 1090; [1959] 3 All E.R. 471.

am satisfied not only, of course, that the accused was not guilty of the offence with which he was charged, but that he did not in the circumstances of this case in fact give just cause for the belief that he was, however it may have appeared to the police at the beginning of the proceedings.

In those circumstances, I think that it would be an undeserved hardship if he had to pay a heavy bill of costs, and one in respect of which the Costs in Criminal Cases Act, 1952, is designed in a proper case to give relief. I do not like the phrase "costs against "the police." The order that I propose to make is that the costs of the defence, just like the costs of the police, should be paid out of local funds.

There are two other points which I should perhaps mention. First, it has not been suggested in this case that the conduct of the accused before, after or at the time of the alleged offence contributed in any way to his being placed in the dock. It has been suggested, however, that although the evidence might fall short of proving dangerous driving, it might be sufficient proof of careless driving. I say nothing at all about that. Careless driving is an offence with which the accused man can or could have been charged, and he would then have an opportunity of making his defence to it. But I think it would be wrong if I were to allow the fact, the bare fact without more, that the accused man might be guilty of an offence with which he is not charged to influence my mind, and I have not done so.

The other point is this. Counsel for the prosecution at the end of his submission rightly, I think, presented his apologies on behalf of the prosecution for some vicissitudes, as he described them, in the course of the presentation of the case. If I regarded this order as in any sense a penalty imposed on the prosecution, then, no doubt, it might be right for me to have regard to them. But I do not so regard it; and although such shortcomings of the prosecution as there were caused some inconvenience which might have been greater than turned out to be in fact, they did not in any way add to the burden of the costs which have to be borne either by the prosecution or by the defence, and I have disregarded them entirely. The order, therefore, will be as I have indicated.

Costs of defence to be paid out of local funds.

Solicitors: *Fryer, Bennett & Deal, Weston-Super-Mare; Wansbroughs, Robinson, Tayler & Taylor, Bristol.*

[RESTRICTIVE PRACTICES COURT (SCOTLAND).]

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1959 *June* 1, 2, 3, 4, 5; *July* 23.

* *In re* WHOLESALE AND RETAIL BAKERS OF SCOTLAND ASSOCIATION'S AGREEMENT.

[1958 No. 4 (S.).]

* *In re* SCOTTISH ASSOCIATION OF MASTER BAKERS' AGREEMENT.

[1958 No. 6 (S.).]

Restrictive Practices—Restriction—Whether contrary to public interest—Price restriction—Baking industry—Recommendation of price for standard loaf—Ascertainment of price from average costs—Certain items of profit not included in "baking margin"—System not automatic or subject to outside supervision—System not designed to reflect lowest practicable cost—Domination of industry by five groups of large producers—Whether price stability achieved by virtue of restrictions—Whether dangers of undue concentration of production and monopolistic control avoided—Whether quality and services maintained—Whether benefits or advantages conferred on public—Restrictive Trade Practices Act, 1956 (4 *&* 5 *Eliz.* 2, *c.* 68), *s.* 21 (1) (*b*).

The Scottish Association of Master Bakers, which had some 1,221 ordinary or master-baker members, and the Wholesale and Retail Bakers of Scotland Association, an association of large producers or "plant bakers" with 23 members, all of whom were members of the Master Bakers' Association, made recommendations to their members (admittedly restrictions within the meaning of section 6 of the Restrictive Trade Practices Act, 1956) as to the price of standard bread. The recommendations were based on information received from the Scottish Bread Costings Committee. That committee was set up in 1941 to consult with an independent accountant as to the results of cost inquiries and to agree rates of bread subsidy with the Ministry of Food, and after September, 1956, when the subsidy was abolished and the price of bread decontrolled, was requested to continue cost investigation and advise the associations as to the price of bread; at the time of the hearing the two associations were the only organisations represented on it. The committee carried out half-yearly costings calculated on "representative" samples, most of which came from the large plant bakers. The unit against which cost was measured was a 280 lb. sack of flour, the yield from which was accepted as 216 28 oz. or large loaves, ½d. per large loaf representing roughly 9s. a sack. The baking margin aimed at by the industry was 11s. 2d. a sack but the baking margin figures did not include certain increasingly important additional items of profit from wrapping and slicing, flour rebates and cash discounts, and, taking those items into account, on the averages for the six months ending November, 1958, the average profit margin at that date was 20s. 8d. When the average baking costs were ascertained by the accountant they were

† LORD CAMERON, MR. W. WALLACE and MR. W. G. CAMPBELL.

[Reported by J. R. FIDDES, Advocate, and J. F. LAMB, Barrister-at-Law.]

submitted to the committee, who also had before them a statement showing the cost per loaf of wrapping and slicing, and with that information and their own knowledge of flour rebates and cash discounts, the committee advised the association what recommendations should be issued as to the minimum retail prices of bread. Thus, since decontrol, the activities and recommendations of the committee were not subject to scrutiny or supervision by any outside body; the arrangements did not provide for a complete costing of all the operations connected with the production and sale of standard bread; the independent accountant's remit was limited to the provision of partial and incomplete figures and to offering advice, and in the result the ultimate recommendation as to the appropriate retail price was left to the unfettered discretion of the industry's representatives on the committee, who were free to disregard (and, on one occasion when he advised that the situation warranted a price reduction of ½d. a loaf, had disregarded) the advice of the accountant. The production of standard bread formed approximately 30 per cent. in relation to money turnover of bakers' produce. Demand was stable, and, since labour costs and the cost of flour were also stable, future over-all production needs and principal production costs could be forecast with reasonable accuracy. The industry was largely dominated by five groups of large producers and the number of bakers in Scotland was falling. The price of bread was reasonably stable, and the evidence was that if the price recommendations were withdrawn price competition would be unlikely to arise between the large producers.

The associations sought to justify the recommendations under paragraph (*b*) of section 21 (1) of the Act on the ground that their removal would deny to the public as purchasers and consumers of bread, inter alia, the following benefits and advantages: (1) the stabilisation of the prices of standard bread at known and established levels; (2) prices which in the long run were lower than they would be if the recommendations were withdrawn; (3) the avoidance of the dangers of undue concentration of production and the disadvantages of monopolistic control in particular districts, and (4) the maintenance and improvement of the quality of bread and the standards of service to consumers:—

Held, (1) (a) that where demand was unlikely to be subject to rapid or marked fluctuation, and the range of wage and raw material cost was unlikely to alter substantially within a reasonably foreseeable tract of time, powerful factors making for stability were always present; that it was only a considerable fluctuation in costs which could lead to an effective alteration in the price of the standard loaf; and that it had not been established on a fair balance of probabilities that greater stability of the price of standard bread at known and publicised levels was achieved by virtue of the recommendations than would be achieved if they did not exist (post, pp. 1107–1108);

(b) that, even if the evidence had warranted a finding that an appreciable measure of increased stabilisation of price was achieved by virtue of the recommendations, there was no basis upon general principle or upon the particular evidence for holding that that circumstance by itself conferred a specific and substantial benefit upon the consumer within paragraph (*b*); in that respect it was impossible to divorce the question of quality in relation to price from its stability, and stabilisation of price by itself was not a benefit or advantage.

View expressed in *In re Yarn Spinners' Agreement* (1959) L.R. 1 R.P. 118, 189; [1959] 1 W.L.R. 154; [1959] 1 All E.R. 299 reaffirmed.

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(2) (Post, pp. 1108–1113.) That it had not been proved that in general and throughout the country price levels were lower under the recommendations than they would be under conditions of freedom. The system was not designed to reflect the lowest economically practicable cost or to result in the lowest economically practicable price being paid by the customer—it was not automatic, it was operated solely by members of the industry without outside supervision or control, it was not tied to any level of low cost production, it did not cover all costs or sources of income or profit, and, further, the ascertainment of a price based on the average costs was consistent with high profits being available to low cost producers with no means whereby any benefit of those profits or of the probable higher efficiency of those producers could be passed on to the consumer in lower prices—and even if it could reflect the lowest economically practicable price, the system had not in fact resulted in customers paying that price for their loaves.

There was no basis for the general assumption that the lifting of price restrictions from an industry in which there was a large measure of group domination would not induce greater flexibility of price. The more natural inference from the facts was that if the restrictions were removed extended opportunity for competition in price would sooner or later be embraced; it was to be presumed that freedom from the restrictions struck at by the Act was in the public interest, and freedom from such restrictions necessarily implied freedom to compete in price as well as in any other matters, and upon that view the associations had failed to overcome the presumption against them.

(3) That a system of price fixing and control operated by members of an industry in which the preponderance of power and production was concentrated in the hands of a few large group producers did not necessarily or naturally operate to reduce risk of undue concentration; that the process of concentration which was going on would continue unabated if the recommendations were removed and its rate of progress would not be altered; and that, therefore, without denying that "monopolistic control" had its dangers for consumer interest, and without considering the point at which concentration of production became "undue," it had not been shown that continuance of the recommendations would lessen the dangers of undue concentration of production, whatever they might be, or the disadvantage of monopolistic control in particular districts. A system which made for lower prices of standard bread would be better in both the immediate and the ultimate interest of the consumer (provided that quality and service did not suffer), and the small high cost producer would then tend to find his remedy by way of survival by developing the other sides of his business, and by the production of "hand-made" breads, thus bringing into play the advantage which his craft-skill might offer (post, pp. 1113–1115).

(4) That there was no reason why freedom from restriction in price should, in general, lead to reduction in the quality of the product and that, on the evidence, and even if it were to lead to price competition, the associations had not established that any diminution in quality or service would be likely to result from removal of the recommendations (post, pp. 1115–1116).

In re Yarn Spinners' Agreement (supra) followed.

The associations, therefore, had failed to establish their case under paragraph (*b*), and the recommendations as to the prices of standard bread must be declared contrary to the public interest.

TWO REFERENCES.

On February 10, 1958, the Registrar of Restrictive Trading

Agreements, pursuant to section 20 (2) (*a*) of the Restrictive Trade Practices Act, 1956, by two notices of reference referred to the court the agreement made between the members of the Wholesale and Retail Bakers of Scotland Association and the agreement made between the members of the Scottish Association of Master Bakers, numbered 252 and 981 respectively on the register of agreements. By representation orders each association was made sole respondent to the respective proceedings on behalf of all its members.

The two references were heard together; the statement of case and the answer in respect of each agreement were in similar terms, and the following statement of facts taken from the opinion of the court contains, inter alia, the facts set out in the opening paragraphs of each record:

The respondents in this case are the Scottish Association of Master Bakers and the Wholesale and Retail Bakers of Scotland Association. Both these are trade associations within the meaning of section 6 (8) of the Restrictive Trade Practices Act, 1956. The earlier association (the Master Bakers) was founded in 1891 with objects, inter alia, "to promote and protect the interest of "the trade, to further technical education, to watch over legisla-"tive enactments affecting the trade, to further social intercourse "among the members, to support a benevolent fund, and gener-"ally to maintain the status of the trade." The Wholesale and Retail Bakers of Scotland Association was formed in April, 1951,[1] with the declared object "to represent, promote and protect the "trading interests of its members engaged in the baking of bread "and/or cake and flour confectionery in Scotland and to undertake "any act which may be considered incidental or necessary to the "carrying out of this object."

As regards the earlier association, the Scottish Association of Master Bakers, under article 16 of its constitution and rules it is provided that "all decisions come to or recommendations made "shall be duly recorded by the secretary. No decision shall be "binding on a member provided notice of dissent is given at the "meeting at which the decision was reached or within seven days "of receipt of intimation of the decision from the secretary. No "member shall act contrary to any decision or recommendation "with which he has already complied until seven days after giving "notice in writing to the secretary of such intention." There are three clases of members in the Master Bakers' Association: first, ordinary members, comprising (a) persons or firms who are master bakers; (b) directors of limited companies engaged in the baking trade; (c) managers of bakeries; (d) sons of master bakers engaged in the trade, and (e) retired master bakers; secondly, associate members, being persons having a business connection with the trade; and, thirdly, honorary members being persons who have

[1] In succession to the Glasgow and West of Scotland Master Bakers' Association founded in 1932 [statement of case, para. 2].

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rendered special services to the association or trade. Ordinary members pay a larger subscription than associate members and, in addition, an oven levy based upon the number and capacity of their ovens. As at February, 1958, the association had 1,221 ordinary members and some 600 associate and honorary members. Only ordinary members are entitled to vote at meetings and to receive recommendations on prices.

The office-bearers and the elected members of the executive committee of the association, which is responsible for the direction of its affairs, are elected at the annual general meeting. The association is also divided into 22 local divisions covering the whole of Scotland. Local divisions appoint divisional office-bearers and executive committees and are generally responsible for local affairs. Divisional chairmen are members ex officio of the association's executive committee. The Master Bakers' Association is substantially representative of all large and small private traders in the industry, but since registration under the Act a number of co-operative societies who were members of the Master Bakers' Association have withdrawn from membership. The Wholesale and Retail Bakers of Scotland Association was formed to promote and protect the interest of the large producers or "plant bakers." This body has a total of 23 members, all of whom are also members of the Master Bakers' Association.

The baking industry is made up of four distinct classes of bakers, viz. (1) the family baker; (2) the large retail baker; (3) the wholesale baker, and (4) the co-operative societies. The family baker generally has his bakehouse at the rear of his premises and a retail shop in front, and the variety of his products is as a rule limited to those which can be hand-produced economically. On occasion, he may have a few other retail shops near to his bakehouse; he may also have a limited delivery by van. The large retail baker has a chain of retail shops scattered over a wide area and served from a central bakehouse. In his case he usually operates automatic bread-making plants similar to the wholesaler. He also sells by van over a wide area. The wholesale baker has a central bakery, usually in a large city or town, and sells by vans to retailers such as grocers and dairymen. Sectors of his area of supply are allocated to van-salesmen, each of whom may have from 50 to 100 retail customers in his sector. In addition, bakery goods are dispatched by rail to remote places throughout Scotland. The co-operative societies (who obtain a large part of their bakery goods from United Co-operative Baking Society) sell to their members either over the shop counter or from vans. A few societies sell to the private retailer on a wholesale basis.

On the removal of bread subsidy in September, 1956, there were approximately 600 bakery businesses in Scotland making bread, and of these 120 were converting more than 25 sacks of flour into bread per week. A sack of flour weighs 280 lb. and when converted into bread gives an approximate yield of 216 1¾ lb. loaves or 192 2lb. loaves.

The bakers' produce may be generally classified in the following groups: first, "Standard Bread"; second, "Bread Products," including milk loaves, malt loaves, proprietary and other special loaves, Vienna bread and rolls and morning rolls; third, "Flour "Confectionery," including teabread, iced teabread, smalls, biscuits, butter biscuits, cakes, fancy cakes, fruit loaves and bun loaves; and, fourth, "Bakery Meat Products," including pies, bridies and sausage rolls. The rough proportion of the total production in Scotland in relation to money turnover of these four groups is approximately, standard bread 30 per cent., bread products 7 per cent., flour confectionery 60 per cent., bakery meat products 3 per cent.; so that the provision of standard bread roughly represents rather less than one-third of the total bakery production in Scotland. "Standard Bread" means all batch or pan loaves of 14 oz. weight or multiples thereof, baked, by members of the respondent associations, from brown or white flour or blends thereof, whether or not subsequently wrapped or sliced, other than Vienna bread or fancy or proprietary or specially enriched bread.

In Scotland there are two types of standard bread, the square or batch loaf and the pan loaf. The square or batch loaf, which is the traditional loaf of Scotland, has soft crumb all round it and the pieces of dough are all baked in one batch. The pan loaf, on the other hand, is baked in a tin and is comparable with the English tin loaf. The batch loaf is cheaper to produce than the pan loaf (which is a slightly enriched loaf and, accordingly, has a rather more costly ingredient content). According to figures supplied by the Ministry of Agriculture, Fisheries and Food in 1956, approximately 62·56 per cent. of standard bread sold in Scotland was batch bread and 37·44 per cent. was pan bread.

The statutory weight of bread is governed by section 6 of the Sale of Food (Weights and Measures) Act, 1926. This section has been suspended by emergency legislation, the current statutory order being S.I. 1953, No. 1283, as amended by S.I. 1956, No. 1181. Under article 3 of this order loaves in excess of 10 oz. in weight must have a net weight of 14 oz., or multiples of 14 oz. Standard bread is usually sold in weights of 28 oz. or 14 oz., of which the 28 oz. loaf is the more popular.

The Master Bakers' Association, following practices well established at the date of its formation, made recommendations to its members as to the price of bread, and in later years, particularly since the price of flour confectionery was controlled by the Government during the war, has also made recommendations as to prices of other confectionery goods. Although the respondents' constitutions contain no powers for enforcing observation of their recommendations, no question arises as to whether these fall within the scope of the statute, as it was conceded that they are covered by the terms of section 6 (7) of the Act.

Prior to February 10, 1958, the local divisions of the Master

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Bakers' Association were in use to issue recommendations, differing in each district, as to prices of a variety of articles other than standard bread, including, inter alia, morning rolls and various items of flour confectionery and bakery meat products. These additional recommendations contained no specific requirements as to weight, size or contents, and were not based on any costing system or analysis of costing figures. They were withdrawn by the respondents as at February 10, 1958, and therefore the only restrictions which are in issue in the present proceedings are those which arise out of the current recommendations in respect of the prices of standard bread and the wholesale discounts relating thereto.[2]

The activities of the Master Bakers' Association are not limited to making recommendation of minimum prices of bread or other bakery products. These have represented only a small part of the association's activities. It takes part in the negotiation of wages and conditions of employment in the industry with the Bakers' Union and has helped to foster the extremely good relations which are said to exist in the industry. In addition, it assists members through its negotiation with various government departments charged with duties under such statutes as the Factories Acts, the Shops Act, Wages Councils Acts, Food Acts and other statutes which directly affect the interests of the trade. Over and above these services the Master Bakers' Association provides advisory services through which any member can obtain expert advice on any practical or technical problem. It organises practical and technical demonstrations and discussions, by which means trade information and techniques are disclosed and exchanged among members. It makes itself responsible for the secretarial and administrative work of the National Bakery Education Committee, which deals with the training of apprentices and itself arranges the provision of scholarships, the organisation of competition and the general promotion of technical training. Both the association and many of its individual members give active

[2] The registrar alleged the following restrictions in respect of the agreement between the members of the Wholesale and Retail Bakers of Scotland Association: (a) Not to offer or supply standard bread to consumers except at the retail price recommended by the association as appropriate to the standard bread offered or supplied and to the area in which such bread is offered or supplied; (b) not to offer or supply standard bread to retailers except at the wholesale price recommended by the association as appropriate to the standard bread offered or supplied and to the area in which such bread is offered or supplied; (c) not, having complied with a recommendation made by the association in respect of the prices to be charged for standard bread, to offer or supply such bread at prices other than those recommended until seven days after giving notice to the secretary. And in respect of the agreement between the members of the Scottish Association of Master Bakers: (a) Not to offer or supply standard bread to consumers except at the retail price recommended by the association as appropriate to the standard bread offered or supplied and to the area in which such bread is offered or supplied; (b) not to offer or supply standard bread to retailers except at the wholesale price recommended by the association as appropriate to the standard bread offered or supplied and to the area in which such bread is offered or supplied.

support to the British Baking Industries' Research Association, a body which circulates a wide variety of technical and scientific information from this country and abroad. These activities no doubt contribute, as is claimed, to the efficiency of the baking industry, and could, in appropriate conditions, contribute a consequential benefit to the consumer.

At the same time the number of bakers in Scotland has been progressively falling during the past eight years and the membership of the association has shown a similar decline since 1950. The small baker has had to compete with the large, highly mechanised producers: this has tended to show itself in smaller concerns going out of business or ceasing to produce bread, or being absorbed by the larger enterprises. This has affected particularly the family bakers, and today only about half this association's membership is making bread, while the great majority of these bread-makers are producing bread in a very small way. So far as is known, no new businesses baking bread in any appreciable quantity have started up since the war.

It was established in evidence that from very early days provision has been made for control of the price and weight of bread as being an essential commodity. Much of this control was exercised by local authorities at what were called Bread Assizes, which ceased to operate early in the nineteenth century. Later in that century various local trade associations made, from time to time, recommendations as to uniform prices of bread. Upon the outbreak of war in 1939, food rationing and control of food prices were introduced, and the prices of standard war-time flours and "national" bread were controlled, with penalties against prices in excess of the controlled price. In 1941 a system of bread subsidy was introduced which remained in operation until September 29, 1956, and during that time maximum prices were prescribed for "national" bread, which prices were subsidised in order to give a permitted margin of profit. The subsidy was paid by the Ministry of Food, and, in order to determine the rate of subsidy, it was necessary for the Government to obtain from a representative cross-section of the industry in Scotland particulars of the cost of production, distribution and sale of bread, and a uniform system of costings was instituted, representative samples of revenue and costs being provided by a sample of members of the industry. The particulars of costs and revenue so obtained were furnished at regular intervals to the Ministry. In 1940 the association, along with representatives of the co-operative societies and of what is now the association known as the Wholesale and Retail Bakers of Scotland, had set up a committee of the industry known as the Scottish Bread Costings Committee, which was to ascertain the costs of bread production and distribution, to consult with an independent accountant as to the results of costing inquiries, to agree the subsidy rates with the Ministry, to assist in obtaining the requisite cost returns from the individual

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bakers and to advise the constituent associations on matters relating to costings and subsidy.

James Dowling, C.A., of Thomson McLintock & Co., was appointed by the committee as the independent accountant to receive the cost returns from the bakers, collate them and bring out an average cost for the whole Scottish bread industry. The Ministry of Food had a costings division and a firm of accountants acting on behalf of that division. These investigated the figures prepared by the independent accountant and, after agreement between the sides had been achieved, the rate of subsidy was determined.

When the bread subsidy was abolished on September 29, 1956, the trade representatives, i.e., representatives of the Co-operative Union (who later withdrew) and of the respondents, requested the Scottish Bread Costings Committee and its independent accountant to continue with the work of cost investigation and ascertainment and to advise them as to the price of bread from that date. Flour had been decontrolled on August 29, 1953. The figures costed were those in respect of "national" bread, that being a loaf, batch or pan, of a quality and content which was regulated within prescribed limits. The so-called white loaf, milk bread and proprietary breads were excluded from the costings. Further, no figures were included (a) for the cost and proceeds of wrapping and slicing, (b) for flour rebates receivable under the Millers' Rebate Scheme operative from December 4, 1955, as regards Scotland, or (c) for cash discounts. Costings for subsidy purposes were carried out quarterly until the last four years, when they were on a half-yearly basis, a practice which has been followed since decontrol. Until 1953 the final costings results were arrived at by calculation of an average of the results of each business in the sample. From that date till the discontinuance of subsidy the sample of cases costed was considerably increased by the addition of a number of businesses mainly drawn from the more outlying districts and generally of small or medium size, and the method of averaging was altered by making a more detailed compartmenting of the results of bakers of differing weekly sackages, and these results were "weighted" to render the ultimate figure produced a more accurate reflection of typical baking costs. These figures (calculated separately for batch and for pan bread) were then combined, weighted in an ascertained proportion according to the proportion of the type of bread produced (batch 60 per cent., pan 40 per cent.), and the resultant weighted average was the figure on which, with the inclusion of the permitted profit margin, the subsidy was calculated.

When the subsidy was discontinued and the selling prices of bread freed from control, the Bread Costings Committee, in response to the request of the respondents already referred to, continued carrying out half-yearly costings with the object of having information available for the purpose of recommendation of minimum prices. As "national" bread had then ceased to

exist as such, the new costings were related to all bread except milk bread and proprietary brands.

The form of costings after decontrol remained the same except that the number of cases costed was reduced and the costings included figures for advertising, these having been disallowed in costings for subsidy. The results of batch and pan bread costings were not amalgamated as had formerly been the case, the new costings being required for separate consideration of the prices of batch and pan bread, and, owing to lack of information and to the fact that the sample on which costings were calculated was considerably reduced in number, the results were not weighted over sackage groups in the industry as had been the case for the latter years of subsidy. The number of samples costed during the period of subsidy had dwindled down to 20 in 1953, but it was claimed that inquiries showed that this number was sufficient at that time to enable a representative picture of the levels of costs and proceeds in the Scottish industry to be obtained. When bread was decontrolled and costings were continued, the number participating in the samples taken for costings purposes did not increase and most of these came from large plant bakers, mainly in the central area of Scotland, whose operations accounted for approximately half the total sackage of flour baked into bread in Scotland. The number of cases costed in the five half-yearly inquiries carried out since September 29, 1956 (including that of March, 1959) have been respectively 17, 17, 14, 14 and 15.

It is not necessary to analyse in detail the method of costing, but the general pattern may be described. The unit against which cost is measured is the sack of flour. The generally accepted yield from a sack of flour is 216 large 28 oz. loaves, and for approximate calculation in terms of cost or process, one halfpenny per large loaf represents roughly 9s. per sack. The figures upon which costs are ascertained are divided into the following headings: I. Proceeds of sale; II. (i) Ingredients; (ii) Baking wages; (iii) Baking expenses; (iv) Shop expenses; (v) Delivery expenses; (vi) Wholesale discount and contract allowances; (vii) Losses on stale and damaged bread; (viii) Loss on setters (loaves, frequently distorted, bordering the outside of a hatch); (ix) General expenses; (x) Flour. The completion of the costing return is carried out by the baker himself and he is responsible for the allocation of wages figures and ingredient costs as between bread and other goods and services.

In the proceeds of sale the baker sets out the actual proceeds of sale of his standard bread, separating batch and pan and subdividing these as between the large and small loaves. When the price of bread was controlled and subsidised the margin of profit permitted was subject of discussion with, and determination by, the government. The figure which, it was maintained by the industry during the latter part of the period of control, should be allowed as baking margin or profit margin in terms of the costings system was 11s. 2d. per sack. This figure was not accepted by

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the Ministry which at that time was only prepared to concede for costing purposes a profit margin of 5s. per sack as compared with the estimated pre-war figure of 4s. per sack. In 1954 the permitted profit margin was increased to 7s. per sack with an additional subsidy of 4s. on the first 25 sacks of a baker's weekly national bread production, which had been granted in 1953. Although this additional subsidy was of little consequence to the large baker, it was of considerable benefit to the small producer. On decontrol the industry decided to aim at a baking margin averaged over batch and pan bread of 11s. 2d. per sack, and this has remained the target average of "baking margin" since decontrol. The baking margin figures, however, did not, and do not, include certain increasingly important additional items of profit from wrapping and slicing, flour rebates and cash discounts. Taking these into account the independent accountant of the Costings Committee stated that on the averages for the six months ended in November, 1958, the average profit margin at that date contained the following items:

	s.	d.
Baking margin	13	2
Wrapping and slicing	2	4
Flour rebate	3	6
Cash discount	1	8
Total	20	8

He agreed that individual producers might have been and were making profit margins at that time much greater per sack than the above margin; in one particular selected example of one firm the corresponding figures were:

	s.	d.
Baking margin	19	6
Wrapping and slicing	5	8
Flour rebate	4	4
Cash discount	1	8
Total	31	2

He stated that, in his view, at that time 15s. per sack was a reasonable average overall profit and agreed, broadly, that a more than adequate return had been obtained since May, 1958.

When the figures of average baking costs have been ascertained, they are submitted to the Costings Committee. The committee also has before it a statement showing the average cost per loaf of wrapping and slicing on the same four-week period and is therefore apprised of the wrapping and slicing profit per sack earned by the concerns in the sample. With this information before them, along with their own broad knowledge of flour rebates and cash discounts, the committee advise the respondents what recommendations as to minimum retail prices of standard bread and wholesale discounts should be issued to the industry and the public.

This is not an end of the matter, because the retail price is not uniform throughout the country, certain differences being made

in respect of different areas. These differences are always by way of supplement to the recommendations as to minimum price issued by the respondents after receiving the advice of the Costings Committee. For the purpose of determining the price of standard bread Scotland is divided into three parts, namely, area 1, mainland south of the Caledonian Canal; area 2, mainland north and west of the Caledonian Canal; area 3, Inner and Outer Hebrides, Orkney and Shetland. It appears that these areas were originally determined by the Ministry of Food and have been accepted by the respondents for the purposes of their recommendations as to the minimum retail price for standard bread. In area 1 the recommended minimum retail price is (with certain geographical exceptions) the basic price; in the other areas it is subject to certain recommended increases, known as differentials. The price differentials (which operate and vary as between both areas and types of standard bread) are determined by the respondents' 22 Divisional Committees. These differentials vary from ½d. to 2d. per large standard loaf, equivalent to from 9s. to 36s. per sack of flour respectively. The bases upon which these differentials are decided are not found in analysed costs or calculated figures, but are determined, in the light of their own personal knowledge of local circumstances, by the appropriate committees, which take into account such matters as flour carriage charges in excess of the Glasgow–Edinburgh transport charge, delivery charges in remote areas, fuel costs and special wage costs. This is, in outline, the machinery which is available to and used by the industry for the determination of the recommended minimum retail prices of standard bread.

The associations sought to justify their price recommendations under paragraph (*b*) of section 21 (1) of the Restrictive Trade Practices Act, 1956.[3]

I. M. Robertson Q.C. and *D. W. R. Brand*, for the associations, cited the following cases in argument: *In re Blanket Manufacturers' Agreement*[4] and *In re Yarn Spinners' Agreement.*[5]

[3] Restrictive Trade Practices Act, 1956, s. 21: "(1) For the purposes of "any proceedings before the Court ". . . a restriction accepted in pur- "suance of any agreement shall be "deemed to be contrary to the public "interest unless the Court is satisfied "of any one or more of the following "circumstances . . . (*b*) that the "removal of the restriction would "deny to the public as purchasers, "consumers or users of any goods "other specific and substantial bene- "fits or advantages enjoyed or likely "to be enjoyed by them as such, "whether by virtue of the restriction "itself or of any arrangements or "operations resulting therefrom . . . "and is further satisfied . . . that "the restriction is not unreasonable "having regard to the balance be- "tween those circumstances and "any detriment to the public or to "persons not parties to the agreement "(being purchasers, consumers, or "users of goods produced or sold by "such parties, or persons engaged . . . "in the trade or business of "selling such goods . . .) resulting "or likely to result from the operation "of the restriction."

[4] (1959) L.R. 1 R.P. 208; [1959] 1 W.L.R. 442; [1959] 2 All E.R. 1.

[5] (1959) L.R. 1 R.P. 118; [1959] 1 W.L.R. 154; [1959] 1 All E.R. 299.

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J. O. M. Hunter Q.C. and *J. R. Fiddes*, for the registrar, were not called upon.

Cur. adv. vult.

July 23. LORD CAMERON read the following opinion of the court, which, having stated the facts as set out above, continued: The industry has certain characteristics arising out of its nature and structure which, we think, are of importance in considering the issues raised in this case. Bread is not only an essential commodity but it is also one for which the demand, in particular for standard bread, is comparatively stable, and, both in totality and in particular areas, can be forecast with reasonable accuracy for a reasonably foreseeable future. The same factor of stability tends to be true of labour costs as well as of the cost of the principal ingredient—flour. This means that future overall production needs can be forecast with substantial accuracy and so can the principal production costs. It is a peculiarity of the industry not only that it is largely dominated by five groups of large producers, but that the sample figures, upon which its existing calculations are based, are drawn in large measure from the operations of these groups, whose position, certainly as regards standard bread, is therefore one of virtual domination. Further, experience over the past 20 years has shown an increasing tendency for the small producer to disappear from the industry, either from leaving it altogether or from amalgamation with or absorption by one of the large groups, and there has been an absence of recruitment.

Since decontrol in 1956 the activities and recommendations of the Costings Committee have no longer been subject to the scrutiny or supervision of any outside body. Secondly, apart from any question of adequacy of sample, the arrangements in force do not provide for a complete costing of all the operations connected with the production and sale of the commodity. Thirdly, although there is an independent accountant appointed, his remit is limited to the provision of partial and incomplete figures and to offering advice. In the result, therefore, the ultimate recommendation as to the appropriate retail price is left to the unfettered discretion of the industry's own representatives, who are free to disregard and have in fact, as the evidence in this case shows, on occasion disregarded the independent accountant's advice as to the recommendation to be made.

Finally, it has to be kept in mind in considering the restrictions under review that the baking of standard bread is only one activity of the baking industry, and that the profits arising therefrom represent only a part, and not necessarily the major part, of the profits earned in that industry.

We turn now to consider the contentions and arguments of the respondents, but before doing so we should like to express our appreciation of the extremely frank and full statements made on behalf of the respondents by their officials and the independent accountant, whose testimony was of the greatest value, and our

acceptance of the sincerity of the opinions expressed by the trade witnesses called on the respondents' behalf as to the future trends in the industry if the present restrictions are removed.

The respondents maintain that the restrictions in question in the present case, being recommendations as to the minimum retail prices of standard bread and the wholesale discounts to be allowed thereon, are lawful in that they come within the protection afforded by section 21 of the Act. They claim, for various reasons set out in their pleadings, that section 21 (1) (*b*) applies to the recommendations as to minimum prices, and 21 (1) (*g*) to the recommendations as to wholesale discounts. As the issue on wholesale discounts only becomes live if the respondents succeed in their claims under section 21 (1) (*b*), it will be both logical and convenient to consider these first and in the order in which they are set out in the respondents' pleadings, always keeping in view that the burden of proof here lies upon the respondents.

The first question that arises is whether in fact prices of standard bread are stabilised at known and publicised levels. There is no doubt, of course, that variations in the price of bread are publicly intimated under the present system of recommendations, and we think the evidence shows that there is reasonable stability in the price of bread. But we are not satisfied that this stabilisation is achieved by virtue of the restriction, which is the essential point for the respondents to prove. On the contrary, it appears to us from the evidence of the respondents' own trade witnesses that in the absence of restriction the price of standard bread would be in very large measure stabilised because of the existence of the important stabilising factors in the structure and nature of the industry itself, to which we have already drawn attention. Not the least important of these is the fact that, given the statutory requirement as to weight of the standard loaf, it has been shown that a variation of one halfpenny in the price of a large standard loaf is equivalent to a variation in the return to the baker of 9s. per sack of flour baked. Therefore it is only considerable fluctuations in cost which can lead to effective alteration in the price of the standard loaf. Here we would point out that this circumstance would not prevent reduction of less than ½d. per loaf when the customer took more than one loaf at a time, e.g., ¼d. (in the case of two loaves) or ⅛d. (for four loaves) per large loaf. In these circumstances and where, as here, demand for a commodity is unlikely to be subject to rapid or marked fluctuation, and the range of wage and raw material costs is not likely to alter substantially within a reasonably foreseeable tract of future time, powerful factors making for stability of price are always present. Further, we think it is plain from the evidence of the respondents' trade witnesses that knowledge of the price of bread and of any material change in it is likely to be and remain widespread without the aid of such

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publicity as is got by the publication of the associations' recommended prices. Again, the witnesses for the respondents were practically unanimous that if the recommendations were withdrawn the price of standard bread would remain constant in the short run and that thereafter it would tend to follow the impact of the important economic factors to which we have already referred, and which themselves admittedly tend to stability of price and serve to prevent any but really substantial movements in cost being reflected in fluctuation of price. In addition, we were pressed with evidence to the effect that among the five dominating groups of producers price-cutting warfare was unlikely to break out even under conditions of free competition in price. We will have occasion later to refer to this evidence and the argument based upon it in considering the second of the grounds on which the respondents claim to be within section 21 (1) (*b*). These are additional circumstances that, in our opinion, would operate to promote stabilisation and inhibit minor or frequent fluctuations in the price of bread. It was, however, suggested in evidence that increases in the price of bread would more rapidly follow under conditions of freedom than under the present system. This hypothesis, however, has to be considered in the light of the factors we have already mentioned as making for a natural stability of price as well as in the light of the provision which already exists for calling emergency meetings of the Costings Committee. On this latter point it can be recorded that on the occasion of the last increase in price on December 10, 1956, the whole issue was determined in a few days, the price then under review having been fixed and published only as recently as September 30 of that year. Moreover, as the practice of the Costings Committee is to have flour and other costs under continuous review so as to be able to report to the association whenever a change in bread prices is required, it cannot be doubted that, where the desire exists within the industry for a change in price, machinery has been provided for its rapid translation into action. We are not satisfied that if this restriction were removed, there would be any substantial lessening of the time-lag between the occurrence of any increase in costs sufficiently significant to warrant an increase in price of standard bread, and concerted action to bring about an increase in price. We are not satisfied that the respondents have established on a fair balance of probabilities that greater stability of price of standard bread at known and publicised levels is achieved by virtue of the recommendations than would be achieved if the recommendations did not exist. In any event, we are not satisfied that the respondents have shown that the difference, if any, would be other than negligible.

But even if stabilisation were achieved by virtue of the recommendations, the critical issue still remains whether, in that circumstance, there is an advantage or benefit to the consuming public which is at once specific and substantial. No doubt it can be accepted as a general rule that price control tends to make

for price stability, but the Act presumes that recommendations such as those in the present case are contrary to the public interest until the presumption is overcome in one or other of the limited exempting categories prescribed by the statute. Further, in considering whether to promote stabilisation as claimed by the respondents is to confer a specific and substantial benefit or advantage on the consuming public it is, in our view, impossible to divorce the question of quality in relation to price from its stability. It is not stabilisation of price by itself alone which is a benefit or advantage; it can only be stabilisation at the right level; it is difficult to envisage circumstances in which stabilisation at an excessive price level could be held to confer benefit on the consumer. We reaffirm the view already expressed by this court in *In re Yarn Spinners' Agreement* [1] that, as a general rule, price stabilisation as an alternative to a free market is not a benefit to the consuming public. Stabilisation does not appear to us to be necessarily a virtue. Indeed, it may prevent or retard the introduction of progressive methods in industry and thus operate positively against the interest of the consumer. Even if it were found (and we do not think that the evidence led would warrant such a finding) that an appreciable measure of increased stabilisation of prices at known and publicised levels was achieved by virtue of these recommendations, we can find no basis, either in general principle or upon the particular evidence in this case, for holding that this circumstance by itself confers a specific and substantial benefit or advantage on the consumer. But quite apart from these considerations we find in fact that it is not proved that the price of standard bread has been stabilised by virtue of the recommendations under review. Thus the essential basis on which the respondents' argument is founded has not been established, and for all these reasons we reject the first of the respondents' contentions in support of their claim under section 21 (1) (*b*). In so doing we have not ignored the historical circumstances to which the respondents referred or on which they appeared to some extent to rely in this part of their case. We do not doubt that bread is an essential commodity, nor could it be denied that there is a long history of control over its price, but for the most part it would appear that that control was exercised by outside authorities and was not directed from within the industry itself as under the present system. In any case we do not think that an appeal to history, without analysis and comparison of the conditions in which the historical system operated, is of any real help in deciding the issue before us today, which has to be determined in terms of an Act of Parliament of 1956.

The next ground on which the respondents rely appears to raise the most substantial issue in the case and the most critical. As pleaded, this claim was very wide indeed. It was said that "Consumers of bread are enabled to buy standard bread of high

[1] (1959) L.R. 1 R.P. 118, 189; [1959] 1 W.L.R. 154; [1959] 1 All E.R. 299.

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"quality at the lowest prices which are economically practicable "from time to time because of the nature of the costings system "and the fact that the margin of profit is small. The operation "of the system communicates the benefit of savings in cost to "the consumer at least as effectively as would be the case in "market situations which might emerge if bakers fixed their own "prices. Under the costings system falls in cost are automatic-"ally passed on to the public." Mr. Robertson conceded that this contention went too far and that on the evidence he could not support it. This concession, which on the evidence Mr. Robertson could scarcely have withheld, cuts deep into the respondents' case. Mr. Robertson's submission was much more limited and more modest, as he took his stand on the proposition that if the restrictions are removed, the public in general throughout the whole country will be deprived in the long run of prices as low as they would be if the system of restriction is retained.

Mr. Robertson further argued that this issue should be considered as at February, 1958, the date of the reference in these cases, at which date the lowest profit margin for the whole period since decontrol was brought out according to the independent accountant's figures. We do not agree with this. The facts of the case must be looked at as a whole and not merely the situation existing at a particular point of time. In view of the independent accountant's evidence that he had advised the Costings Committee at any rate in light of the November, 1958, figures that the profit margin achieved on the existing price according to his calculation was more than adequate—and there was no contrary evidence—we think it would have been impossible to support the contention as set out in the respondents' pleadings. But we do not think that the evidence as to the method of price ascertainment, or its operation in practice, warrants the respondents' contention in the more moderate form submitted by Mr. Robertson. The system of costing adopted in the industry is based on average figures of baking costs taken from what is claimed to be a reasonably representative sample. But as we have already pointed out, the figures on which the average "baking margin" is calculated do not contain the whole income of the bread producer. Additional allowances have to be made for profits on wrapping and slicing, flour rebates and cash discounts, none of which is included in the baking margin figures. It is true that the Costings Committee are furnished with certain figures by their independent accountant to represent average profits on wrapping and slicing, but they have no firm or calculated figures on the other two matters, which are regarded as being within the personal knowledge of the individual member of the Costings Committee and, as we have already shown earlier, these figures can be very substantial. Again, as the system is controlled by the industry itself, its operation cannot be immediate or automatic. Further, when the recommended minimum price comes to be considered by those areas and divisions in which

differentials in the price are permitted, the appropriate committees apply these differentials at their discretion and not upon the advice of the independent accountant or upon any costings figures, actual or calculated, supplied by him. The position, therefore, may be summarised thus: the system of price fixing is not automatic in operation; it is operated solely by members of the industry without outside supervision or control; it is not tied to any level of low cost production; it does not accurately cover all costs or sources of income or profit; it provides no accurate or factual basis for the ascertainment of appropriate geographic differentials, and there is no evidence to show that the areas for the operation of the differentials are drawn so as to operate fairly in the interests of consumers in the particular areas. Further, the ascertainment of a price based on averaged costs has been shown in the evidence in this case to be consistent with high profits being available to the low cost producers, with no means existing whereby they can pass any part of the benefit of these profits, or their own probable higher efficiency, to the consumer in the shape of lower prices for standard loaves. Not unnaturally it is among the low cost producers that the businesses controlled by the five dominating groups are to be found. Thus the system is not designed to reflect the lowest economically practicable cost, or to result in the lowest economically practicable price being paid by the consumer, and if it does not do so in the short run, we do not see why it should do so in the long. But even on the assumption (which we do not accept) that in use this system could reflect the lowest economically practicable price, we think it is plain from the evidence that it has not in fact resulted in customers paying that price for their standard loaves. As we have already pointed out, at any rate in light of the November, 1958, figures, the independent accountant advised the Costings Committee that the situation then disclosed was such as to warrant a price reduction of one halfpenny. This advice was not taken and, while the reason given for not taking action in light of the figures of May, 1958, might be in some measure supportable, i.e., that earlier fluctuation in cost had caused some bakers losses which they were reasonably entitled to make up, no such reason was advanced to explain inaction in November. The explanation offered, that it was not desired to make a change in view of these proceedings, did not strike us as sufficient or even relevant. The inevitable consequence would seem to be that the consumer in Scotland has had for many months to pay sums, substantial in the aggregate, in excess of what would be sufficient to provide the baker working on average costs with more than an adequate margin of profit. That the manner of operation of the system in this respect has caused uneasiness in the industry was demonstrated by the evidence of Mr. Webb, representing one of the dominant groups, and by that of Professor Campbell of St. Andrews University, an economic expert called for the respondents. Professor Campbell pleaded that the system had not been

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in operation for very long since removal of subsidy and control, and that a reduction of price may confidently be expected; but there has been, in our opinion, sufficient experience to enable a fair inference to be drawn as to its operation in the hands of the industry. Professor Campbell also stated very frankly and fairly that the system could be improved by the introduction of an element of external control or supervision, a view which was supported by Mr. Webb. Against this background of fact can it be said that the respondents succeed in proving that in general and throughout the country the price levels will be lower under restriction than they would be under freedom? Mr. Robertson could not suggest that a fall in costs would be more rapidly reflected in a fall in price under the restrictions than under conditions of freedom: his main and, indeed, only contention could be that an increase of price consequential on increased costs would be likely to follow more swiftly under free competition than under the present system of restriction. The argument, in general, is a difficult one for the respondents because of the body of evidence which was led to the effect that price competition was unlikely to arise following the removal of restrictions, and that no marked change was likely to take place in the price structure in the industry. The specific ground on which Mr. Robertson took his stand was that, because of the group domination of the industry, price competition was "just not a "possibility." This statement was supported by the evidence of Mr. Webb, Professor Browning and Mr. Morrison, all representing certain of the dominating groups, and is evidence which requires careful consideration. All founded on the disrepute which the "price cutter" would achieve, and all assumed the continued existence of the present balance of power and "peaceful co-"existence" in the industry. If this evidence is accepted, then obviously it is only on the narrow ground to which we have already referred that the respondents' contention could be based. But the opinion of these witnesses, experienced and honest as they were, is in a measure a matter of speculation and there is no basis for a general assumption that the lifting of price restrictions from an industry in which there is a large measure of group domination will not induce greater flexibility of price, especially where it is conceded that there is a keen spirit of competition in matters of quality and service throughout the whole industry, and that the process of absorption of small businesses into the large groups is steadily progressing.

In this connection it is proper to notice an argument based upon what was called the "surplus capacity" of the industry. It was said that this was not sufficient to act as a spur to price competition. But we were not impressed by the evidence on this matter; surplus production capacity is a matter which, in the first place, cannot be adequately assessed by a mere calculation of the available oven capacity over and above that required to meet current peak load demands. In assessing the true surplus

production capacity of the industry a much more detailed factual investigation would be necessary than was possible in this case; and it would be even more important, in our opinion, to have regard to the potential production capacity of those already engaged in the industry, particularly of the dominant groups among whom serious competition might be assumed to be more likely, if competition was to arise at all. Under competition one of the rewards for a lower price is increased turnover. There are in this industry those with ample financial resources to provide production capacity for this. We therefore do not think that in this case the type and character of evidence presented as to alleged "surplus capacity" in the industry is of any real value in determining the question before us at this stage.

The more natural inference from the facts of the case appears to us to be that, if restriction on price were removed, extended opportunity for competition in price would sooner or later be embraced, and, indeed, there is already some evidence in the case that removal of price restrictions on bakery products other than standard bread has led to variation in price both above and below the former recommended level. Upon the point that increase in price may more rapidly follow increase in cost if the restrictions are removed, although this argument receives support from the opinions of certain of the respondents' trade witnesses drawn from the dominant groups, we are not satisfied that these opinions are sound. It is only substantial fluctuations in cost which can be reflected in alterations in the price of standard loaves and, for the reasons we have already given in considering the question of price stabilisation, it appears to us that, if the circumstances were otherwise equal, equally rapid action could and would be taken under the present system to adjust price to meet such an increase in costs. There is no evidence at all that the existence of the present restrictions has either prevented or postponed an increase of price which would have been warranted by a sufficient increase in costs. It must always be kept firmly in view that it is to be presumed that freedom from the restrictions struck at by the statute is in the public interest, and freedom from such restrictions necessarily implies freedom to compete in price as well as in any other matters. We therefore find that the respondents fail to establish that, in general and in the whole country, prices to the consumer are likely to be higher under free competition than they are under restriction, and upon this view of the matter we reject the second main ground on which they now seek to overcome the presumption against them and to bring themselves within the shelter afforded by section 21 (1) (*b*).

The next ground argued by Mr. Robertson was that the restrictions conferred a benefit in the avoidance of the dangers of undue concentration of production, and the disadvantages of monopolistic control in particular districts, while permitting the proper development of the industry and concentration of production in large plants where that is economically desirable. We

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think it is plain on the evidence that the process of concentration is going steadily on and would go on unabated were the restrictions removed, or, in any event, that the rate of progress would not appreciably alter. That being so, there is no necessity to consider in this case the point at which concentration of production becomes "undue," and, not surprisingly, no evidence was available on this matter. A system of price fixing and control, operated by members of an industry in which the preponderance of power and production is concentrated in the hands of a few large group producers, does not necessarily or naturally operate to reduce risk of undue concentration of production or to prevent monopoly. By itself it does nothing to prevent the small producer being swallowed up or one group from absorbing another. There was nothing in the evidence led which seemed to us to contradict this view of the matter. As the evidence is that the process of absorption is going steadily on, and it is not suggested that this process would be appreciably hastened in free competition, then it is demonstrable that the restrictions are no bar to measures of concentration. The point on "monopolistic "control in particular districts" seems to be met by what we have already said upon the evidence. If the process of concentration which is admittedly at work under conditions of restriction continues under conditions of freedom, and it is not suggested that there will be any appreciable alteration in the speed at which such concentration proceeds if the restrictions are removed, then progress towards "monopolistic control" is not checked by the existence of the restrictions, and the same disadvantages would arise whatever system—freedom or restriction—prevailed. It is not to be denied that "monopolistic control" has its dangers for consumer interests, but this is not the question; the question is whether the movement towards this end is arrested by virtue of these restrictions. The precise question that we have to consider is whether the respondents can show that, by virtue of the restrictions propounded by them, the disadvantages of monopolistic control in particular districts (some of which were illustrated in the evidence of Mr. Burnett) are checked so as to confer a specific and substantial advantage on the consumer. It was suggested that the smaller and higher cost producer must be expected gradually to cease the production of standard bread, as being unprofitable, and that that process was at least arrested by the maintenance of the present price restrictions. But, quite apart from the fact that this tends necessarily to offer higher profits to the large groups, being low cost producers (and it is difficult to see what benefit this confers on the consumer) this would not in any way prevent those responsible for the swallowing up of the small producer from continuing that process and, indeed, using for that purpose the larger measure of profit thus made available to them. In this connection the evidence of Professor Browning was significant. He stated that one reason why the large group producers were not in favour of price cutting at their own hands was that

this would operate to the disadvantage of the small high cost producer by reducing his profits and make him apprehensive that such a lowering of price was designed to squeeze him out of business, and so more ready to sell his business at a lower price to one or other of the groups. In our view, a system which made for lower prices of standard bread would be better both in the immediate and ultimate interest of the consumer (provided quality and service did not suffer, a matter dealt with later), and that the small high cost producer would tend to find his remedy and way of survival (as was pointed out in evidence) by developing the flour confectionery and other sides of his business and, possibly, also by the production of "hand-made" breads, so bringing into play the advantage which his craft skill might offer. It has always to be kept in view that the baking industry's activities and products extend over a wide range of commodities, of which standard bread is only one, and by no means the most profitable, either actually or potentially. Upon the whole evidence and arguments we are not satisfied that the respondents have demonstrated that the continuance of the restriction leads in any appreciable degree to a lessening of the dangers (whatever they may be) of undue concentration of production or the disadvantage of monopolistic control in particular districts.

The respondents further contended that the restriction confers benefit as tending to the maintenance and improvement of the quality of bread and the standard of service to consumers. In this connection we refer to what was said by the court in *In re Yarn Spinners' Agreement* [2] about quality and service. We see no reason why freedom from restriction in price should, in general, lead to reduction in the quality of the product. In this particular case it was, however, maintained that the evidence showed that diminution in quality was to be expected if freedom of price competition was added to freedom of competition in quality and service. Mr. Robertson strongly argued that, if price competition were open, competition in quality and service would lessen and then there would be a falling off in both these matters, to the injury of the public. This argument, however, ignores the evidence of his own witnesses that competition in price is an unlikely sequel to removal of the restrictions. If his witnesses are correct in their view—though for reasons already given we question this—then the factual assumption of this argument disappears. On the other hand, if price competition is permitted, we do not see why this should lead to diminution of quality of the product. It is said that since decontrol there has been improvement in the quality of standard bread, but we heard no evidence which satisfied us that this, if true, in fact was due to decontrol, and was not rather due to other extraneous circumstances such as improvement in the quality of flour and increased efficiency in the industry itself. Nor were the respondents'

[2] (1959) L.R. 1 R.P. 118, 188; [1959] 1 W.L.R. 154; [1959] 1 All E.R. 299.

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witnesses unanimous in their forecasts; their views were divided, and the more positively expressed view was that no change was to be expected in the quality of bread baked or of services rendered if restrictions were removed. In any case no attempt was made, and we doubt if it could be made, to assess the probable extent of any such apprehended diminution. It was not suggested, nor do we think that experience would support the view, that the example of other industries where price competition is free shows that this freedom leads to diminution of quality in the article produced or in the measure of the services proffered to the consumer. In this industry itself the recent removal of price restriction on flour confectionery and baking products other than bread was not said to have produced any falling off in the quality of the product, nor was it said that this was likely in the foreseeable future. In these circumstances, we are of opinion that the respondents fail in this instance also to discharge the burden of proof upon them and that it is not established that any fall in quality or service is likely to follow removal of the restrictions on the prices of standard bread.

The last matter upon which the respondents founded related to the volume of research and the rate of technical progress in the production of bread. Mr. Robertson very wisely conceded that he could not substantiate his claim in respect of research, but contended that the existence of the restriction fostered a degree of co-operation in the industry which was of specific and substantial benefit to consumers. While we do not doubt that frank and friendly discussion among members of the industry may indirectly (and ultimately) benefit the consumer we find it difficult to define the specific benefit to be gained or to measure its extent. As it is not suggested that either association will dissolve if the price restrictions are removed, it is plain that the means and facilities for co-operation will continue to exist and will be maintained, and it is not easy to see why, if the keenest competition in quality exists side by side with a substantial measure of co-operation, removal of price restriction in the matter of only one of the numerous products of the baking industry should operate to reduce the existing degree of co-operation and lessen the good relations among members of the industry. In any case, the subject is both nebulous and speculative: in what particulars that affect the interests of the consumer of a standard loaf will "co-operation" fall away and to what extent? At present, it does not appear that recipes or the secret details of manufacturing processes are exchanged to any substantial degree, while it is open to anyone to purchase and analyse the commercial products of other bakers for their own information and, indeed, there was evidence before us that this is in fact done by at least one large concern. In the result we can find no firm basis in evidence for the views that the measure of co-operation which in fact exists in the industry, as illustrated by the objects and activities of the respondents, is achieved by virtue of the particular restrictions.

and far less that the measure of such co-operation will be to any appreciable degree lessened by removal of the restrictions. Nor is it possible to estimate to what extent, if any, an assumed but indeterminate and indeterminable lessening of the existing measure or spirit of co-operation within the industry itself would remove a specific and substantial advantage at present enjoyed by the consumer of standard bread by virtue of the restrictions. We therefore reject the respondents' contention on this final head. In the result, therefore, we hold on the facts that the respondents have failed to establish their case on section 21 (1) (*b*) upon any of the grounds advanced by them.

Being of this opinion, we find it unnecessary to consider whether the recommendations as to wholesale discounts are restrictions of such a character as to come within the scope of section 21 (1) (*g*), because, if the respondents fail, as we hold they have in fact failed, on section 21 (1) (*b*), the application of 21 (1) (*g*) to the recommendations on wholesale discount does not arise. In these circumstances we express no opinion as to whether these recommendations could in any circumstances be brought within the protection of section 21 (1) (*g*).

If the respondents fail to discharge the initial onus of proof which lies upon them, and if, as we find, they are unable to substantiate in fact any of the grounds upon which in their pleadings they allege that they are brought within section 21 (1) (*b*), it becomes equally unnecessary to consider and balance the specific and substantial benefits claimed against the detriments arising out of the retention of the restriction, except in so far as any facts which would have been material to that issue have necessarily been taken into consideration in assessing the respondents' claim to confer upon consumers of standard bread the specific and substantial benefits or advantages which they set out in their pleadings.

Upon the whole matter we declare that the recommendations as to prices of standard bread are contrary to the public interest, and that, that being so, the recommendations as to wholesale discounts are also contrary to the public interest.

Declaration accordingly.

Solicitors: *Beveridge & Co., W.S., for Bishop, Milne, Boyd & Co., Glasgow; Beveridge & Co., W.S.; John M. Dick.*

[RESTRICTIVE PRACTICES COURT.]

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1959 *June* 22, 23, 24, 25, 26, 29, 30; *July* 1, 2, 3, 6, 7, 31.

* *In re* WATER-TUBE BOILERMAKERS' AGREEMENT.

[1957 No. 24 (E. & W.).]

Restrictive Practices—Restriction—Whether contrary to public interest—Price restriction—Water-tube boilermaking industry—Selection of member by reference to record of trading and customer preference—Option of selected member to reduce price to lowest evaluated price—Object of restriction to spread available work in regard to needs of producers—Preservation of capacity in national interest—Whether benefits or advantages conferred on public—Whether reasonably necessary to negotiate fair terms with Electricity Board—"Preponderant"—"Reasonably necessary"—Whether removal of restriction would result in "reduction in . . . export business which "is substantial" — Whether reduction to be "substantial" — Restrictive Trade Practices Act, 1956 (4 *&* 5 *Eliz.* 2, *c.* 68), *s.* 21 (1) (*b*) (*d*) (*f*).

Evidence—Profit margin—Desirability of accounts.

On the true construction of section 21 (1) of the Restrictive Trade Practices Act, 1956,[1] the word "substantial" in paragraph (*f*) relates to the expected "reduction" and not to the "export business" and, therefore, in order to bring the paragraph into operation it is not enough to show that there is a likelihood that removal of the restriction would result in any reduction, however small, of a substantial export business; but the court must be satisfied that there is a likelihood that it would result in a substantial reduction in the volume or earnings of the export business

† UPJOHN J., SIR STANFORD COOPER, MR. W. L. HEYWOOD and MR. W. G. CAMPBELL.

[1] Restrictive Trade Practices Act, 1956, s. 21 (1): "For the purposes "of any proceedings before the "Court . . . a restriction accepted in "pursuance of any agreement shall "be deemed to be contrary to the "public interest unless the Court is "satisfied of any one or more of the "following circumstances . . . "(*b*) that the removal of the restriction would deny to the public as "purchasers, consumers or users of "any goods other specific and substantial benefits or advantages "enjoyed or likely to be enjoyed by "them as such, whether by virtue of "the restriction itself or of any "arrangements or operations resulting "therefrom; . . . (*d*) that the restriction is reasonably necessary to enable "the persons party to the agreement to "negotiate fair terms for the supply "of goods to, . . . any one person not "party thereto who controls a preponderant part of the trade or "business of acquiring . . . such "goods, or for the supply of goods to "any person not party to the agreement and not carrying on such a "trade or business who . . . controls "a preponderant part of the market "for such goods; . . . (*f*) that, having "regard to the conditions actually "obtaining or reasonably foreseen at "the time of the application, the "removal of the restriction would be "likely to cause a reduction in the "volume or earnings of the export "business which is substantial either "in relation to the whole export "business of the United Kingdom or "in relation to the whole business "(including export business) of the "said trade or industry . . . and is "further satisfied . . . that the "restriction is not unreasonable "having regard to the balance between those circumstances and any "detriment to the public or to persons "not parties to the agreement (being "purchasers, consumers or users of "goods produced or sold by such "parties . . .) resulting or likely to "result from the operation of the "restriction."

either in relation to the whole export business of the United Kingdom or to the whole business of the trade or industry.

The Water-Tube Boilermakers' Association was a trade association of makers and designers of land water-tube boilers for central power stations and industrial boilers for the United Kingdom and overseas. The association's agreement provided, inter alia, for the following arrangement, operated in the case of inquiries from the United Kingdom, the Commonwealth and a number of other territories overseas, the object of which was to spread the available work having regard to the needs of members. When more than one member received an inquiry for a boiler, a meeting of the interested members was held at which one (or sometimes two) was chosen as the "selected member": in the selection consideration was given to a record of trading, and also to customer preference, the latter being given greater emphasis in the case of overseas inquiries. Prior to the meeting each of the members supplied details of the price which they proposed to quote, and after the selected member had been chosen, those prices were disclosed and evaluated on a common basis; no member might at any time thereafter alter the price tabled by him except the selected member who, if his price was not the lowest, had the option of reducing down to the level of the lowest evaluated price, but not below it. The information obtained at the meeting enabled members to keep a close check on the general level of prices, and the arrangement was so operated that it did not result in the quotation of inflated, but of competitive and keen prices, allowing a low but reasonable margin of profit; members' prices compared very favourably with those of outside boilermakers; one effect was to keep prices higher than they otherwise would be in times of slack demand, but without it there would be a severe cut in prices to such an extent that few if any boilermakers would be able to conduct their business at a profit. One result of the arrangement was that purchasers might have to pay more for boilers than they would otherwise have done, but the effect of that on the purchaser of a unit of electricity would be infinitesimal.

The position of the industry was special: though considerable in size it was concentrated in the hands of eight or nine companies, six of whom, all old-established, large, efficient and financially strong companies with world wide reputations for the highest quality work, were members of the association; it was highly specialised and required the maintenance of highly qualified research staff, scientists and technicians and skilled artisans, involving high overheads, much of which represented cash outgoings; sub-contracting and sub-purchasing were features of the industry. In the home market the Central Electricity Generating Board was the only customer for electric power-house boilers (about 83 per cent. of the total home orders) and since 1954 had placed its contracts by competitive tender; the board had no desire to force prices down to an uneconomic level but was anxious that persons tendering should put in a price giving a small but reasonable profit. The export side of the industry was substantial, about 40 per cent. of members' activities being concerned with the export of both types of boilers. Some members maintained offices and staffs in overseas territories and in the past members had been highly successful in securing orders against foreign competition. The present trend was towards large boilers giving rise in the future to few but very large orders, each taking several years to carry out and costing some millions of pounds. For one or two years past the industry had been in a state of recession, leaving a substantial capacity unfilled, but on the long term view demand would be

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likely to exceed present capacity and it would not be in the national interest if any of the members were forced out of business.

The association sought to justify its arrangement under section 21 (1) of the Restrictive Trade Practices Act, 1956, (1) under paragraph (*b*) on the ground that its abrogation would deny to the public specific and substantial benefits in that, by preventing prices from falling to an uneconomic level, it preserved essential capacity which would be required to meet future demand and which would otherwise be lost, and that without it research, development, sub-contracting and, ultimately, quality, would not be maintained; (2) under paragraph (*d*) as being reasonably necessary to enable members to negotiate fair terms with the board which controlled a preponderant part of the market; and (3) under paragraph (*f*):—

Held, (1) (post, pp. 1139–1141), that it had not been proved that abrogation of the arrangement would deny any benefits to the public. There was no evidence to suggest that members lacked the resources to keep in business or to retain their key personnel during the contemplated recession; if members thought it worth while to keep the collective research department in being they would do so; while the individual companies would be well able to maintain their essential research departments over the recession and to take advantage of the gradual return to full demand to be expected. The standard of work would be maintained and sub-contracting would continue whether or not the arrangement remained in being, and any tendency it might have to keep sub-contracting to members acted as a detriment to the public.

(2) (post, pp. 1141–1143). That whether or not a particular purchaser was a "preponderant" buyer within the meaning of paragraph (*d*) was a question of fact in all the circumstances of each particular case, and that, without attempting to define that word and whether or not "market" meant merely the home market or the whole market available to members, on the facts the board was properly described as controlling a preponderant part of the market; that the words "reasonably necessary" in paragraph (*d*) did not require proof that a preponderant buyer was likely to try to enforce unfair terms, but that it was sufficient if in all the circumstances without the restriction suppliers would not be able to negotiate fair terms—that was, terms upon which an efficient manufacturer could make and sell his goods at a reasonable, but no more than a reasonable, profit—but in the hope of getting an occasional contract would be likely to tender at an uneconomic price; that, although in the ordinary case where a preponderant buyer employed the method of competitive tender the normal results of free competition should be allowed to come into play and the necessary conditions for the operation of the paragraph would not arise, in the special circumstances of the present case, there being six big, efficient members who ought in the national interest to stay in business and few, very large, orders which it was expedient should to some extent be spread over the industry, the requirements of the paragraph were satisfied; but that the arrangement was not "reasonably necessary" to enable members to negotiate fair terms with the board, for, in that it applied also to all other home contracts for industrial boilers, and to all contracts of every kind in the overseas territories, it was unnecessarily wide, and the claim under paragraph (*d*) failed on that ground.

(3) (post, pp. 1144–1146). That if the arrangement were abrogated it would be likely that there would be a reduction in the foreign orders obtained by members; it enabled a member to put in the keenest possible price and the combination of the keenest price and customer preference helped to secure business overseas; the

consultation between interested members each contributing to the background of knowledge essential to a proper assessment of market possibilities was of great, perhaps crucial, value, while the existence of the overseas establishments was also a help, in maintaining export orders; that, on the facts, the reduction in the volume and earnings of the export business to be expected if the arrangement were abrogated would be substantial within the meaning of the paragraph. The requirements of paragraph (*f*), accordingly, were satisfied.

On the balance between the circumstances set out in paragraph (*f*) and any detriment to the public resulting from the operation of the arrangement:—

Held, (1) that, having regard to the definition of "goods" in section 36 (1), the "public" must be confined to the purchasers and users of central power house and industrial boilers, and did not include the users of electricity (post, p. 1147).

(2) That, since the preservation of capacity was in this case in the national interest, there was no detriment in the restriction of the free play of competition and the influence on the distribution of contracts under the arrangement; that the real detriment to be weighed against the reduction in exports was that purchasers of boilers might have to pay more for boilers than they would otherwise do; and that, in all the circumstances, that detriment did not outweigh the national benefit resulting from the maintenance of exports to be anticipated if the arrangement were to continue. Accordingly, the arrangement was not contrary to the national interest (post, p. 1147).

REFERENCE.

The Registrar of Restrictive Trading Agreements, pursuant to section 20 (2) (*a*) of the Restrictive Trade Practices Act, 1956, referred to the court an agreement subsisting between all the members of the Water-Tube Boilermakers' Association, numbered 509 on the register of agreements, and contained in the association's constitution, general rules, list of members and model form of general conditions of contract. The association, a trade association within the meaning of section 6 (8) of the Act, was an association of six makers and designers of land water-tube boilers, boilers for raising steam used as a source of energy for the generation of electricity or other purposes, or as a source of heat for various industrial purposes. It was founded in 1933 and had always consisted of the same members, namely, Babcock & Wilcox Ltd., Clarke, Chapman & Co. Ltd., International Combustion Ltd., and International Combustion Export Ltd., John Thompson Water-Tube Boilers Ltd., Simon-Carves Ltd. and Yarrow & Co. Ltd. On and from February 26, 1957, the association had adopted a new constitution and working rules, superseding those previously in force, which constitution and rules formed the subject-matter of the proceedings.

The objects of the association were stated in clause 2 of the constitution as follows:

"(A) To promote and advance the status of the Water-Tube "Steam Boiler Industry and in particular of United Kingdom "contractors for water-tube steam boilers and to raise funds for "this purpose. To encourage the members of the association to

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"maintain a high standard for their products in the home market "which in turn will help to foster, maintain and develop the "export business of the industry. (B) To provide a means for the "exchange of views and information between contractors. (C) To "carry out, either alone or in conjunction with others, research "and development work and to raise funds for the purpose. "(D) To act on behalf of the industry in discussion and negotia-"tions with the United Kingdom or other Governments, with "nationalised industries and with other organisations and users "of water-tube steam boiler plant. (E) To assist in the equitable "distribution between members of the work available and thereby, "and consistent with meeting the requirements of the purchasers, "to seek to ensure the most efficient use of the resources of the "members of the association. (F) To consult together with the "object of combating foreign competition and devising means for "expanding export trade. (G) To collaborate with other associa-"tions and bodies." By clause 3 the scope of the association covered the supply of water-tube steam boilers, which term included steam raising plant associated with nuclear power installations, intended to be installed on land in the territories specified in the General Rules and all plant incidental or subsidiary to the installation and working of such boilers including (inter alia) such associated items as superheaters, stokers, pulverising plant, economisers, steel chimneys, coal, ash and dust handling plant (including civil engineering work being part of an electrostatic precipitator), air-heaters, pipes and lagging, provided in connection with one or more water-tube steam boilers, but excluded foundations, brick or concrete chimneys, bunkers and building from the scope of the agreement. Clause 4 excluded boilers for marine purposes.

By clause 5: "Any member who has a portion of a contract "which he does not himself manufacture, whether it is associated "with boiler plant or any other equipment he may supply in the "course of his business, shall, where possible, give those other "members of the association who normally manufacture such "portion of the contract the opportunity of quoting for the "supply to him of such equipment." Clause 14 provided that all members who had subsidiary or associated companies or representatives whom they could control, and who dealt in boilers or any apparatus or plant incidental or subsidiary to installation and working of boilers, should take all necessary steps to ensure that such subsidiary or associated companies or representatives did not act in any manner contrary to the agreement. Clause 25 provided for the establishment of a research and development committee with the following terms of reference: "(i) To initiate "and to put in hand collective research. (ii) To give consideration "to any suggestion put forward either by members . . . or any "outside body with regard to subjects suitable for joint research. "(iii) To arrange contact, and if desirable, collaborate with other "organisations who are engaged on research work. (iv) The

"committee shall be required to consult the council with regard "to financial expenditure where in any one year its expenditure "on research work, including work carried out on its behalf by "the Boiler Availability Committee, is likely to exceed £100,000," and [(v) and (vi)] to submit reports to the council on work in hand and expenditure, all information obtained by the committee to be available at any time to all members, regular progress reports being submitted to members. By clause 28 the annual cost of running the association and contributions to its activities was to be recovered from members in proportion to each member's share of the orders reported as received during the previous three years; by clause 29 the association was to pay out of contributions made under clause 28 all the expenses incurred during the year for research and development and for carrying on the working of the association and for approved contributions to other organisations. The General Rules of the association defined home business as covering the supply of water-tube steam boilers as defined in clause 3 of the constitution intended to be installed on land in Great Britain, Northern Ireland, the Isle of Man and the Channel Islands, and overseas business as covering the supply of such water-tube steam boilers in any other territory within the scope of rule 4 [in effect, the Commonwealth and a number of other countries mainly in the Middle East, but not the United States and Europe [2]].

The following summary [3] of the operation of the arrangement contained in the rules, in particular rule 5, admittedly a restriction within section 6 of the Act, is taken from the account set out in paragraphs 6, 7, 8 and 9 of the statement of case, and admitted by the registrar in answer to the extent only that it was an accurate summary of the effect of the rules, no admission being made as to the procedure in practice adopted by the members or any of them dealing with inquiries for or offering to supply boilers or in submitting tenders. The arrangement provided for occasions when more than one of the members intended to offer to supply boilers to the same customer or for the same installation. Each member on receiving an inquiry for a boiler or on deciding to submit a tender for the supply of a boiler in answer to a public

[2] The following were the territories listed in rule 4: Aden, Australia, Basutoland, Bechuanaland, Bermuda, British North Borneo (including Sarawak), British East Africa, British Guiana, British Honduras, British West Africa, British West Indies, Burma, Ceylon, Confederation of Malaya, Cyprus, Egypt (excluding sugar works), Eire, Falkland Island and Dependencies, Fiji, Gibraltar, Gilbert and Ellis Islands, Iraq, Hong Kong, India, Malta, Mauritius, New Zealand, Nyasaland, Pakistan, Palestine, Persia (Iran), Pitcairn Island, Rhodesia (Northern and Southern), St. Helena, Ascension and Tristan da Cunha Islands, Seychelles Islands, Siam (Thailand), Singapore, Solomon Island, Sudan, Swaziland, Tonga Islands, Transjordan (The Hashimite Kingdom of the Jordan), Turkey, Union of South Africa, U.S.S.R., and any territory not included in the list which was part of the British Commonwealth (except Canada), Protectorates or Mandated Territories.

[3] A more detailed account of the operation of the arrangement is given in the judgment of the court, post, pp. 1133–1136.

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advertisement notified the director of the association, who, if he received more than one notification in respect of the same installation, convened a meeting of the members who had notified him as above, the meeting being held shortly before the latest date by which offers had to be delivered to the customer. Before the meeting the members prepared their offers. There was no restriction whatsoever placed on them in the preparation of the offers, and each member had an absolute and unfettered right to decide the designs and the terms including prices which he would offer: by rule 14 members were required to maintain adequate staffs to prepare their tenders in a proper and efficient manner. A member might, if he chose, make his offer to the customer before the meeting. Before or at the beginning of the meeting the members delivered to the director particulars of their offers, set out in a form designed to facilitate comparison between the offers. In some cases a member might decide to offer to supply the boiler to a design materially different from that specified by the customer, when he was said to have put in an "alternative scheme," the price of which was also disclosed to the director. At the meeting the first business was a discussion whether any one of the members was entitled to receive special consideration for the particular contract. In considering that the members took into account any claim by a member of preference shown by the customer for his work; they also considered the production capacity of each member present as shown by the volume of work undertaken by him in the past, and any likely increase in his production capacity and the extent to which his capacity was likely to be employed at the time of execution of the contract. Any claim by a member that he should be given an opportunity of obtaining the contract to enlarge his experience would also be taken into account, and in the case of overseas inquiries members had regard to the work and organisation built up in the territory concerned by any member. After taking such matters into account and any other matter which seemed to be relevant, the members decided whether any of them should be selected as being entitled to special consideration for the particular contract, the member so selected being the "selected member." The director then disclosed to the meeting particulars of the offers which members had given to him and they decided which of the prices disclosed was the lowest, due regard being given to all relevant matters, including any difference in the work to be done, or in the plant and materials to be supplied and the relative guaranteed efficiencies of the plant offered by members. The lowest price for the customer's specification so ascertained was known as the "lowest evaluated price." If a member other than the selected member had tabled the lowest evaluated price the meeting decided by what amount the selected member's price should be reduced to make it equivalent to the lowest evaluated price, due regard being had to any difference in the offers, and the selected member was then given the opportunity of reducing

his price at his option by the whole or part of that amount, and if he decided to reduce his price he so informed the meeting. The director then disclosed particulars of the offers contained in any alternative schemes received from any of the members, and if the selected member had put forward an alternative scheme he might reduce his price for that in the same proportion as he had already reduced his main offer, informing the meeting if he decided to do so. Save as aforesaid, no member might make any variation in any offer which he had delivered to the director, whether for the work as specified by the customer or for an alternative scheme. If after the meeting a member received a notice from the customer revising the specification of the contract he had to inform the director, who decided whether it was a major or minor revision. If he decided that the revision was minor, all members receiving the notice were entitled to alter their prices in respect of the revision, but they had to notify the director and give details of any technical modifications involved. The director did not disclose that information except to the selected member, and then only if the selected member had received notice of the revision and had notified the director of that fact and of his intended alteration in price. In that event the alteration and modifications sent by other members to the director were disclosed to the selected member, who could reduce his price for the revision to a price equivalent to the lowest evaluated price quoted by any other member for that revision. If the director decided that the revision was a major revision the matter was dealt with as though it was an inquiry for a new offer, the members concerned being only those who had received the notice of revision.

In further and better particulars of this part of their case the respondents stated that they had no rigid rule or practice restricting the matters which they took into consideration in selecting "selected members." A member might put forward any matter in support of his case for selection which he thought pertinent, an example being that a member had, in the case of a foreign inquiry where there was likely to be foreign competition for the contract, suggested that he had a better chance of obtaining the contract than any other British boilermaker by reason of the fact that he had in the past done work in the particular area or had a particular influence or goodwill in that area.

Consideration of other subsidiary provisions in the agreement was stood over pending the court's decision on the main restriction.

The respondent association and members sought to justify that arrangement under paragraphs (*b*), (*d*) and (*f*) of section 21 (1) of the Restrictive Trade Practices Act, 1956.

The facts are stated in the judgment of the court.

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B. J. M. MacKenna Q.C. and *D. A. Grant* for the respondent members and association.

John Megaw Q.C. and *W. A. Bagnall* for the registrar.

No cases were cited in argument.

Cur. adv. vult.

July 31. UPJOHN J. read the following judgment of the court: The respondents are the Water-Tube Boilermakers' Association (which we shall call "the association") and the six companies who are members thereof. The association was formed in the year 1933 as the result of a price war which had seriously damaged the industry in the late 1920s and the early 1930s, when, we were told, boilers were sold at wholly uneconomic prices.

The objects of the association (as altered in February, 1957) are (inter alia) to promote and advance the status of the water-tube steam boiler industry and, in particular, of United Kingdom contractors for water-tube steam boilers and to raise funds for this purpose; to provide a means for the exchange of views and information between contractors; to carry out, either alone or in conjunction with others, research and development work and to raise funds for the purpose; to assist in the equitable distribution between members of the work available and thereby and consistent with meeting requirements for the purchasers to seek to ensure the most efficient use and resources of the members of the association; to consult together with the object of combating foreign competition and devising means for expanding export trade.

The association is in fact concerned solely with the industry of making land water-tube boilers, which (for brevity) we will call "boilers." This industry is concentrated in the hands of a few large companies, and today there are not more than eight or nine companies in the United Kingdom capable of carrying out contracts for the largest boilers. Of these companies, six are members of the association. Formerly, there was a seventh, but it was absorbed by Babcock & Wilcox Ltd. in 1952. Otherwise the membership has been unchanged since the formation of the association. A brief description of these members must be given.

The first is Babcock & Wilcox Ltd., the giant of the industry, and some 80 per cent. of its business is concerned with the manufacture of boilers. Next is Clarke, Chapman & Co. Ltd., and rather more than half of its business is concerned with the manufacture of boilers and ancillary plant. Third is International Combustion Ltd., and 80 per cent. of its activities is in the manufacture of boilers. Fourth is John Thompson Water-Tube Boilers Ltd. This is a subsidiary of John Thompson Ltd., a holding company. The water-tube subsidiary is not itself a manufacturing company. It designs boilers and contracts to make and erect them, using for that purpose sub-contractors and buying from other companies in its group and outside it. Fifth is

Simon-Carves Ltd. Like John Thompson Water-Tube Boilers Ltd., it is a company which designs boilers and contracts to make and erect them but does not itself own any manufacturing plant. It sub-contracts and buys its requirements from others. The sixth and last member is Yarrow & Co. Ltd. It manufactures boilers and about one-third of its activity is in the manufacture of boilers.

The members are all companies of long standing in the boiler industry. They are large, and in two or three cases very large, companies, and all are financially strong. They all have world-wide reputations for work of the highest quality.

The activities of boiler manufacturers may be divided into two classes. First, they design and manufacture the giant boilers required for central power stations both at home and abroad. It follows that from April, 1948, when the Central Electricity Authority was formed, it was the only home customer for these boilers. In 1955 its name was changed to British Electricity Authority and a separate authority was formed for the South of Scotland. In 1958 the Central Electricity Generating Board (to whom and to whose predecessor, the British Electricity Authority, we shall refer as "the Electricity Board") took over the distributing functions of the British Electricity Authority down to area boards. The present position is that the Electricity Board is the only customer in England and Wales for these boilers.

The second class of boiler has been referred to as "the "industrial boiler"; that is to say, a boiler required by manufacturing concerns, which may be for running their own steam plant and electrical generators, for manufacturing processes, for heating their premises, or for all these purposes. These boilers are generally much smaller than those required by the central power stations. As will appear later, about 40 per cent. of the activities of the members of the association are concerned with the export of both types of boilers to countries overseas, principally it would appear to Australia, South Africa and India.

After the war, there was a greatly increased demand for electricity, a demand which it has been estimated increases annually at 7 per cent. or thereabouts of installed capacity at the beginning of each year. Thus the demand for electricity in this country should double itself every ten to twelve years. Apart from a few hydro-electric schemes, this demand had to be met by steam turbo generators, the steam being produced either in coal- or oil-fired conventional boilers or in nuclear-powered "heat "exchangers," which, however, in essence, are water-tube boilers. The day when some means is discovered of converting nuclear heat directly into electrical energy without the intervention of steam turbo generators has been treated by all as remote.

The boilermaking industry had not the capacity to produce boilers to meet this post-war demand for electricity, and so, in about 1949–50 the Electricity Board encouraged members of the association and others to expand their manufacturing capacity.

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They also invited a few other concerns who were not previously concerned with the manufacture of land water-tube boilers to come into the industry, and at least one, John Brown Land Boilers Ltd., did so.

At this time, the Electricity Board planned for a standard rating of 60-megawatt boilers (that is, boilers whose steam capacity would produce some 60 megawatts of electricity), and a large number of these were ordered and delivered. Until the year 1956 or 1957 there was therefore a heavy demand upon the boilermaking industry, although it is true to say there were considerable fluctuations due to the Government limitation of capital investment in equipment in certain years, noticeably 1953 and 1954. This was, however, fully made up by a large expansion in 1955. On the whole, however, it is broadly true to say that the industry was employed to capacity.

The boilermaking industry is making great technical advances, not only in the size of boilers being built, but in the temperatures and pressures employed. This is because the science of steam production is now advancing at a rapid rate. Much research is going on into the behaviour of water and steam at ever-increasing pressures and temperatures, for it is found that the higher the pressure and temperature, the more efficient is the plant. Some of this research is a fundamental scientific research carried out at universities and elsewhere, such, for example, as the research into Boiler Circulation Theory just completed at Cambridge University.

This brings with it many other problems, both theoretical and practical; for example, as to the physical quality, size and thickness of the water-tubes at these great temperatures and pressures. Then new methods of using the flue gases by "reheaters" between the expansion stages of the turbine have recently been produced. Many other examples of the advanced scientific and technical knowledge required on the part of an up-to-date boilermaker could be given.

In the actual process of making and erecting a boiler, much "know-how" is employed. An expensive laboratory staff must be maintained. Let us give one example only. There may be over 100 miles of water-tubes in a big modern boiler, with thousands of welded joints. The drum of the boiler must itself be welded. Every weld must stand these enormous pressures and temperatures, and much testing by various scientific means is necessary. Furthermore, every boiler must be specially designed for its particular job on its particular site and have regard to the fuel to be used, even if it be built to some standard rating of capacity. As it has been said, each must be tailor-made. This involves the maintenance of a large highly qualified design staff capable of turning the latest scientific and technical discoveries to practical account. The construction and erection staff must also be highly skilled. We are satisfied that the boilermaking industry is highly specialised, requiring the services of highly qualified

scientists, technicians and artisans, and that scientifically it is today making great progress. This means that the industry has to be capable of bearing, in the present period of rapid development, exceptionally heavy overheads.

Let us give a few figures to illustrate this changing face of the industry. In the early 1920s, a large boiler would produce about 40,000 lb. of steam per hour at 250 lb. to the square inch at a steam temperature of 600 degrees Fahrenheit. The latest boiler now under construction for the Electricity Board is designed to produce no less than 3,750,000 lb. of steam per hour at a pressure of 2,400 lb. to the square inch at a temperature of 1,055 degrees Fahrenheit. The research on Boiler Circulation Theory was concerned with pressures of over 3,000 lb. to the square inch. An industrial boiler is now under construction to work at 3,300 lb. per square inch.

These great advances in scientific and technical knowledge have led to the building of boilers of greatly increased size and cost. After the war, the Electricity Board planned, as we have said, for boilers of a standard rating of 60 megawatts. With the great advance in scientific knowledge, however, the board now have under construction by one manufacturer of the association a boiler to produce 550 megawatts. In the future it is thought that the probable general trend will be for boilers perhaps not quite so large but capable of producing 350 to 370 megawatts.

This interesting feature of the industry makes the maintenance of highly qualified research staffs of great importance. Large staffs for this purpose are maintained by the larger members and at considerable cost.

In addition, the association maintains a research department under its technical officer, William Foster Simonson. He has one assistant. The functions of both of them are entirely administrative. Under the association's Research and Development Committee, they organise research in universities and by other bodies. The Boiler Circulation Theory research already mentioned is one example. Many others could be given and we only mention one or two others by way of further illustration: tube plate design, undertaken by University College, London; stresses in thick pressure vessel heads, undertaken by the University of Nottingham. The technical officer also represents the association on a number of scientific committees; for example, The Boiler Availability Committee, The British Coal Utilisation Research Association, The Flame Radiation Research, and a number of other bodies and committees. The members also sometimes submit specified problems for the consideration of an ad hoc committee, usually presided over by the technical officer.

The annual budget of the research department is some £80,000, which is shortly to rise to £100,000. Of the £80,000, some £73,000 is spent in direct research, and the balance in overheads, salaries and office expenses. This sum is provided by the members in, we understand, unequal proportions.

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The boiler industry stands fairly high in a list produced to us from the records of the Department of Scientific and Industrial Research showing the expenditure of research expressed as a percentage of net output. However, we do not attach much weight to this figure, for expenditure on boiler research must, from the nature of the industry, be a costly business compared with many other industries.

We have already mentioned that two of the members are designing and erecting companies only and do not themselves manufacture boilers. They must necessarily do all that by sub-contract or purchase. But sub-contracting and purchasing are striking features of this industry, not only by these two members but by the manufacturing companies themselves. It was noticeable that though Yarrow is a manufacturing concern, when it obtained a very large contract from the Electricity Board for the Blyth Power Station, no less than five-sixths of the contract price represented sub-contracting and purchasing. The existence of the association undoubtedly encourages the members to sub-contract among themselves rather than with outside boilermakers, but it is clear that in practice a number of sub-contracts are placed with outside companies. Ancillary machinery is, of course, purchased from the expert companies specialising in such machinery who are not themselves boilermakers.

The industry, though small in terms of the number of companies engaged, is a very considerable industry in size. Thus over the years 1952 to 1958 inclusive, orders for boilers (including orders for heat exchangers for nuclear power stations, which, however, constitute only a small proportion of the output) were as follows:

Orders placed by the Electricity Board	
with members	£138,480,000
with outside U.K. boilermakers	£55,810,000
with foreign boilermakers	Nil
Other home orders placed, i.e., for industrial boilers	
with members	£30,560,000
with outside U.K. boilermakers	£7,570,000
with foreign boilermakers	£760,000
Foreign orders placed within scope of territory of association's agreement	
with members	£93,240,000
with other U.K. boilermakers	£6,250,000

i.e., a total of £99,490,000 compared with orders placed in such territory with foreign boilermakers of £16,660,000.

Foreign orders placed with members outside the scope of the agreement were £13,050,000. The total of all home orders over

the same period is £233,180,000, and of all (home and foreign manufacturers) overseas orders within the scope of the association's agreement £116,150,000. The industry has, therefore, a substantial and important export side, but its backbone is undoubtedly the Electricity Board.

The cost of a boiler varies enormously. The great 550-megawatt boiler now under construction will cost something in the neighbourhood of £6,000,000. Many of the smaller ones for central power stations may cost between £1,000,000 and £3,000,000. From tender to completion of the contract may easily take four to five years. An industrial boiler will cost much less but may be several hundred thousand pounds.

We must now examine the effect of these great and recent advances in scientific theory and design of boilers and in their size and cost upon the economics of the industry. Shortly, it means that the numbers of orders for boilers will be greatly reduced, although, of course, the value of each boiler will be much more substantial. Just as a measure of this problem, it may be useful to give one or two tentative and necessarily approximate figures as to the future. When the board was considering generating plant under construction or planned at March 31, 1955, for the five years to the end of 1960, the indicated programme was for 210 boilers, mostly of 60 megawatts; but now, thinking in terms of much larger boilers, though the figures must be regarded as very tentative, the number of smaller boilers planned has been much reduced and the probability seems to be that the number of boilers planned or under construction in 1962 for the five years ending in 1967 will be 34 much larger ones. The effect of this means that, starting in the quite near future, there will only be three or four orders placed for boilers each year for most of the next decade. While each boiler is very much greater in cost and capacity than those formerly ordered, in fact the cost and the number of persons employed in manufacture of, say, a 300-megawatt boiler are certainly nothing like ten times that of a 30-megawatt boiler, and therefore it follows that there will be a considerable shortage of orders and work in the industry compared to the decade now ending. The unchallenged evidence was that the industry is now in a position of difficulty. Furthermore, it appears that there is a recession in the important and substantial export business, which, however, is expected to revive with a rise in prices of primary commodities.

The position, therefore, at the moment, we are satisfied upon the evidence, is that the industry is now, and probably for one or two years has been, in a state of recession. There are too few orders both at home and overseas, leaving a substantial capacity in the industry unfilled.

It is always speculative to forecast the future of any industry, but the terms of section 21 of the Restrictive Trade Practices Act, 1956, make it our duty to consider likely future conditions, and we do so, though with reluctance. It is a matter on which we

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have heard much evidence from those engaged in the trade and from economists. As we see the future, this recession may possibly increase as the big boiler programme of the Electricity Board gets under way; we do not, however, see any reason to anticipate a deep depression or slump conditions. However, the recession is unlikely to decrease and may be expected to last for something in the region of five years, until the middle of the 1960s. Thereafter there is likely to be an upturn in boilermaking activity. This is so for several reasons: (1) The working life of a boiler is 20–30 years; a replacement demand will be starting for those installed in the immediate post-war era, bearing in mind the length of time required for the erection of the modern giant boiler. (2) To meet the annually increasing demand for electricity, the Electricity Board expects its orders for the giant boilers to expand to about eight per annum during the decade 1965–75. (3) A revival in overseas demand is expected.

We therefore envisage a return to substantially greater activity in the middle and later 1960s, not a sudden surge but, having regard to the necessity for long-term programming by the great power station authorities or companies, a gradual and well ordered increase in demand. On the long term, say from the 1970s onwards, economists and those engaged in the industry agreed that there would be a heavy demand for boilers which would probably exceed present capacity. This view is based primarily on the expected demand for electricity from the under-developed countries (much of which must be satisfied by turbo-electric rather than hydro-electric means) coupled, of course, with expanding demand at home. No doubt the emphasis will, in due course, turn from conventional boilers to nuclear power heat exchangers, but we find it quite impossible to make any forecast upon this.

The position, therefore, of the boilermaking industry is a very special one, which we now summarise very briefly. The industry itself requires highly scientific and technical knowledge, and rapid advances in this are constantly being made. Research is very important. A boiler designer or maker requires a relatively larger highly skilled staff than is common in industry generally, and this involves him in high overhead costs, a large proportion of which represents cash outgoings.

The industry is concentrated in the hands of some eight or nine companies, of which the six principal ones are in the association. These companies are all old established, all comparatively large and some very large, they are efficient and financially strong, with world-wide reputations for the highest quality work. They all maintain the necessary scientific, technical and expert artisan staff to compete in world markets and to employ the latest scientific and technical improvements.

The present trend of central power house boilers is towards larger boilers, giving rise in the near future to a few orders for very large boilers, each taking four or five years to erect and costing some millions of pounds. In the home trade there is only

one customer for these boilers. On the short-term view, the industry has and will have excess capacity, but on the long-term the demand is likely to exceed capacity. Sub-contracting is a feature of the industry.

In view of the expected long-term expansion in demand, we are satisfied that it would not be in the national interest that any of these member companies should be forced by economic pressure to give up boiler production. This, however, is not directly a relevant matter.

We must now consider in detail the restrictions operated by the association. At the request of the parties, we have considered only the main restriction, that contained in rule 5 mentioned below, and no others. We understand there are certain subsidiary restrictions, but by agreement they have been stood over for consideration at a later date after the decision of the court on rule 5 is known.

Until it was brought to an end at the beginning of 1957, the association operated a system whereby, putting it very briefly, they met and allotted a given contract to one of their members and the others all quoted higher prices. It was recognised that that was a restriction within the meaning of the Restrictive Trade Practices Act, 1956, and as a direct result of the passing of the Act that scheme was abandoned and a new one was substituted. The new scheme, which began in February, 1957, covers, like its predecessor, only certain territories, that is to say, the home trade and the British Commonwealth (except Canada), together with some other countries such as Palestine, Persia, Siam and one or two other places. The reason for this is, it appears, historical, and this territorial limitation seems to have gone back to the time when the association was formed. In the United States of America, some members had affiliations which precluded the operation of any agreement; other countries were too under-developed to be interesting to boilermakers. It is possible that the territory chosen for the operation of the agreement was selected as being the most promising field for exports; but, after this lapse of time, the evidence on the point is meagre.

Rule 5 of the rules of the association is the one which governs the new procedure when an inquiry is received for a boiler, but as it is very lengthy we do not propose to set it out in full but to explain it by showing how it operates. When a member of the association receives an inquiry for a boiler, it is his duty to report it to the director of the association, Kenneth James McKillop. If no other member reports a similar inquiry, then nothing further is done and the member is entirely free to deal with the inquiry without any restriction. This covers the great majority of inquiries. In fact, from February, 1957, to the end of December, 1958, there were 1,048 inquiries, and of these 688 were sole inquiries to which rule 5 had no further operation. If two or more inquiries are received and notified to the director, the matter is considered at the next regular monthly meeting of members

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under a file number, so that only those members who had received the inquiry know to what it refers, and nothing is disclosed to other members. The members who have received the inquiry then decide on the next step. It may be a case to which rule 5 is "not applicable." This sometimes happens in relation to certain overseas territories, where some members have associated companies who will be tendering, and the member will not, and so cannot, table his price as later explained. It may be a case where the parties decide that the operation of rule 5 is "to be "deferred," usually because the inquiry is not firm or calls only for an approximate figure without detailed specification. Then there have been a few cases where, for exceptional reasons, and sometimes in the early days of working the scheme through mistake, the parties decided rule 5 was "not to be operated." Finally, they may decide that it shall be operated. That has happened in 83 cases out of the 1,048 inquiries that we have already mentioned. In those cases the following procedure operates: One member volunteers to produce a price schedule form, based on common data, to assist evaluation; that is, he takes out of the specification certain common items for ancillary machinery, for example, soot blowers by X, fans by Y. This is sent to each member. Then a date is fixed for a special meeting of the interested members to consider the whole matter. That meeting takes place, as nearly as is practically possible, immediately before the tendering date. This is done for two reasons: first, to give the interested members the maximum amount of time to prepare their tenders; secondly, because, as the director candidly admitted, it gives the members less time to have second thoughts and, possibly, to yield to some temptation not to act strictly in accordance with the rule.

At this special meeting the director acts as independent chairman. The persons attending are high executives of their respective companies and, in important inquiries, will be accompanied by their experts. The first matter to be considered is which member, if any, should be what is called the "selected "member." That is determined normally on what has been called the "record of trading." The object is to spread the work having regard to the needs of members to secure a contract. For this purpose, the director has prepared a record of trading for each of the members from the years 1947 to 1956 inclusive. This record is in the form of a series of tables showing home orders (one table including nuclear power and another excluding such orders) and overseas orders for each of certain overseas territories; for example, one table for Australia, one for India and so on, so that information is readily available for each member to see and compare the orders he has received over that period in each country relative to the other members; percentages are worked out, showing in each table each member's orders as a proportion of the total. The director also prepares, month by month, precisely similar tables showing the results of trading for the last

five years (60 months) preceding the particular monthly meeting. If a member in the course of that five years' trading shows a substantially less percentage of the total amount of trading compared with his percentage from 1947 to 1956 in the relevant trading area, then he is in a favourable position to be considered as the selected member. For this purpose, the figures to be compared are the figures in the country from which the inquiry originates; for example, if the inquiry originates from Australia, figures relating to home and all other countries are ignored. Naturally, the matter is frequently the subject of very considerable argument.

We are satisfied that there is one serious defect in this system, a defect admitted by the members themselves, and which they now have under consideration. The figures relating to record of trading do not include figures of sub-contract work which, in an industry depending so much on sub-contracting, obviously gives the figures an unrealistic bias. Another defect is that the basic record seems to be frozen in the period 1947 to 1956.

For the purposes of this discussion, orders for nuclear plant are ignored except as a last-ditch argument. We may add at this point that though the rule is so drawn as to bring boilers for nuclear power stations into its ambit, it has never yet operated in such cases up to now, for the Electricity Board has given orders for power stations complete to various consortia which have been formed to undertake the work. Another matter that may be taken into account is what is called "customer preference"; that is to say, having regard to the history of the matter or some other circumstance, one member may claim that the customer would prefer, other things being equal, to give the contract to him. In connection, however, with the home trade, it is extremely difficult for any of the members successfully to claim customer preference and, normally speaking, the matter is decided upon the record of trading as we have briefly described it. Ultimately, then, a decision is reached as to whether any member shall be chosen as the selected member and, if so, which. Sometimes, and it has happened more frequently lately, two members may be chosen as joint selected members.

Now the director will have received in confidence from the members the prices they propose to quote, in answer to the inquiry. The figures will give very full details of the constituent prices making up the total quoted price, and he prepares very full schedules, available for each interested member, showing, putting it shortly, the breakdown of each member's total price.

At this stage, after the selected member has been chosen, the director "tables" these prices and there follows a prolonged inquiry into the respective merits of the prices tabled. That is to say, the members meet with their experts and try to evaluate the prices on a common basis so that they may be sensibly compared "material for material and performance for performance." That is necessary because members do not necessarily tender on

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precisely the same basis. Many details of performance, or of building or construction, may vary considerably, or a member may produce an alternative scheme because, as it was put in evidence, the tenderer may think that he knows better than the customer what is best for the particular situation, and may put in a quotation which does not follow the specification. A great deal of detailed evidence was properly given before us upon the price evaluation stage which we do not think it necessary to repeat here. Suffice it to say, that after a prolonged discussion which may last some hours or go on next day, the parties have so far always been able to agree upon these evaluated prices, and the lowest price is called the "lowest evaluated price."

Now follows the whole essence of the operation of rule 5. No one except the selected member may thereafter at any time alter the price which he has tabled. The selected member has this option if, but only if, his price is not the lowest evaluated price, that he may reduce his price either wholly or in part down to the lowest evaluated price but not below it. If he is found to have the lowest evaluated price, then he, like the others, cannot alter his price. If he is not the lowest, the selected member is normally required to declare then and there at the meeting if he elects to reduce and, if so, by how much.

When comparing the prices for the purpose of evaluation, each member will have worked on the basis of the price schedule prepared by the volunteer member. But he may prefer to quote for some other make or type of ancillary equipment. This he shows in his tabled price as a "variation," setting out the difference in value, plus or minus as the case may be, and the price as actually tendered to the customer will be varied accordingly.

The result of this procedure is that the customer, on receiving tenders, may find that two members are quoting equal or nearly equal prices. He therefore has an enlarged choice, if price is the material consideration.

The customer may want a revision of the specification and, consequently, a revision in the quotation as received from a member. This must be reported to the director, who has authority to decide (if necessary, after consulting the technical officer of the association) whether the variation is major or minor. If minor, then the member goes ahead and quotes a revised price without further reference to the other members. But if it is a major variation, then the whole of rule 5 must be operated all over again as though it was a new inquiry.

The scheme has great advantages to the selected member. He knows that he can, if he so desires, submit what will normally be as low an evaluated price as any of the members and lower than all except one other (or two others, if there are joint selected members) and will thus be in a good position to get the contract so far as the members are concerned. We say "normally" because some of the big customers, and noticeably the Electricity

Board, keep an expert staff who go through a similar process of evaluation when the tenders are received. This process may take a month or more and is much more elaborate than the process we have briefly described above. When prices are very close and competitive, the experts of the Electricity Board, for instance, may reach a conclusion different from that reached by the members at their meeting. In such cases, the contract may go to a member who is neither the selected member nor the member who has tabled the lowest price. In any event, it may go to a boilermaker not a member of the association.

Of the 83 cases in which the rule has operated up to the end of 1958, it is interesting to note that the selected member tabled the lowest price in no less than 43 cases. In the remaining 40 cases, the member reduced wholly or partially on 25 occasions but elected not to reduce at all in 15 cases. Of these 83 cases, 51 have to date resulted in orders being placed. Of these 51 orders, 37 have been placed with members. The remaining 14 have gone to outside boilermakers or to foreign competitors. Of the 37 cases placed with members, the selected (or joint selected) member also had the lowest evaluated price and secured the order in 18 cases. The selected member reduced wholly or in part and secured the order in eight cases. A non-selected member who also had the lowest price secured the order in six cases. A non-selected member who was not lowest secured the order in five cases. In these 37 cases, the total value of orders obtained by members was about £37,000,000.

We are satisfied, having heard Leopold Brook of Simon-Carves and George Sturrock Brown of Yarrow and the director of the association, that this scheme is honestly worked in the manner we have described. We are completely satisfied, having seen him in the witness-box, that the director is a strong independent chairman.

We are further satisfied upon the evidence that the prices tabled by members at these meetings are really competitive and keen prices, by which we mean prices which cover overheads and depreciation and allow a small, but only very reasonable, margin of profit. In this connection, we desire to say that the evidence of the profit margin was not satisfactorily produced to us in a convincing manner, being unsupported by accounts. We accepted such evidence as was tendered in this case only because we realised that the scheme has been operating for such a short time and the contracts take so long to work out that figures of actual profits obtained on these contracts may not yet be available. However, it is clear from figures produced to us of cost per kilowatt, and is indeed plain from the fact that the members have been so successful in securing orders, that their prices compare very favourably with outside boilermakers.

We are also satisfied on the evidence that the operation of rule 5 brings other advantages to members almost, if not quite, as great as winning the prize of selection. First, it prevents

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him from yielding to the practices followed by some customers of resorting to "Dutch auctions"; that is, the customer goes round to one or more of those who have tendered and tries to persuade them that a little reduction in the price will secure the contract. That is particularly valuable in a period of depressed trade.

Secondly, after the meeting, each member takes away and makes a careful study of his rivals' figures appearing in the detailed schedules prepared by the director. This enables each member to keep a close check on the general level of prices. It enables him to see if his estimators are keeping generally in line with his rivals. Some error in his design or costing may appear from an examination of these documents. That will enable him to correct the error and to put in a keener estimate on the next occasion. Furthermore, it leads to very careful preparation of the price to be quoted, for the member's detailed figures will be carefully examined by his rivals and he would not like it to appear that compared to his rivals he has made some mistake or miscalculation. We are satisfied that rule 5 is of great benefit to members and is so operated that on the one hand it does not result in inflated prices being quoted but competitive prices which only include a low but reasonable margin of profit, and on the other does not result in "slashed" or uneconomic prices being tabled, for it is the acknowledged object of the scheme to keep prices higher than they otherwise would be in times of slack demand. The case of the association is this, that without such a scheme, prices would fall to a wholly uneconomic level and would mean that the members would not make an adequate profit on their contracts and might indeed suffer severe losses.

We accept this view of the situation. We think that without the scheme, there would be a severe cut in prices. Here is an industry consisting of few companies having an excess capacity and chasing too few very large but infrequent orders. Even with the scheme, some of the members have been without any orders from the Electricity Board for some years. With the scheme, however, each member knows whether his tendering is in line with those of his fellow members and each time he fails to secure an order he knows that his record of trading will give him a better chance of becoming the selected member next time; his quoted prices will become even keener and his hope of a big contract may legitimately increase. Without the scheme, all he knows is that he misses contract after contract. He does not know if his design is at fault, whether his estimators are out of line, or whether he is falling behind in technical achievement. The time arrives when he must have an order at any cost if he is to remain in the industry and to retain his key personnel. He will slash his prices to obtain an order, not attempting to make a profit or even to meet all his overheads, and this will lead to a general fall in prices. We had an excellent example of this in

evidence with regard to one of the outside United Kingdom manufacturers. A tender was called for and then there was a re-tender, by which time he had learnt of his competitors' tenders. In the re-tender he cut his prices by 20 per cent., which must have involved him in severe loss, but he obtained the contract. The strength of the association, however, apparently averted any serious fall in prices in later contracts.

We now turn to consider the submissions of the association in relation to the Act. First, it is said that the operation of rule 5 brings them within section 21 (1) (*b*), which we do not pause to read. It is said that the operation of the rule tends to preserve capacity. By that is meant really retention within the industry of key personnel. We have already said enough to show that it is vital in this highly technical and progressive industry to keep the key scientists, designers, chief draftsmen, and metallurgists and estimators if a particular company is to be in a position to deal with the expected expansion of orders in the future. Further they must keep with them the experienced and highly technical efficient workmen, foremen, skilled artisans, welders and the like, including those specially trained to erect the boiler on the site. It is said that without this scheme the companies would be compelled to dismiss much of this skilled personnel, for they cannot afford the overheads in keeping them underemployed during the expected period of depression for the next four or five years.

We are unable to accept this argument. All the members are companies of long and high standing, financially well placed, and reports of the companies have been read to us which show that the directors are keenly alive to the vital necessity of keeping this highly skilled and technical personnel on the pay-roll. That has appeared again and again in the reports that have been read to us. In the depression as we see it over the next five years or more, we have not the slightest doubt that in fact the directors will not take the risk of dismissing their key personnel. They may dismiss a number of their skilled draftsmen and artisans, and that indeed has already happened while the scheme still operates, as was proved by the figures given before us; but we are satisfied that they will keep the essential key personnel who are there to organise the departments and will be there ready to train on the less skilled personnel when the expected increase in demand arises. Putting it shortly, all of the members are strong long-established boilermakers and there is no evidence to show they lack the resources to keep in business during the contemplated recession. The directors realise perfectly well that if they are to remain in the business, they must retain these personnel; they will do so.

Secondly, it is said that without the scheme the collective research department which we have already mentioned will close down. We have already pointed out that some £80,000 to £100,000 a year is being spent by the association in collective

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research. This is a negligible amount compared to the very large overhead expenditure involved in this industry, and we are quite satisfied that if it is thought by the members to be worth while to keep the department in being during a period of recession, they will in fact continue to provide this comparatively small expenditure. If they do not think it is worth while, they will no doubt reduce or close down the research department. There is nothing in this point.

Thirdly, it is said that unless the scheme is continued in operation, the individual research departments will have to be closed down. It is no doubt true that the individual research departments do cost the companies in the aggregate a great deal of money. It may be that if a period of very deep depression is to be anticipated for a considerable number of years, the companies would be compelled to close down their research departments, but we have already said we do not envisage such a deep depression. We have no doubt, for the reasons already given, that the companies will be well able to maintain their essential research departments over the expected recession for the next four or five years and take advantage of the gradual return to full demand which we expect to occur after that period.

Then it is said that if the scheme goes, quality will deteriorate. It is said that at present tenders provide a "generous" fulfilment of the specification; that is to say, that boilers are designed which not merely carry out the tests laid down in the specification on trial runs when everything, the quality of the coal and so forth, is at its most favourable, but will provide an equally good day-to-day performance in normal operating conditions. We do not think that this is a valid argument. The Electricity Board has itself a very expert staff in boiler performance. Industrial users will normally consult eminent and very experienced engineers. These experts are fully alive to the difference between test runs and day-to-day performance and it is to be expected that they will so frame their specification as to give the day-to-day performance which they expect. This is a minor consideration only.

Finally, it is said that the preservation of the scheme will tend to keep the sub-contracting among members. So be it, but we do not follow this argument. We have already stressed the sub-contracting feature of this industry and whether the association's restrictions remain in being or not, sub-contracting will go on whether among members of the association or outside. Indeed, we think that it is advantageous to the public that sub-contracting should not tend to be limited to the members, for there may be outside boilermakers who are specialists in particular ancillary goods which are more suitable for the contract in question. In fact it appears that members do not contract exclusively amongst themselves but frequently go to outside bodies for ancillary machinery. We think the tendency to keep sub-contracting to members operates as a detriment to the public.

In conclusion, although the association has proved that the scheme contains many advantages for the members, we are of opinion that they have entirely failed to prove that its abrogation would deny to the public any benefits.

We turn then to the respondents' claim under section 21 (1) (*d*) of the Act; that is, the preponderant buyer paragraph. That paragraph reads as follows: "that the restriction is reasonably "necessary to enable the persons party to the agreement to "negotiate fair terms for the supply of goods to, or the acquisi-"tion of goods from, any one person not party thereto who "controls a preponderant part of the trade or business of acquiring "or supplying such goods, or for the supply of goods to any "person not party to the agreement and not carrying on such "a trade or business who, either alone or in combination with "any other such person, controls a preponderant part of the "market for such goods."

It is claimed that the Electricity Board controls a preponderant part of the market for boilers. We do not propose to attempt any definition of the word "preponderant"; it seems to us that it must be a question of fact in all the circumstances of each particular case as to whether or not a particular purchaser can be so described. Nor do we propose to attempt any definition of the word "market." It was submitted to us that the word "market" did not mean merely the home market but it meant the whole market available to the members of the association. Whichever definition of "market" be taken, we are satisfied that the Electricity Board is properly described as controlling a preponderant part of the market. The board is the only customer for Central Electricity Power Station boilers in England and Wales.

Let us restate a few of the figures we have already mentioned. During the years 1952 to 1958 inclusive, the total amount known to have been placed in the home market was £233,000,000. Of this total, the amount placed by the Electricity Board was £194,000,000. In the same period overseas orders, for territories within the scope of the agreement, known to have been placed with home and foreign boilermakers, amounted to £116,000,000. The board, therefore, placed 83 per cent. of the total home orders and 56 per cent. of the combined home and overseas orders for the period. It seems to us clear upon those figures that the Electricity Board is properly described as controlling a preponderant part of the market, and we so stated during the hearing.

It is, we think, also permissible to take into account as an element, but only as an element, the unique prestige and reputation of the Electricity Board. We were satisfied on the evidence that if an overseas buyer who has made an inquiry of a member can see and inspect some recent and up-to-date installation of the latest and most advanced design which that member has recently erected for the Electricity Board, this will have an important influence on the overseas customer and may result

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in the award of a contract to the member. Apart altogether from the desire to fill the member's order book, the importance therefore of getting orders from the Electricity Board cannot be over-stressed.

The question remains whether the restriction is reasonably necessary to enable the members to negotiate fair terms for the supply of goods to the Electricity Board. As we have earlier pointed out, immediately after the war the Electricity Board was faced with the necessity for ordering a vast amount of new equipment to meet the greatly increased demand for electricity, so that they invited companies to increase their capacity. Their method of placing orders at this time was by direct allocation. From 1954 onwards, however, all orders for boilers have been placed by competitive tender, save in exceptional circumstances. In 1954 a committee of inquiry was set up to inquire into the electricity supply industry, under the chairmanship of Sir Edwin Herbert. This committee reported in January, 1956 [Cmd. 9672], and entirely approved of the method of placing orders after inviting tenders. Indeed, the Herbert Committee went so far as to suggest that the Electricity Board should obtain tenders not only from home boiler manufacturers but from those abroad. We do not doubt that the procedure of putting out these vast orders to competitive tender by the Electricity Board is business-like, entirely proper and in the national interest.

If the rule is abolished, however, we have already given our reasons for thinking that the probable effect in a period of depression will be that the members and others will quote prices which will be uneconomic, and which will depress prices generally in the industry to a level at which few, if any, of the boiler manufacturers will be able to conduct their business at a profit. The Electricity Board has in evidence before us however, made it quite clear that they do not desire to force down prices to an uneconomic level. They are anxious to see that the members and other persons invited to tender put in prices for boilers which give them a small but reasonable profit.

Mr. Megaw, for the registrar, is therefore quite right when he submits that the Electricity Board is not trying unfairly to force down prices by adopting this system of competitive tender. He then submits that to bring sub-paragraph (*d*) into play it is necessary to show that the preponderant buyer is likely to use his powers to negotiate unfair terms. That, he says, is not proved in this case, and he says that if the members of the association like to put in tenders at uneconomic levels, that is their business, but it does not bring paragraph (*d*) into operation.

We cannot agree with Mr. Megaw's construction of the paragraph. We have to see whether, in all the circumstances of the case, the restriction is reasonably necessary to enable the members to negotiate fair terms for the supply of boilers to the Electricity Board. We do not think that the paragraph necessarily requires proof of the existence of a preponderant buyer who is likely to try

to enforce unfair terms. It is, we think, sufficient, if in fact in all the circumstances of the case without the restriction the suppliers will not be enabled to negotiate fair terms, but in the hope of getting an occasional contract are likely to tender at uneconomic prices. By "fair terms" we understand the paragraph to mean terms upon which the efficient manufacturer can make and sell his goods at a reasonable, but no more than a reasonable, profit.

In the special circumstances of this case, we think that the conditions for the operation of the paragraph are satisfied.

We must not be understood as saying that whenever there is a preponderant buyer who employs the method of competitive tender, a case for some restriction is at once made out. In the ordinary case where such a procedure is followed, the normal results of competition will come into play. The more efficient tenderers will gradually obtain a bigger share of the market and will drive the less efficient out of business. That is as it should be, and will not usually give rise to the necessary conditions for the operation of the paragraph. But in the case before us, however, there is no room for the free play of competition in the ordinary sense. Here we have six big and efficient firms who ought in the national interest, having regard to the expected long-term demand, to stay in the business. In the meantime there are these very few, very large, orders which it is expedient should to some extent be spread over the industry and not concentrated in the hands of very few.

That, however, does not conclude the matter in the respondents' favour, for we have to consider whether this particular restriction, that is rule 5 itself, is reasonably necessary to enable the members to negotiate fair terms with the preponderant buyer. It seems to us clear that the rule as it stands is not reasonably necessary for that purpose, for the simple reason that it applies not only to contracts with the Electricity Board but to all other contracts for home industrial boilers and all contracts of every kind situate in a large number of overseas territories. It is in fact quite unnecessarily wide. It is said that if rule 5 is to operate only in connection with Electricity Board orders, it will be operated so seldom that it will not fulfil its purpose of enabling members to judge of the general level of prices. We cannot accept this argument. Under this paragraph the object of the rule is not to enable members to obtain knowledge of the general level of prices, but to negotiate fair terms with the Electricity Board. Therefore, the application under paragraph (*d*) fails upon this ground.

We now come to the last paragraph relied upon by the respondents; that is section 21 (1) (*f*). It is in these terms: "that, "having regard to the conditions actually obtaining or reasonably "foreseen at the time of the application, the removal of the "restriction would be likely to cause a reduction in the volume "or earnings of the export business which is substantial either in

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"relation to the whole export business of the United Kingdom or "in relation to the whole business (including export business) of "the said trade or industry."

Before dealing with this section in detail, however, we desire to add one or two facts upon the operation of rule 5 when it is applied to the overseas territories. In the first place, the members interested usually have an early preliminary meeting before the tabling meeting. At this meeting there is a very detailed discussion upon the specification. There is a much greater exchange of technical knowledge and "know-how" than in the case of home orders, for we are satisfied upon the evidence that the principal object of members, when dealing with overseas orders in an included territory, is to bring the order home to this country, and there is less emphasis placed upon the record of trading. Not only is there a much greater exchange of technical and commercial information, credit and other requirements, but the members pool information and tell one another what they have heard, possibly only by way of rumour, as to other likely outside or foreign manufacturers who are going to tender for the particular inquiry. This consultation is far more important in dealing with overseas inquiries. Alternative specifications may be discussed. This may be of the utmost use to members. Then, in the case of these overseas orders, much greater emphasis is placed upon customer preference and far less upon the record of trading. In some overseas territories, one or two of the members maintain offices and a competent staff, and the question of customer preference frequently settles itself. It is, of course, clear that, as in the home market, one object of the operation of rule 5 is to maintain prices, but it was agreed that the rule is applied much more flexibly to overseas inquiries. How then, runs the registrar's argument, with much force, can it be that the existence of the rule enables members to obtain a larger share of the export market than would otherwise be the case, for it is not in dispute that the outside and foreign boilermakers are intensely competitive? He submits, if the rule is abolished, members will tender at lower prices and are therefore more likely to win the competition against their foreign and outside rivals.

Paradoxical though it may seem, we do believe in fact that the continued existence of the rule will enable the members to obtain a larger share of overseas orders (which cannot be numerous) than would be the case if the restriction was abolished. If there were no rule, a member tenders in the dark. It may be that he has made some mistake or that his estimators have got out of line, and he may put in a tender which will just miss the order although he may be the contractor preferred by the customer. When, however, the matter has been thoroughly thrashed out, first at a preliminary meeting and then at the ordinary tabling meeting, any interested member may be reasonably satisfied that his tender is strictly in line with the general level

of prices, and that his estimators or designers have made no mistake, or, if they have, he can rectify that if he is the selected member. He also knows that if he really is likely to be the member to whom the foreign customer would want to give the order, he is likely to be chosen as the selected member. Accordingly, it enables him to put in the keenest possible price which will, therefore, give him a still better chance of securing the order. The combination of customer preference and the lowest price must help to secure overseas business.

There is another way in which we think the rule may operate to maintain export orders. We have already mentioned that some of the members keep considerable staffs and offices in some overseas countries. We think that if the restriction were to be removed, there would be a likelihood at any rate of some of these offices being closed and extremely valuable local contacts lost, with consequential loss of orders. With the restriction in force, the members gain that extra confidence which makes it worth while to keep these expensive organisations overseas in being.

The figures as to foreign trade given to us show, indeed, how successful the members have been in the past, and that the rule has not been applied to the detriment of overseas trade. We have formed the opinion that consultation between interested members, each contributing to the background of knowledge essential to a proper assessment of market possibilities, is of great, and perhaps even of crucial, value in dealing with inquiries from abroad. We are satisfied that if the restriction is removed, having regard to the conditions which may reasonably be foreseen, there is likely to be a reduction in foreign orders obtained by members of the association.

This brings us to an important question of construction on paragraph (*f*). Mr. MacKenna submits that in order to bring the paragraph into operation, the export business must be shown to be substantial in relation to the whole business (including export business) of the trade or industry in question. In this case he shows that without difficulty. If that be so, then he submits he only has to show the likelihood of any reduction, however small, in the volume or earnings of that substantial export business in order to satisfy the section.

Mr. Megaw on the other hand submits that the respondents must show that it is the reduction which is substantial; that is to say, comparing the expected reduction in the volume or earnings of the export business with the whole business, including export business, of the trade or industry, you must show that the reduction expected is substantial. Mr. MacKenna relies upon a strict grammatical construction of the section. He says the word "which" naturally refers to the immediately antecedent noun "business." He submits further that if Mr. Megaw's construction is correct, it should read "business which *would* be substantial" and not "is." While we recognise the force of Mr. MacKenna's argument based upon the strict grammar of the

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paragraph, we do not think it is the correct construction. We think that, without doing violence to the words of the section, it can be read in the manner suggested by Mr. Megaw. We think that is what Parliament intended. The export business may be quite small both in volume and earnings compared to the total volume or earnings of the business both at home and abroad; nevertheless it may in absolute terms be valuable and if the reduction is expected to be substantial, then it seems to us that the paragraph is intended to operate. The section taken as a whole is clearly directed to a comparison between the state of affairs with the restriction in force compared to the expected situation if it is removed and the comparison must show a substantial or serious change; not something small or insubstantial. Thus, in sub-paragraph (*b*) the court must be satisfied that the removal of the restriction would deny substantial and specific advantages to the public. Under paragraph (*e*), the court must be satisfied that the removal of the restriction would be likely to have a serious and persistent adverse effect on the general level of unemployment. And so, when one comes to paragraph (*f*), it seems reasonably clear that Parliament's mind is directed to a substantial reduction in exports.

It is indeed a very difficult matter in this case to express a view upon the question whether the removal of the rule will cause a substantial reduction in this very substantial export trade. It is not possible to express any quantitative views upon it. What seems to us important, however, is that the size of boilers is increasing not only at home, but throughout the world, and it may be reasonably expected that the value of overseas individual boiler contracts will tend in the future to follow the expansion which has been so noticeable in this country. Consequently the loss in any year of even one overseas contract may represent a substantial reduction in the export figures of the industry, and that indeed we think is made reasonably clear by a perusal of the record of trading relating to some of the overseas countries.

We have reached the conclusion that, giving the matter the best judgment we can, the abolition of rule 5, operated in the way that it is in relation to overseas orders, would be likely to cause a substantial reduction in the volume or earnings of the export business compared to the total of the whole business (including export business) of the trade or industry. Accordingly, we have reached the conclusion that the respondents, upon the particular facts of this case, satisfy paragraph (*f*) of section 21 (1).

We turn then to the final balancing provision at the end of subsection (1). On one side of the balance is the circumstance that the removal of the restriction is likely to cause a substantial reduction in the volume or earnings of the export business. On the other side of the balance, we have to consider what is the detriment to the public resulting, or likely to result, from the operation of the restriction. In this case the public concerned

are the purchasers and users of central power station and industrial boilers. Having regard to the definition of "goods" to be found in section 36 (1) of the Act, it seems to us clear that the public do not include the users of electricity; in any event the difference in the price of a unit of electricity to a member of the public by reason of the fact that the Electricity Board or some other Power Station Authority has to pay rather more for its boilers would be infinitesimal.

The grounds of detriment relied upon by the registrar are to be found in paragraph 19 of his answer. The first two grounds allege that the effect of the restriction is to prevent or restrict the free play of competition between firms of differing efficiency and that the scheme for influencing the distribution of contracts tends to prevent the concentration of business on the low-cost boilermakers and involves an uneconomical use of the nation's productive resources. We have already given our reasons for not accepting the first of these submissions, in the special circumstances of this case, when we were considering paragraph (*d*). As to the second, as we have already stated, we are satisfied that with or without the scheme there will be no reduction of capacity in the industry.

The registrar next alleges that the price restrictions are likely to lead to the submission to the customer by members of prices which are higher than those which the members would quote in the absence of such an agreement. He then alleges that it is a detriment to the public that any arrangements should be maintained which discourages the manufacturer from reducing his prices if he is in a position to do so.

Finally, he says that by the operation of the restrictions the selected member may be faced with a temptation of reducing the price which he is prepared to tender by lowering the standard of his work. We have already considered this point and we regard the detriment as a minor one.

We must, however, deal in detail with the registrar's submission that the price restrictions will lead to higher prices and that the member will be discouraged from reducing his prices if he is in a position to do so. It is, of course, true that the members may tender somewhat higher prices than if the restriction is abolished, especially in times of depression, and it is no doubt equally true that a member will not put in a price which does not give him a fair return.

In our judgment, the real detriment to be weighed against the reduction in exports is that the purchasers of boilers may have to pay rather more than they otherwise would for their boilers.

In all the circumstances of this case, we do not think this detriment to the public outweighs the national benefit resulting from the maintenance of exports which we anticipate if the scheme continues.

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Accordingly, in this case the respondents succeed in discharging the onus cast upon them by section 21 of proving that the restriction is not contrary to the public interest.

Declaration accordingly.

Solicitors: *Claremont, Haynes & Co.; Treasury Solicitor.*

J. F. L.

[COURT OF APPEAL.]

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June 8, 9.
Lord Evershed M.R., Romer and Pearce L.JJ.

* *In re* BLANKET MANUFACTURERS' AGREEMENT.

Restrictive Practices—Registration—Agreements registrable—Sanctity of contract agreement — Recommendation to manufacturers not to accept variation or cancellation of contracts without approval of trade association—Whether restriction in respect of "prices to be "charged . . . for goods," "terms or conditions on which goods "are to be supplied" or "quantities or descriptions of" goods to be supplied—Whether Restrictive Trade Practices Act, 1956, *applies to agreement affecting rights under completed contract — Whether operation of Part I confined to agreements affecting supplier's pre-contractual position — Restrictive Trade Practices Act,* 1956 (4 *&* 5 *Eliz.* 2, *c.* 68), *s.* 6 (1) (*a*), (*b*), (*c*), (3).

Section 6 (1) of the Restrictive Trade Practices Act, 1956, provides: " . . . this Part of this Act applies to any agreement "between two or more persons carrying on business . . . in the "production or supply of goods, . . . under which restrictions are "accepted by two or more parties in respect of the following "matters, . . . (*a*) the prices to be charged, quoted or paid for "goods supplied, offered or acquired, . . . (*b*) the terms or con-"ditions on or subject to which goods are to be supplied . . . "(*c*) the quantities or descriptions of goods to be produced, supplied "or acquired. . . ."

Paragraphs (*a*), (*b*) and (*c*) of section 6 (1) of the Restrictive Trade Practices Act, 1956, on their true construction, are directed to restrictions regulating the position of a party to the agreement when he is about to enter into a trading contract and do not contemplate restrictions affecting his rights and obligations under a completed contract.

The Blanket Manufacturers' Association, a trade association, made a recommendation accepted by its members as binding upon them, that " No manufacturer shall agree to the breaking of any contract by "reduction of price or other procedure. Should any attempt be made "to break or vary the contract the manufacturer shall refuse to accept "cancellation or variation and endeavour to obtain completion of "the contract. . . . If a manufacturer has good reason to agree a "request for the cancellation or variation of a contract he shall not "so agree until approval is given by the reference committee":—

Held, that the recommendation, although a "restriction," did not regulate the provisions as to price, terms or conditions or quantities or descriptions to be incorporated into contracts made by members with their customers, but affected only the rights and

obligations of the members after they had entered into the contracts, and that, therefore, it was not a restriction "in respect of" any of the matters set out in paragraphs (*a*), (*b*) or (*c*) of section 6 (1).

Decision of the Restrictive Trade Practices Court (1959) L.R. 1 R.P. 208; [1959] 1 W.L.R. 442; [1959] 2 All E.R. 1 affirmed.

CASE STATED by the Restrictive Practices Court.[1]

By notice of reference dated October 1, 1957, the Registrar of Restrictive Trading Agreements referred to the Restrictive Practices Court an agreement, numbered 801 on the register of agreements, made between the members of the Blanket Manufacturers' Association, a trade association as defined in section 6 (8) of the Restrictive Trade Practices Act, 1956.

The following extracts from the judgment of the court,[2] delivered on March 23, 1959,[3] were read in the Court of Appeal.

The respondent, the Blanket Manufacturers' Association, was formed in January, 1946, with the main object of co-operating for the common good, protection and benefit of the members and to safeguard and further their interests. Membership is confined to manufacturers of woven woollen blankets and consists at the present time of about 20 companies. Members are centred for the most part in the West Riding of Yorkshire or at Witney in Oxfordshire. Originally the main energies of the association were engaged in co-ordinating the blanket industry's approaches to the Board of Trade about price control and utility schemes. From 1949 onwards at general meetings of the association a number of resolutions relating to minimum prices, terms of sale and minimum qualities were passed. These resolutions, with one exception which we shall deal with later, are admittedly restrictions for the purpose of section 6[4] of the Restrictive Trade

[1] Restrictive Trade Practices Act, 1956, s. 2 (4): "The supplementary provisions set out in the schedule . . . shall have effect with respect to the proceedings of the court." Sch.: "7. The decision of the court on a question of fact shall be final: but an appeal shall lie on any question of law from any decision or order of the court—(*a*) in the case of proceedings in England and Wales, to the Court of Appeal; . . . 8. Any appeal under the last foregoing paragraph to the Court of Appeal . . . shall be by way of case stated. . . ."

[2] Restrictive Practices Court Rules, 1957 (S.I. 1957, No. 603), r. 81: "In proceedings in England and Wales . . . the judgment of the court shall, in so far as facts are stated therein, be deemed to be a case stated for the purpose of any appeal on a question of law to which those facts give rise. . . ."

[3] (1959) L.R. 1 R.P. 208, 248, 257; [1959] 1 W.L.R. 442; [1959] 2 All E.R. 1.

[4] Restrictive Trade Practices Act, 1956, s. 6: "(1) . . . this Part of this Act applies to any agreement between two or more persons carrying on business within the United Kingdom in the production or supply of goods . . . being an agreement under which restrictions are accepted by two or more parties in respect of the following matters, that is to say:—(*a*) the prices to be charged, quoted or paid for goods supplied, offered or acquired . . . (*b*) the terms or conditions on or subject to which goods are to be supplied or acquired . . . (*c*) the quantities or descriptions of goods to be produced, supplied or acquired. . . . (3) In this Part of this Act 'agreement' includes any agreement or arrangement, whether or not it is or is intended to be enforceable . . . and references . . . to restrictions accepted under an agreement shall be construed accordingly; and 'restriction' includes any negative obligation, whether express or implied

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Practices Act, 1956, and are the subject-matter of this reference to us. According to the statement of case these resolutions were sometimes expressed to be "recommendations" to the members and sometimes to be agreements between the members. But looking at the substance of the matter it is clear that each resolution was mandatory in form and it is not disputed that members recognise that such resolutions are binding (at any rate in honour) upon them, and that if a member is not prepared to accept and act on the resolution it is his duty to resign from the association. We are not concerned in this reference to consider the position under section 6 (7) of the Act if the recommendations had been phrased as genuine recommendations which in terms the member might accept or reject.

We propose to consider first the restriction set out in paragraph 31 of the statement of case relating to Sanctity of Contracts as it has been called in argument. The resolution was made on or about June 19, 1951, to the following effect: "No manufacturer shall agree to the breaking of any contract by reduction of price or other procedure. Should any attempt be made to break or vary the contract the manufacturer shall refuse to accept cancellation or variation and endeavour to obtain completion of the contract. If this should fail the member must send all correspondence to the secretary without informing the customer that he is doing so. The secretary should then forthwith write the customer to the effect that the correspondence had been handed to him and asking for the customer's explanation for his attempt to break the contract in order that he may advise the manufacturer concerned. If a manufacturer has good reason to agree a request for the cancellation or variation of a contract he shall not so agree until approval is given by the reference committee, which reference committee shall consist of the chairman, Mr. Illingworth [the association's accountant], and the secretary." The first question is whether such a resolution is a restriction within section 6 (1) of the Act, the registrar acceding to the view that if it is not within the section we have no jurisdiction to consider it. We have not found this an easy question to answer. The real question is whether an agreement between two or more persons, being manufacturers of the same type of goods, not to cancel or vary any contract of sale of goods made or to be made in the future by any of those persons with their customers without the consent of some third party, is the acceptance of a restriction which falls within any

". . . and whether absolute or not. "(7) Where specific recommendations ". . . are made by or on behalf of a "trade association to its members . . . "as to the action to be taken or not "taken by them in relation to any "particular class of goods . . . in "respect of any matter described in ". . . subsection (1), this Part of this "Act shall apply in relation to the "agreement . . . as if it contained a "term by which each . . . member . . . "agreed to comply with those recommendations. . . . (8) In this "section 'trade association' means a "body of persons . . . formed for the "purposes of furthering the trade "interests of its members. . . ."

one or more of sub-paragraphs (*a*)–(*c*) of section 6 (1). This is a question of construction, and we have reached the conclusion that giving the words used in the section their natural and ordinary meaning, such an agreement cannot be fitted into any of the sub-paragraphs. Accordingly, in our judgment, we have no jurisdiction to consider the validity of this resolution. We may add that had we reached a contrary conclusion we should have held that the resolution, though highly beneficial to the members of the association, was not for the benefit of the general public or to wholesalers or retailers dealing with members of the association and was, therefore, contrary to the public interest.

The registrar appealed against that part of the court's decision.

The court also held that the other recommendations made by the association (with the exception of one relating to a minimum quality for blankets) were contrary to the public interest and so declared; against that holding the association did not appeal.

John Megaw Q.C. and *A. W. Bagnall* for the registrar.
Walter Gumbel for the association.

The following case was referred to in argument: *Morris* v. *Baron & Co.*[5]

LORD EVERSHED M.R. This appeal raises the single question whether a certain "restriction" (to use the word that I find in section 6 of the Restrictive Trade Practices Act, 1956, and which is admittedly applicable in this case) is one falling within the scope of the first subsection of section 6 of the Act. The "restriction," as I have called it, is set out in the judgment of the Restrictive Trade Practices Court,[1] and is in the following terms (being dated June 19, 1951): "No manufacturer shall agree to the breaking "of any contract by reduction of price or other procedure. "Should any attempt be made to break or vary the contract "the manufacturer shall refuse to accept cancellation or varia- "tion and endeavour to obtain completion of the contract. If "this should fail the member must send all correspondence to "the secretary without informing the customer that he is doing "so. The secretary should then forthwith write the customer to "the effect that the correspondence had been handed to him and "asking for the customer's explanation for his attempt to break "the contract in order that he may advise the manufacturer "concerned. If a manufacturer has good reason to agree a request "for the cancellation or variation of a contract he shall not so "agree until approval is given by the reference committee which "reference committee shall consist of the chairman, Mr. Illing- "worth and the secretary."

That passage which I have read is the subject of a resolution

[5] [1918] A.C. 1.

[1] (1959) L.R. 1 R.P. 208; [1959] 1 W.L.R. 442; [1959] 2 All E.R. 1.

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duly passed by (so as to be binding upon) the members of the Blanket Manufacturers' Association; and the question was formulated by the court as follows[2]: "The real question is whether "an agreement between two or more persons, being manufac- "turers of the same type of goods, not to cancel or vary any "contract of sale of goods made or to be made in the future by "any of those persons with their customers without the consent "of some third party, is the acceptance of a restriction which "falls within any one or more of sub-paragraphs (*a*)–(*c*) of "section 6 (1)."

I turn, accordingly, to that subsection. It provides: "Subject "to the provisions of the two next following sections, this Part "of this Act applies to any agreement between two or more "persons carrying on business within the United Kingdom in "the production or supply of goods, or in the application to goods "of any process of manufacture, whether with or without other "parties, being an agreement under which restrictions are "accepted by two or more parties in respect of the following "matters, that is to say:—(*a*) the prices to be charged, quoted "or paid for goods supplied, offered or acquired, or for the "application of any process of manufacture to goods; (*b*) the "terms or conditions on or subject to which goods are to be "supplied or acquired or any such process is to be applied to "goods; (*c*) the quantities or descriptions of goods to be produced, "supplied or acquired."

I can pass over paragraphs (*d*) and (*e*); but I should read subsection (3): "In this Part of this Act 'agreement' includes any "agreement or arrangement, whether or not it is or is intended to "be enforceable (apart from any provision of this Act) by legal "proceedings, and references in this Part of this Act to restric- "tions accepted under an agreement shall be construed accord- "ingly; and 'restriction' includes any negative obligation, "whether express or implied . . . and whether absolute or not."

It is the contention of the appellant in this court, the Registrar of Restrictive Trading Agreements, that the resolution already read (which is briefly called the "Sanctity of Contracts" resolution) falls—plainly—within the scope of the word "restriction," as it is expanded at any rate to include "any negative obligation." For it is said that the effect of it is to limit or restrict the ordinary freedom which a trader would have to make such arrangements as he thought fit for cancelling or varying a contract already made, if such a course commended itself to him. And so far there is no contest between the registrar and the association; for the association also agrees that this recommendation or resolution is or constitutes a restriction. But is it a "restriction" within the terms of the subsection which I have read?

The court, in its judgment, stated that they had not found the question one easy to answer; and I agree that it is not an easy

[2] L.R. 1 R.P. 208, 258.

question. But I have myself come to the same conclusion as did the court—that, reading the language of the section according to its ordinary significance, this restriction cannot fairly be said to fall within the language of subsection (1) of section 6.

The matter is, I think, very largely one of first impression; and (as both Mr. Megaw and Mr. Gumbel conceded) it is not one which lends itself usefully to much elaboration. But I accept the premise of Mr. Gumbel's argument that the language of paragraphs (*a*), (*b*) and (*c*) of the subsection is, upon the face of it, directed to the case of a manufacturer about to enter into a trading contract. I do not say that necessarily the language would not cover other cases; but in each case (it will be recalled) there is the collocation "*to be*"—"to be charged"; "to be applied"; "to be produced"—indicating that the draftsman is looking to a point of time when the contract is about to be entered into and is not contemplating the case where the contract has already been made.

It is, therefore, against that background that the question must be put and answered: Is this resolution fairly within the language? Is it (in other words) an "agreement under which "restrictions" (including "negative obligations") "are accepted "by two or more parties in respect of" one or more "of the "following matters: the prices *to be* charged . . ."—etcetera; "the terms or conditions on . . . which goods are *to be* "supplied . . ."; or "the quantities or descriptions of goods "*to be* produced. . . ."?

It is, no doubt, true that if a manufacturer, having made a bargain with a customer, later agrees with that customer, by way of variation of an existing contract, to reduce, say, the price, he may be said to make an arrangement with that customer which relates to the price which will ultimately be paid for the goods. None the less, if the question be posed, and be answered, as I think it must, according to the ordinary usage of our tongue, I agree with the court that this recommendation cannot properly or fairly be described as being within this subsection—as being an agreement under which restrictions, including negative obligations, are accepted in respect of any of these specific named matters.

I only add this—as was indeed conceded by Mr. Megaw: If this part of the section had confined itself merely to reference to the terms or conditions on or subject to which goods are to be supplied or acquired, that might have been a formula of so wide a scope as to include all agreements which in some sense were directed to that end. But the express sub-division into cases relating to prices as distinct from terms or conditions, and as distinct again from quantities or descriptions of goods, seems to me to have the effect of somewhat confining the language of each paragraph; and, therefore, without further elaboration (for I have said that the case does not, as I think, much admit of elaboration) I conclude that, fairly construed, this recommendation

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cannot be said to be of the description which you find in any one of the paragraphs of this subsection.

I would, accordingly, dismiss the appeal.

ROMER L.J. I agree. I accept the view which was suggested by Mr. Gumbel, that section 6 (1) of the Act of 1956, in so far as it relates to the prices and other terms or conditions of contracts for the supply or acquisition of goods, is confined to agreements regulating the pre-contractual position of members of an association such as the respondents, and that, once a member has entered into a contract with a customer, an agreement previously entered into with the other members affecting his rights and obligations under the contract is unaffected by the subsection. In other words, this part of the subsection is, in my judgment, directed to, and confined to, agreements regulating the contractual provisions as to the prices, terms and conditions, etc., which are to be incorporated in contracts into which the members enter with their customers. This is the general impression which I derive from subsections (1) and (3) of section 6, and, in particular, from the presence in paragraphs (*a*), (*b*) and (*c*) of subsection (1) of the words "to be"—"to be charged"; "to be supplied"; "to be produced"; etc.

If this view be right, the appeal must clearly fail, for it would never be a term or condition of any contract of sale between a member of the association and a customer—nor does the agreement in question require that it should be—that the member should not agree to its cancellation or variation without the consent of a third party.

As the Master of the Rolls has said, the point is a short one, and one of first impression; but I agree with the Restrictive Practices Court that the agreement which it is now sought to impeach cannot fairly be fitted into any of the provisions of section 6 (1) of the Act. I therefore agree that the appeal fails.

PEARCE L.J. I entirely agree with what my Lords have said: In my view, section 6 (1), in so far as it relates to the prices and other terms or conditions of sale, is directed to restrictions prior to the contract for the sale of goods. The "Sanctity of Contracts" restriction only affects the situation after the contracts of sale have been entered into. It is a restriction, but it is not a restriction that comes within the terms of paragraphs (*a*), (*b*) or (*c*), on a fair construction of their language.

I agree, therefore, that the appeal should be dismissed.

Appeal dismissed with costs.

Leave to appeal to the House of Lords; the association to have its costs in the Court of Appeal in any event.

Solicitors: *Treasury Solicitor; Brooke, Dyer & Goodwin, Leeds.*

J. F. L.

[COURT OF APPEAL.]

* HAZELDINE AND OTHERS *v.* MINISTER OF HOUSING AND LOCAL GOVERNMENT AND ANOTHER.

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1959
Nov. 2, 3.

Hodson and Ormerod L.JJ.; Upjohn J.

Police—Compulsory purchase—"For functions of the police authority"—Housing—Police Act, 1946 (9 *&* 10 *Geo.* 6, *c.* 46), *s.* 15.

At an inquiry relating to the compulsory purchase of land for the provision of houses for police officers, the evidence showed that in order to provide an efficient police service it was necessary for the officers to have houses reasonably near their work. The objectors to the order did not dispute the evidence but contended that the power to purchase land compulsorily under section 15 of the Police Act, 1946, for the "functions of the police authority" did not include the provision of houses for police officers:—

Held, that the "functions" of the police authority included the provision of an efficient police service, that on the evidence the provision of houses for police officers near their work was necessary for this purpose, and that, accordingly, the order was within the words of section 15 of the Act of 1946.

Decision of Lord Parker C.J. (1958) 172 E.G. 675 affirmed.

APPEAL from Lord Parker C.J.

By a compulsory purchase order dated May 31, 1957, the Cheshire Police Authority, made an order for the purchase of certain land at Cheadle Hulme, Cheshire. The land adjoined the large divisional police headquarters at Cheadle Hulme, and was required for the purpose of providing houses for police officers. At the back of the land there was a builder's yard and adjacent land, which was owned by Mrs. Martha Emily Hazeldine, the first appellant, and occupied as tenant by her son, Samuel Hazeldine, third appellant. An adjoining cottage was owned by his wife, Mrs. Ethel Saxon Hazeldine, the second appellant.

Objections were made to the compulsory purchase order and a public inquiry was held before an inspector, on whose report the order was confirmed by the Minister of Housing and Local Government and published on April 10, 1958.

The appellants applied to the court under the Acquisition of Land (Authorisation Procedure) Act, 1946, Sched. I, para. 5, for an order quashing the compulsory purchase. The application was dismissed by Lord Parker C.J. on October 30, 1958. The appellants appealed to the Court of Appeal.

No appeal arose on the findings of fact that it was reasonably necessary for the purpose of the local police authority that the land should be acquired for the provision of houses for police officers reasonably near their work in order that they might carry out their duties efficiently; but it was contended that the power of the police authority to acquire land compulsorily under section 15 of the Police Act, 1946,[1] "for the functions of the police" did

[1] Police Act, 1946, s. 3: "(2) "Subject to the provisions of this "Act, an amalgamation scheme shall "make provision with respect to the "following matters, that is to say:— "(*a*) the establishment of a combined

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not include a power to purchase land compulsorily for the provision of houses for police officers.

Iain Glidewell for the appellants.

J. R. Cumming-Bruce for the Minister of Housing and Local Government.

The Cheshire Police Authority was not represented.

The following case was referred to in argument: *In re Bowman.*[2]

HODSON L.J. This is an appeal by one Samuel Hazeldine and others from an order of Lord Parker C.J., dated October 30, 1958, by which he confirmed on appeal an order for the acquisition of land which belonged to the appellants. No question arises as to the procedure which was taken under the Acquisition of Land (Authorisation Procedure) Act, 1946, but the point taken by the appellants is that there was no statutory power in the circumstances of this case to acquire their land. The respondent to the appeal is the Minister of Housing and Local Government, who has supported the order.

[His Lordship stated the facts, read the relevant sections of the Police Act, 1946, and continued:] It is to be noted that there is no express provision in the sections which I have read, nor indeed in the Act, enabling a police authority compulsorily to acquire land for the purpose of housing. The argument for the appellants rests upon that omission, for they say, and rightly say, that in other cases, as, for example, in section 1 (6) of the Fire

"force for the combined area, the "transfer to that force of members "of the constituent forces, and the "appointment as first chief constable "of the combined force of such person "as may be specified in the scheme; "(*b*) the maintenance of the com-"bined force by a combined police "authority constituted in accordance "with the provisions of the scheme, "and the transfer to that authority "of the police functions of the con-"stituent authorities."

S. 5: "(3) A combined police "authority shall have the same "powers as the council of a county "or county borough with respect to "the acquisition of land for police "purposes, including the powers in "that behalf conferred on such coun-"cils by this Act, and to the appro-"priation and disposal of such land, "and the provisions of this Act and "of the Local Government Act, 1933, "with respect to the acquisition, "appropriation and disposal of land "by such councils shall have effect "accordingly as if references therein "to the council of a county or county "borough included references to a "combined police authority. (4) For "the purpose of the discharge of their "functions under the scheme, the "combined police authority consti-"tuted by a county scheme shall have "the powers of a county council, and "the combined police authority con-"stituted by a borough scheme shall "have the powers of a county borough "council."

S. 15: "The council of any county "or county borough being a separate "police area may be authorised, by "means of an order made by the "council and confirmed by the "Minister of Health, to purchase "compulsorily any land, whether "situated within or without the "county or borough, which is re-"quired for the purpose of any of "the functions of the police authority "for the county or borough."'

S. 19: "'Combined police autho-"'rity' means the authority respon-"sible for the maintenance of a "combined force . . ."

[2] [1932] 2 K.B. 621; 48 T.L.R. 351.

Brigades Act, 1938, express provision is made that the powers of a fire authority shall include "power—(*a*) to provide accommodation, . . . including housing and other accommodation for members of any such fire brigade and furniture reasonably required for such accommodation; (*b*) to purchase compulsorily by means of an order made by the authority and confirmed by the Minister of Health any land required for the purposes of their functions under this Act. . . ."

Looking back at the history of the legislation with regard to the police, we were referred to the County Police Act, 1840, of which section 12 made provision for station houses and strong rooms as follows "It shall be lawful for the justices in general or quarter session assembled of any county in which or in any part of which constables shall be appointed under the first-recited Act, if they think fit, to order that station-houses and strong rooms, or either of them, for the temporary confinement of persons taken into custody by the constables, be provided in such places as the said justices shall think fit, . . ." That, of course, was in the early days of the police force as we know it now. Reference was also made to the Town Police Clauses Act, 1847, and to the Metropolitan Police Act, 1886. The Metropolitan Police, as it was pointed out, are under the authority of the Home Secretary, but there is a receiver who has a certain power conferred upon him by statute, and by section 2 of the Act of 1886 the receiver has power with respect to the construction of buildings and purchase of land: "The police receiver from time to time may provide, by building or otherwise, a central office and such police stations, offices, houses, and buildings as are required for the purposes of the metropolitan police force."

In section 15 of the Act of 1946 there is no express reference to housing for the police, and it has been argued both here and in the court below that a statute which, in the public interest, compulsorily takes land away from a private person, must be strictly construed; and that the word "functions" means duties, and there is no reason to expand that word so as to include the provision of houses. But one must take the whole phrase and, giving full weight to the point that there is an omission of any direct provision with regard to housing, one has to consider what is the proper construction of the language used by Parliament in section 15 of the Act of 1946. The words are "The council . . . may be authorised, by means of an order . . . to purchase compulsorily any land . . . which is required for the purpose of any of the functions of the police authority for the county or borough." The functions in question are the functions of the police authority. As Lord Parker C.J. said, and I agree with him, that the functions of the police authority are not limited in any way but they must be to provide an efficient police service. While the duties of a policeman on the beat are to be considered independently of the functions of the authority, his functions being to maintain law and order, the functions of the authority itself must

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necessarily, in my judgment, include such things as are reasonably necessary for the provision of an efficient service. There being no question on the facts of this case as to whether there was any evidence upon which the conclusion could have been reached that the provision of housing was necessary, I have no doubt that as a matter of law those words are satisfied by the order in this case, which is to the effect that the provision of houses is required for the purpose of the functions of the police authority. The matter does not seem to me to be capable of further elaboration, and I only conclude by saying that I am in full agreement with the decision of Lord Parker C.J. and I would dismiss this appeal.

Ormerod L.J. I agree. Mr. Glidewell on behalf of the appellants has argued that the words of section 15 of the Police Act, 1946, must be construed strictly and that a strict construction of the words "for the purpose of any of the functions" will not admit of a power vested in the police authority to acquire land for the purpose of building houses for the police. There can be no doubt that the statute, or this portion of the statute, being one providing for the compulsory acquisition of land, should be construed strictly. The only question here is whether in the circumstances the section warrants the very narrow construction which Mr. Glidewell submits should be put upon it. As Mr. Cumming-Bruce has said, there is another canon of construction, which is that Parliament in imposing duties may by implication impose the power by which those duties can be performed; and those two matters have to be considered in deciding what meaning should be put on the words "for the purpose of any of "the functions." There is no doubt here—it has been admitted by Mr. Glidewell both here and in the court below—that the provision of houses for the police in this area would be of advantage to the police authority in performing their functions. The evidence of the Chief Constable at the inquiry before the inspector of the Minister, which has been quoted by Lord Parker in his judgment, was: "I say from my general experience of "police forces and my special experience in Cheshire that a "particular difficulty in the administration of and operation of "a police force arises from the fact that we have to provide a "twenty-four-hour service on every day of the year in the "majority of our activities." He was obviously concerned with the necessity of having his police housed in such a way that he was able to provide men to deal with such emergencies as might arise from day to day and almost from hour to hour. It appears that the Minister on the recommendation of the inspector accepted that position and accepted that it was necessary that police houses should be built in this area. If, in fact, it is a necessity, then the question arises whether the section is sufficiently wide to contain the powers to build the houses. The wording of the section enables the local authority to acquire land which is required for the purpose of any of the functions of the

police authority. The function of the police authority is to provide and maintain an efficient police force, and for the provision and maintenance of an efficient police force it is essential that they should be adequately housed. If there is no other reasonable way of housing them than by providing houses for them, it appears that the language of this section is wide enough to allow that to be done. In the circumstances, I agree that this appeal should be dismissed.

UPJOHN J. I agree.

Appeal dismissed with costs.

Solicitors: *Jaques & Co. for Whittingham, Glass & Morrison, Manchester; The Solicitor, Ministry of Housing and Local Government.*

I. G. R. M.

[CHANCERY DIVISION.]

* *In re* CLITHEROE'S SETTLEMENT TRUSTS.

1959
Oct. 30.
Danckwerts J.

[1959 C. No. 1145.]

Trust and Trustee—Variation of trusts—Act of 1958—*Avoidance of tax —Supervening tax legislation—Finance Act,* 1958 (6 *&* 7 *Eliz.* 2, *c.* 56), *ss.* 21, 22—*Variation of Trusts Act,* 1958 (6 *&* 7 *Eliz.* 2, *c.* 53), *s.* 1.

£100 was settled upon discretionary trusts as to income, and capital subject to certain consents, during an appointed period for the benefit of a "specified class," provided that the capital of the trust fund should not be reduced below £100, and after the appointed period on trust for the specified class as the trustees should in their absolute discretion appoint, it being contemplated that further sums should be added to the settlement. The definition of the specified class in the settlement provided that the "settlor shall "not be . . . and his wife shall be a member" of the class. Subsequently the settlor and his wife by deed assigned to their daughter any rights which they might have under the settlement. The settlor, with the object of excluding the possible operation of sections 21 (4) and 22 (5) of the Finance Act, 1958, applied to the court under section 1 of the Variation of Trusts Act, 1958, for approval of a proposed variation by deed of settlement in which the definition of the specified class in the original settlement was varied so as to exclude therefrom any wife of his and under which he covenanted to pay to the trustees for the time being of the original settlement £100 per annum in each calendar year during any part of which there was in existence a person, other than the present wife of the settlor, who was the wife or widow of the settlor, and the trustees were directed to hold these sums upon trust for such wife or widow absolutely:—

[Reported by Miss MARGARET THOMAS, Barrister-at-Law.]

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Held, that the proposed settlement would be approved. The avoidance of the effect of the Finance Act, 1958, would be beneficial to the settlor, the infant beneficiaries, and also to any future wife of the settlor since she would receive £100 certain each year in lieu of a possible benefit.

In re Roberts (1959) The Times, February 27, 1959, followed.

Adjourned summons.

By a settlement dated March 8, 1954, the settlor, Ralph Assheton, now Lord Clitheroe, settled £100, together with any further sums of money that he might settle upon the same trusts, upon trust during the period beginning at the date of the settlement and ending at the expiration of 20 years after the death of the last survivor of the lineal descendants of King George V, "the appointed period," with power to the trustees to pay, divide or apply the income of the trust fund to, between or for the maintenance or benefit of any of the "specified class." The trustees might at any time during the appointed period, with the consent of the settlor's son, Ralph John Assheton, and of his wife, Sylvia Benita Frances Assheton, while living, and after the death of the survivor of them, at the trustees' absolute discretion, pay or apply any part of the capital of the trust fund to or for the benefit of any member of the specified class freed and released from the trusts concerning them, provided that the capital should not be reduced below £100. At the expiration of the appointed period the trustees were to hold the trust fund for the members of the specified class then living, in such proportions as they should in their absolute discretion appoint, and subject to any such appointment, if more than one, in equal shares. The settlement provided that "the expression the 'specified class' shall "for the purpose of this deed mean the descendants of Sir Ralph "Cockayne Assheton or the spouse of any of them provided "always that the settlor shall not be a member of the specified "class and his wife shall be a member." Sir Ralph Cockayne Assheton was the father of the settlor.

It was also provided that the settlor's named wife and his son should have the power of appointing new trustees, but that the settlor should in no circumstances be appointed a trustee. From time to time the settlor paid additional sums of money into the settlement which were invested in the purchase of land. By a deed of assignment dated December 9, 1955, expressed to be supplemental to the settlement, the settlor and his wife assigned to their daughter, Bridget Assheton, on the occasion of her marriage any rights that they might have under the settlement to the intent that they should be completely excluded from any benefits therein.

The settlor wished to vary the definition of "specified class" so as to exclude any future wife of his in order to avoid the operation of sections 21 (4) and 22 (5) of the Finance Act, 1958, under which, if such a person became a beneficiary under the

settlement, the income received by her would be deemed to be the income of the settlor.

The settlor accordingly applied to the court under section 1 of the Variation of Trusts Act, 1958, for an order approving on behalf of the present infant members of the specified class a proposed variation by deed of settlement in which the definition of the "specified class" in the original settlement was altered to read "provided always that neither the settlor nor any wife "of the settlor shall be a member of the specified class," and under which the settlor covenanted with the trustees that he or his personal representatives would pay to the trustees for the time being of the principal settlement £100 per annum in each calendar year during any part of which there was in existence a person, other than the present named wife of the settlor, who was the wife or widow of the settlor; the trustees were directed to hold the sums so paid upon trust for such wife or widow absolutely. The proposed settlement further provided that neither the settlor nor any wife of the settlor should be appointed a trustee.

P. J. Brennan for the applicant settlor.
R. C. Seddon for the trustees.
H. H. Lomas for all the members of the specified class.

The following case was cited in argument: *Inland Revenue Commissioners* v. *Saunders.*[1]

DANCKWERTS J. I have examined this matter somewhat closely and critically because it is a case in which it is plain that the whole object of the exercise of the power is to eliminate a tax liability which would otherwise fall upon Lord Clitheroe in respect of a fund now included in the settlements. There are other circumstances also which induced me to investigate the matter with some care.

The settlement dated March 8, 1954, was a settlement only of the sum of £100, but, of course, it was a settlement of a kind which is well known and which contemplates additional funds being subsequently brought into the settlement and becoming subject to the same trusts. It created an immediate discretionary trust with power in the trustees, subject to certain consents, to pay or apply any part of the capital of the trust fund to or for the benefit of any of the specified class. The point which has given trouble arises entirely from the specified class. The settlor, Lord Clitheroe, who was at the date of the settlement the Rt. Hon. Ralph Assheton, made reference to the descendants of his father, Sir Ralph Cockayne Assheton, in this manner: "The expression "'the specified class' shall for the purpose of this deed mean the "descendants of Sir Ralph Cockayne Assheton or the spouse of "any of them provided always that the settlor shall not be a

[1] [1958] A.C. 285; [1957] 3 W.L.R. 474; [1957] 3 All E.R. 43.

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"member of the specified class and his wife shall be a member." No doubt that looks all right on the face of it, but the trouble has arisen owing to the fact that Lord Clitheroe might marry again, and a future spouse might become a member of the specified class.

By an assignment executed on December 9, 1955, on the occasion of the marriage of their daughter, Lord Clitheroe and his wife appointed to the daughter all their interests under the settlement of March 8, 1954. That assignment still left the future spouses of the settlor untouched, as is clear from *Inland Revenue Commissioners* v. *Saunders*,[1] where the Inland Revenue failed in a claim which they made under section 38 (2) of the Finance Act, 1938, to surtax on certain income comprised in the settlement. Thereupon the Inland Revenue did what they often do and proceeded to have a provision inserted into the Finance Act to undo the destruction of their hopes which had occurred in the case decided by the court. There are thus provisions in sections 21 and 22 of the Finance Act, 1958, which have the effect of undoing the advantages to the taxpayer brought to light in *Saunders'* case.[2] I am told that but for these new provisions the trouble would not have occurred in the present case. In these circumstances there is something to be said in favour of the taxpayer in the present case, which would not otherwise have occurred to me, to enable me to regard this as a favourable case. There appears also to have been a decision by Vaisey J. in *In re Roberts' Settlement Trust*,[3] in which he approved a variation under the Variation of Trusts Act, 1958, in circumstances very similar to those in the present case.

Under section 1 of the Variation of Trusts Act, 1958, I have to be satisfied, except in the case of protective trusts, that the person on whose behalf I have to approve a variation procures a benefit. In the present settlement there are no protective trusts because it is not a case of a determinable life interest, but of an immediate discretionary trust under which certain persons are benefiting. Accordingly, I must be satisfied that the proposed variation is not only for the benefit of the infant beneficiaries who have been joined in this application, but also for the benefit of any future spouses of Lord Clitheroe whose interests are going to be excluded by the proposed deed of variation.

The material provisions of the proposed deed of variation are these. The proviso of any specified class contained in the original settlement is cut out and another proviso is substituted in the following terms: "provided that neither the settlor nor any wife "of the settlor shall be a member of the specified class." That seems to be very clearly expressed. There is also a provision, apparently intended to remove the power of the settlor or of any wife of the settlor, to appoint trustees, because it was felt there might be some danger lest that amounted to a means whereby a

[1] [1958] A.C. 285; [1957] 3 W.L.R. 474; [1957] 3 All E.R. 43.

[2] [1958] A.C. 285.

[3] (1959) The Times, February 27.

beneficial interest could be created. However that may be, provision is made for it. In compensation for future spouses losing their interest under the discretionary trusts, under which they might take nothing at all as the trustees in their discretion might otherwise decide, Lord Clitheroe covenants with the trustees to pay them £100 per annum in each calendar year when there is in existence a person, other than the present Lady Clitheroe, who is the wife or widow of Lord Clitheroe, and the trustees are directed to hold such annual sum upon trust for such wife or widow absolutely. That, of course, is a substitute for any interest which the future spouses might take under the settlement, and is purely a personal remedy against Lord Clitheroe and his personal representatives. It might be of very little value in the case of a person who was not of substance financially, and also it would be affected by the question of what are the funds which are now the subject of the settlement. On this point there is no evidence at all. Although the schedule in the proposed deed of variation sets out a number of properties which have been included in the settlement, I have no evidence of the values of these properties. Also, though I may suspect that Lord Clitheroe is a man of means, I have no evidence whatever as to them, and I am not entitled to act in this court except upon evidence which is properly before me.

Accordingly, I propose to approve all the proposals in principle, but I require an affidavit giving some indication of the means of Lord Clitheroe which will show that the covenant is a responsible one, and also some evidence of the total capital value of the property now the subject of the settlement which I am being asked to vary. For the purpose of that evidence being brought before me, I will therefore adjourn this case into chambers.

Order accordingly.
Costs to be paid out of trust funds.

Solicitors: *Budd, Hart & Son for Foysters, Manchester.*

[CHANCERY DIVISION.]

* *In re* H. (AN INFANT).

[1959 H. No. 1968.]

1959
Nov. 5.
Roxburgh J.

Infant—Guardianship—Joint guardians—Appointment of joint guardian by court—Principles applicable—Application by infant's sister for joint guardianship with father—Order by justices to enable sister to apply for custody—Guardianship of Infants Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 45), *s.* 4 (2).

[Reported by Miss MARGARET THOMAS, Barrister-at-Law.]

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On June 25, 1959, a wife obtained in a magistrates' court a separation order against her husband and was also awarded custody of an infant child of the marriage, a girl aged 10 years. The wife died on the same day. On July 30, 1959, the infant's elder sister, who was aged 21 years, applied to the magistrates under section 4 (2) of the Guardianship of Infants Act, 1925,[1] to be appointed a joint guardian of the infant with their father. The magistrates made an order for joint guardianship, stating, as one of their reasons, that they did so to enable the sister to proceed with an application for custody. On appeal by the father:—

Held that, in appointing a joint guardian under section 4 (2) of the Act of 1925 the court must be satisfied that such appointment would be for the benefit of the infant and may not act from some collateral motive, and that the magistrates, in that they had directed their minds to the possibility that a joint guardian might apply for custody and had not considered whether the appointment was desirable and for the benefit of the infant per se, had applied this discretion upon wrong and unjustifiable principles; the appeal, accordingly, must be allowed.

Motion.

On June 25, 1959, a wife obtained in the City of Nottingham magistrates' court a separation order against her husband on the ground of cruelty, and she was also granted custody of one of the children of the marriage, a girl, born on November 13, 1948. The wife died on the day that she obtained the order. On July 30, 1959, the elder sister of the infant, who was 21 years old, applied to the Nottingham City magistrates under section 4 (2) of the Guardianship of Infants Act, 1925, to be appointed a joint guardian of the infant with her father. The magistrates made an order for joint guardianship for the following reasons:

"Having heard the evidence of the father and of the sister of "the infant, and having considered the background in this case, "we were satisfied that the father was not a suitable person to be "sole guardian. The daughter impressed us as a level-headed "young woman, obviously very fond of her younger sister. We "made the order for joint guardianship to enable the daughter to "proceed with an application for custody. The arrangements the "father proposed making for custody seemed to us to be far from "satisfactory. The infant was to live with an aunt whom she "could not remember ever seeing, although the aunt lived in "Nottingham where the infant resides. The father's relationship "with his elder daughter was so bad that they were not on "speaking terms, and it seemed to us doubtful whether he would "be successful in bringing up the infant now approaching "adolescence."

[1] Guardianship of Infants Act, 1925, s. 4 (2): "On the death of the "mother of an infant, the father, if "surviving, shall, subject to the pro-"visions of this Act, be guardian of "the infant, either alone or jointly "with any guardian appointed by the "mother. When no guardian has "been apointed by the mother or if "the guardian or guardians appointed "by the mother is or are dead or "refuses or refuse to act, the court "may if it thinks fit appoint a "guardian to act jointly with the "father."

By this motion the father appealed against the magistrates' order and asked that, in lieu thereof, it might be ordered that he should remain the sole guardian of the infant. Roxburgh J. adjourned the motion into open court.

Bryan Clauson for the father.
Robert Lymbery for the elder sister.

The following case was cited in the course of argument: *In re X.*[2]

ROXBURGH J. I have adjourned this matter into court because it involves some important considerations of law and procedure and, incidentally, no particularly unpleasant matters of fact. Magistrates do most excellent work in these cases for no remuneration and I have only brought this matter into the public eye because so few of these cases, which are mainly dealt with in camera, are reported, and sometimes, and I think this is one of the cases, the magistrates have gone astray, largely because they were not properly informed on certain matters of practice and procedure. It may be for the general benefit of magistrates that how to deal with such a case as this should be generally known. The situation here was undoubtedly difficult because at the time of the death of the infant's mother there were living with her, her elder daughter, who is now 21, and a son. Therefore, the child was in the actual care and control of the elder sister and the brother upon the death of the mother. There is no doubt that the elder sister was in a state of animosity towards her father and was generally concerned about what was to happen to her younger sister. At that time somebody applied an ingenious, but in my view a misdirected, mind to a form of procedure which is novel and irregular and not to be encouraged. The question that the court has to determine under section 4 (2) of the Guardianship of Infants Act, 1925, is not whether the appointment of a guardian may be a convenient step towards some result which cannot otherwise be obtained, but whether it is desirable to appoint a guardian. If it is not desirable to appoint a guardian it cannot be right to appoint one for some collateral purpose, if that collateral purpose can lawfully be obtained by other means. Consequently, the words "if it thinks "fit" in section 4 (2) must mean if the court thinks that such a course will be for the benefit of the infant. If the court below had given any single ground on which it could be for the benefit of the child to appoint a joint guardian and had not plainly indicated that in fact it had acted from a collateral motive, I should have been very slow indeed to interfere, if indeed I could have interfered at all.

The elder sister applied to have herself appointed as joint guardian with the father. The undisputed facts are not in my

[2] [1899] 1 Ch. 526.

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view in any way derogatory to the elder daughter, but the question is, could it possibly have been to the benefit of the infant that she should, in view of her relationship with her father, be appointed a joint guardian with him? The elder sister said that there was no suggestion at the time when her mother obtained her order that her father had been cruel to the infant. She said: "I have been courting eighteen months, my fiancé "is 24, he has had his name down nearly five years for a council "house, and when it comes up we are proposing to get married." She said that her father had on one occasion been unkind to her and then she added: "My father and I are on the worst possible "terms." To my mind it is a fantastic proposition that it could be to the benefit of the infant for the magistrates to appoint a joint guardian who was "on the worst possible terms" with the existing guardian. It is the appointment of a joint guardian, not of a several or separate guardian; and, to my mind, such a thing is against common sense. Counsel for the elder sister, who has conducted the case very temperately and fairly, could not suggest how it could be for the benefit of any infant that persons on such terms should be joint guardians of the infant. In fact it is reasonably certain that the magistrates never thought for one moment that it was for the benefit of the infant that the applicant should be appointed joint guardian. What was in their minds is plainly revealed from the reasons which they have given: they said: "Having heard the evidence of the father and of "the sister of the infant, and having considered the background "in this case, we were satisfied that the father was not a suitable "person to be the sole guardian." That might be quite right as a step to consider whether it was wise to have a proposed joint guardian with the father, but they never took that step. They continued: "The daughter impresses us as a level-headed "young woman, obviously very fond of her younger sister." I do not think there is any doubt about that. But then they said: "We made the order for joint guardianship to enable the "daughter to proceed with an application for custody." That is one thing that they are not entitled to do when the application is for the appointment of a joint guardian. If they were in any doubt as to who should be appointed, it is true that it would not be wrong to consider the possibility that one of the persons under consideration might some day in other proceedings be given custody, but for magistrates to direct their minds wholly to that question, when an application for custody had not yet been started, and not to consider whether the appointment was desirable per se, seems to me to be an application of discretion upon wrong and unjustifiable principles. The sister could not apply for the custody of the infant under the Guardianship of Infants Act, 1925, unless she had previously been appointed a joint guardian, and I am quite satisfied that the magistrates, though they have not said so, were not aware that there was an

alternative procedure available because nobody brought it to their attention. I am not saying that in the circumstances of this case an application to the Chancery Division to make this child a ward of court would succeed—if I said that I should be committing the very offence with which I am charging the magistrates—but it seems to me that, instead of considering the matter before them, they were considering what view they would take of some other matter that was not before them. I must not be taken to be advising that any application in this Division should be made. However, that procedure is readily available if the circumstances justify it. There is nothing to prevent the elder sister from seeking to make this child a ward of court without being appointed a joint guardian. Therefore it cannot be right for magistrates to use this section as a step in devising procedure to give themselves jurisdiction to deal with custody when the section has not yet entrusted such jurisdiction to them. It still remains resident solely in the High Court. In the case of an application by a person in the position of this particular applicant, I do not see any reason why, now that there is legal aid available in a proper case for bringing such proceedings in the High Court, that should not be done, although such cases would be very rare.

There is one other matter to which I must refer because it confirms what I have said about the magistrates having approached the problem wrongly. Their reasons continue: "The "arrangements the father proposed making for custody seemed "to us to be far from satisfactory." What relevance has that? This was not a summons for custody; the father had custody in law but he had not applied for it in fact, and I do not know why the magistrates should deal with it; but if they were going to deal with it they should have confined themselves to the evidence. Then they say: "The infant was to live with an aunt she could "not remember ever seeing. . . ." That seems to me to be plainly wrong; they never saw the infant so how did they know that? The infant gave no evidence and there is not the slightest record in the notes of any such thing being said. Then they said: "The "father's relationship with his elder daughter was so bad that "they were not on speaking terms" That, of course, was common ground. But how can joint guardians who are not on speaking terms operate? That is a matter which surely common sense might have brought to the attention of the magistrates. Finally, "and it seemed to us doubtful whether he would be "any more successful in bringing up his younger daughter, the "infant, now approaching adolescence." I do not think that the prospects of the infant being brought up in any more successful manner would be improved if her education from the age of 11 to 21 was conducted by two persons, one being her father and the other being her sister, who were not on speaking terms.

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I think that I think that I have said enough. I will allow the appeal and discharge the order.

Appeal allowed.

Solicitors: *Hancock & Willis for German & Soar, Nottingham; Church, Adams, Tatham & Co. for Healey & Smith, Nottingham.*

[PROBATE, ETC., DIVISION.]

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* PRACTICE DIRECTION (CUSTODY).

Infant—Custody—Divorce Court—Welfare officer—Reference to.

When both parties to custody proceedings are agreed that a reference to the welfare officer will be of assistance to the judge, application by consent may be made by either party to the registrar of the day, who, on being satisfied that there is sufficient information for the welfare officer about the points at issue in the affidavits, if any, or other documents, may refer the matter to the welfare officer for his investigation before the proceedings come before the judge.

COMPTON MILLER,
Registrar.

Nov. 19, 1959.

[QUEEN'S BENCH DIVISION.]

1959 *Oct.* 12, 19.

Havers J.

* LANG *v.* LONDON TRANSPORT EXECUTIVE and Another.

[1957 L. No. 1202.]

Road Traffic—Negligence—Collision—Road junction—Duty of drivers on major road to users of minor road—Reasonable possibility of danger emerging.

A collision occurred at a road junction between an omnibus and a motor-cycle as a result of which the cyclist was killed. The bus was travelling along the major road at a speed of not more than 20 miles an hour approaching a junction with a minor road. The driver of the bus had seen some cyclists on the minor road and had said in evidence that he knew from experience that anything could happen when approaching a side road leading on to a main road. The motor-cyclist did not slacken speed at a "Slow. Major Road "Ahead" sign on the minor road and rode straight out into the major road and the collision occurred at the crossing:—

Held, that the possibility of danger was reasonably apparent to the driver of the bus, who was therefore under a duty to take reasonable precautions. Although he was on a major road, driving at a moderate speed, and the motor-cyclist was far more to blame, the bus driver had failed to take reasonable care for the safety of other traffic on the road and was therefore negligent; in the circumstances

the cyclist was two-thirds and the bus driver one-third to blame for the accident.

London Passenger Transport Board v. *Upson* [1949] A.C. 155; sub nom. *London Transport Executive* v. *Upson*, 65 T.L.R. 9; [1949] 1 All E.R. 60 applied.

Browne v. *Central S. M. T. Co. Ltd.*, 1949 S.C. 9 not followed.

ACTION.

The plaintiff, Kathleen Lang, the widow and administratrix of the estate of her deceased husband, David Ronald Lang, claimed damages under the Fatal Accidents Acts, 1846 to 1908, and the Law Reform (Miscellaneous Provisions) Act, 1934, against the defendants, London Transport Executive and their driver, Walter Carlile White, for the fatal injuries which the deceased sustained in a collision on July 20, 1956, at the junction of South Lane and Malden Road, Malden, Surrey, between the solo motor-cycle which he was riding and a single-decker omnibus driven by the second defendant, Walter Carlile White, in the course of his employment by the first defendants.

At the material time, Malden Road was a well-known road in Surrey leading from Sutton to the Kingston Bypass. Speed on the road was restricted to 30 miles an hour and at the time of day when the accident occurred, about 6.30 p.m. in July, it carried a very heavy amount of traffic. At about 190 feet in either direction from the junction with South Lane, the word "Slow" was painted in white letters on the road. At the junction there was rather a sharp bend, beyond the junction there was a pedestrian crossing, and a little way beyond that there was a request bus stop. As between Malden Road and South Lane, Malden Road was the major road. In South Lane, 170 to 180 feet west of the junction, there was a "Slow. Major Road Ahead" sign. From a distance of 40 yards from the junction with Malden Road, there was in South Lane, the minor road, a clear view of traffic coming along the main road as far back as a railway bridge, which was about 50 yards from the junction.

A witness, Ward, was driving a motor-cycle owned by another witness, Police Constable Figgest, who at that time was travelling as a pillion passenger on this motor-cycle, which was travelling along South Lane in the direction of Malden Road. As Ward and Figgest were going along South Lane, the deceased, riding his motor-cycle, passed them about 150 yards from the junction, and the undisputed evidence was that after the deceased passed them he did not slacken speed at all and went straight on towards the junction at about 20 miles an hour. Ward and Figgest slowed down as they approached the junction in accordance with the sign. They said that they could then see the bus approaching from the Sutton direction on the Malden Road about 50 yards from the junction and if the deceased had been looking out he would have been able to see it because there was no obstruction to the view. The motor-cycle driven by the deceased went straight towards the mouth of the junction without slackening speed and collided with

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the bus, the deceased receiving fatal injuries. Ward stated that when the deceased's motor-cycle got into Malden Road, the motor-cycle and the bus were very close together, and that when the deceased did start to cross, the bus was so close that he had no chance to avoid it. The defendant White had put on his brakes and started pulling to his right when the deceased came into Malden Road.

The defendant White had been driving buses for 32 years and he had a completely clean record and had won several awards for safety, including the gold medal. Immediately before the accident he was driving the single-decker bus from Sutton in the direction of the Kingston bypass at a distance of 5 to 6 feet from the kerb and at a speed of not more than 20 miles an hour. He could pull up in 40 to 45 feet. He had a clear view of traffic in South Lane for at least as far as 40 yards from the mouth of the junction. He said that just after passing the "Slow" sign in Malden Road, he glanced to his left, according to his usual custom when approaching a side road, and saw a movement of a few cyclists. He was not able to identify the deceased as one of them and he did not see any four-wheeled vehicles in South Lane. He did not look again into South Lane and did not see the deceased until he came out suddenly at about 20 miles an hour in front of his bus, which was then on top of the crossing. When the deceased came out of South Lane, the defendant White immediately braked and pulled over to his right side, which was all that he could then do in the circumstances. He had known the junction well for 14 years. He said that he knew that there was a "Slow. Major Road Ahead" sign in South Lane, and that he knew from experience that anything could happen when approaching a side road leading on to a main road and gave as instances that children sometimes came out in a moment of excitement, or that a driver might come out.

The plaintiff alleged that the defendant White failed to see or heed the approach of the deceased, failed to slow down in case the deceased should fail to stop at the junction, failed to observe or heed the fact that, as the defendant White was approaching the junction the deceased was also approaching it and was obviously or probably not going to slow down or stop before or at the junction, drove too fast in the circumstances and failed to give any or any proper warning of his approach. The defendants, while admitting that the deceased died as a result of the collision, denied that they were guilty of the alleged or any negligence, or alternatively, that their negligence in any way caused the accident, and they pleaded affirmatively that the collision was caused by the negligence of the deceased himself.

Ralph B. Gibson for the plaintiff.

Montague Berryman Q.C. and *John D. Stocker* for the defendants.

The cases cited in argument are referred to in the judgment.

Cur. adv. vult.

October 19. HAVERS J. read the following judgment: This case is brought by Mrs. Kathleen Lang, widow and administratrix of the estate of her deceased husband, David Ronald Lang, under the Fatal Accidents Acts and the Law Reform (Miscellaneous Provisions) Act, 1934. Her husband received fatal injuries as the result of a collision between a motor-cycle he was riding on July 20, 1956, and a single-decker omnibus driven by the second defendant, who was the servant and agent of the London Transport Executive.

I reserved my judgment because I found it difficult to reconcile the decision of the Court of Session in Scotland in *Browne* v. *Central S.M.T. Co. Ltd.*[1] and the dicta of the House of Lords in *London Passenger Transport Board* v. *Upson.*[2]

[His Lordship stated the facts, and continued:] It is clear that it was the duty of traffic approaching from South Lane to the junction with Malden Road to see and observe the sign "Slow. "Major Road Ahead," and to keep a good look-out for traffic on the Malden Road, and not to come out on to the Malden Road unless the driver of the vehicle in South Lane could see that it was safe to do so.

The Highway Code which was then current (1954) contained three passages. The first was No. 34: "When approaching a road "junction where there is a 'Slow' sign, slow down and be ready "to stop when you get there." Counsel for the plaintiff also relied on that, and invited me to say that the two signs "Slow" which are painted on the Malden Road were signs to which this regulation applied. I do not think that was so. The Code contains an example of this very sign "Slow. Major Road Ahead," and I think No. 34 was dealing with that one and that one only, namely, the one which occurs in South Lane.

No. 36 was: "At a road junction, look right, then left, then "right again. Do not go on until you are sure that it is safe "to do so."

No. 37 was: "At a road junction, give way to traffic on the "major road. If in doubt, give way."

On the independent evidence alone it was clear that the deceased did not see, or else completely disregarded, the "Slow" sign, and either did not see the bus at all, which he clearly ought to have done, or, if he did see it, he hopelessly misjudged the distance that the bus was away, and its speed. I am rather inclined to think that he did not look and did not see it. The deceased came out of the minor road at 20 miles an hour at a time when it was extremely dangerous to do so, and when the bus was

[1] 1949 S.C. 9.

[2] [1949] A.C. 155; 65 T.L.R. 9; [1949] 1 All E.R. 60.

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so close that collision was inevitable, or, at any rate, highly probable.

It is clear, therefore, in my view, that the deceased was guilty of a very high degree of negligence, and that this negligence was substantially the cause of the accident. Counsel for the plaintiff has conceded that the motor-cylist was guilty of negligence. One is always reluctant to find negligence against a man who has died, and who has not had the opportunity to go into the witness-box and give his evidence before the court.

In this particular case it may well be that the illness from which the deceased was suffering might have affected his judgment, and he might therefore not be morally very much to blame, but that, of course, does not in the least degree affect his legal position.

He was guilty of a high degree of negligence, but, notwithstanding that, it was contended for the plaintiff that the bus driver was equally to blame and substantially caused, or contributed towards, the accident.

The defendant White had a marvellous driving record. He had been driving buses for 32 years, he had a completely clean record and had won several awards for safety, including the gold medal. It is a regrettable feature of this case that he was so affected by this collision that he has been totally unable to drive again.

Ward says that the bus driver was driving at about 18 to 20 miles an hour, and he thought, from the position he was in in South Lane, he was going quite normally for this time and place.

The defendants relied very strongly on the decision in the Court of Session, *Browne* v. *Central S.M.T. Co. Ltd.*[3] That was a case in which the facts bore a very close resemblance to the facts of this case, although there were, as there always are in these cases, points of difference.

The headnote in that case reads: "A collision occurred at the "junction of a major road and a minor road between an omnibus "which was travelling on the major road and a motor-cycle "which, emerging from the minor road, attempted to cross the "major road. A boy who was a pillion passenger on the motor-"cycle was killed. At the trial of an action brought by the boy's "father against the owners of the omnibus on the ground of the "driver's negligence, the evidence established gross fault on "the part of the motor-cyclist. He had, as he admitted, failed "to notice a 'Slow. Major Road Ahead' sign erected a short "distance from the junction, and had not seen the omnibus which "was approaching the junction, although it must have been "plainly visible. The omnibus had approached the crossing at "its ordinary moderate speed of some 25 miles an hour, and the "driver, when a collision seemed to be imminent, had braked and "swerved in an unsuccessful effort to avoid the motor-cycle."

[3] 1949 S.C. 9.

That headnote shows that the facts approximate very closely to the facts in this case.

It was held by the Court of Session "that the driver of the "omnibus had not been negligent, seeing that, as a driver on a "main road, he was entitled, in the absence of any indication to "the contrary, to assume that the motor-cyclist, a driver on a side "road, would conform to the warning signal and either stop or "slow down and give him the right of way." A verdict of the jury in favour of the pursuer was set aside.

The Lord Justice-Clerk (Lord Thomson) said [4]: "The real "difficulty in the case is whether it was open to a reasonable jury "to take the view that the omnibus was not entitled to maintain "its course or speed in view of the presence in Gallowflat Road "of a motor-bicycle which, in order to proceed on its way, would "have to cross the omnibus's line of traffic either in front of the "omnibus or behind the omnibus. It being open to the cyclist "to cross the omnibus's line of traffic either in front of or behind "the omnibus, ought the driver reasonably to have anticipated "that the motor-cyclist might choose the dangerous of these two "alternatives? It seems to me that there is no doubt at all that "the bicycle could have passed safely and conveniently behind the "omnibus. There was nothing to prevent it, and, indeed, it was "his plain duty to do so. The question still remains. Was the "omnibus driver justified in assuming that the cyclist would take "that course? The omnibus driver was not entitled to rely "absolutely on the fact that he was on a major road and had the "right of way. He was bound to exercise the right of being on "the main road in a reasonable way. He had to watch and "conform to the movement of other traffic which was in the "offing, and he must take due care to avoid collision with it, So "it comes to this, was the jury entitled to think that the "omnibus, despite its prima facie right of way, should have "surrendered that right in anticipation of possible failure on the "part of the cyclist to note the safe course?

"The answer to this must turn on the conduct of the motor-"bicycle and on the opportunities which the omnibus driver had "of observing it. There must be something in the conduct of the "bicycle which the omnibus driver ought to have seen and which "would have certiorated him, had he been taking proper care, "that the motor-bicycle was not going to pass behind but was "going to try to pass in front of the omnibus. What then is the "evidence on this issue?" Held, in the circumstances, that it was not a reasonable verdict.

Lord Mackay said [5]: "The driver was well entitled, keeping a "position on the main road in full daylight and seeing a vehicle "at least as far away as he himself was, to proceed on the "footing that that vehicle would obey the sign which it was "bound to do. In short, I think the evidence as to both vehicles'

[4] 1949 S.C. 9, 12.

[5] Ibid. 14.

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"behaviour at this point brings the case into an exact equation "with the well-known decision of *M'Allister* v. *Glasgow Cor-* "*poration.*[6] There the Lord Justice-Clerk is reported as review- "ing the evidence and stating it as his opinion that there was no "evidence of fault on the part of the driver of the tramway car. "I find the case of the present omnibus indistinguishable."

Then, a little further on, he said[7]: "I have no doubt that "anyone driving on a road such as this Cambuslang–Glasgow "road, which, of course, is the main road too for motor as well as "tramway traffic, is entitled to go on that road in proper position, "and is entitled to keep his proper place on that road, and to do "so in reliance on side road traffic behaving itself as the rules of "the road desired, until it may be at the very last moment some "observation of a gross infringement by others calls for a special "attempt to deal with it. Such duty arises only pro re nata and "cannot be stated as a universally present obligation. I am "prepared to agree with what Mr. M'Kechnie said, that there "*may* be exceptional cases (as where you see a man swaying "from side to side as if out of control)—you must then take "exceptional measures."

Lord Jamieson said[8]: "In my view, while he was of course "not entitled to disregard the presence of the cyclist, he could "not, and was not bound to, anticipate that the cyclist was going "to take the rash course which he did take."

Lord Birnam said[9]: "Speaking for myself, I think it would "be a pity if the court were to give any countenance to the view "that the driver of a vehicle on a major road when approaching a "side road such as the one in question in broad daylight must "slow down to a pace of 10 miles per hour or otherwise share "the blame for any collision that may happen."

Unfortunately, this case was tried on October 15, 1948, after the hearing but before the decision of the appeal in the House of Lords in *London Passenger Transport Board* v. *Upson.*[10] So the Court of Session had not the advantage of knowing what the House of Lords would decide in *Upson's* case; nor, in the House of Lords, had their Lordships had their attention called to the decision in *Browne* v. *Central S.M.T. Co. Ltd.*[11] I should be happy to follow and adopt the reasoning of the Court of Session in that case if I am not precluded by the dicta in the House of Lords in *Upson's* case.

London Passenger Transport Board v. *Upson*[12] really turned upon the fact that the bus in that case was approaching a crossing which was regulated by the Pedestrian Crossing Places (Traffic) Regulations, 1941, and the driver's view was obscured by a taxicab. The case came originally before Humphreys J., and

[6] 1917 S.C. 430.
[7] 1949 S.C. 9, 15.
[8] Ibid. 17.
[9] Ibid. 18.
[10] [1949] A.C. 155; 65 T.L.R. 9; [1949] 1 All E.R. 60.
[11] 1949 S.C. 9.
[12] [1949] A.C. 155; 65 T.L.R. 9; [1949] 1 All E.R. 60.

he found the driver of the omnibus guilty of negligence at common law. The Court of Appeal, by a majority, reversed this finding. Cohen and Asquith L.JJ. reversed the finding of Humphreys J. on the question of common law negligence and found the driver guilty of a breach of the Pedestrian Crossing Places (Traffic) Regulations, 1941. Lord Greene M.R. dissented and attached neither blame nor liability to the driver or the appellants.

The House of Lords unanimously approved the decision of the Court of Appeal as regards the liability of the bus driver under the Pedestrian Crossing Places (Traffic) Regulations, 1941. Lord Porter agreed with the Court of Appeal that there was no negligence; Lord Wright did not express any opinion on the question of negligence, but he criticised the judgment of the Master of the Rolls; Lord Uthwatt again did not find it necessary to give any decision on the question of negligence, but there is a passage in his opinion to which I must refer. Lord du Parcq and Lord Morton of Henryton both held that the driver was negligent.

Lord Porter said [13]: "My Lords, if the driver could and ought "to have seen the plaintiff hurrying towards the crossing before "she reached the taxicab and to have anticipated that she was "about to or might hasten across the crossing and did not do so, "undoubtedly he would be guilty of negligence at common law." Counsel for the plaintiff relied upon that passage and, applying it to the facts of this case, he contended that if the bus driver could and ought to have seen Mr. Lang, the driver of a motor-cycle hurrying down towards this crossing, the bus driver should have anticipated that Mr. Lang was about to or might hasten across the crossing, and, as he did not do so, he was guilty of negligence at common law.

Lord Wright found there was a breach of the regulations and, as I have said, he did not decide the question of negligence.

He said [14]: "I ought to add that I agree with Lord du Parcq "in criticising the passages which he quotes in the opinion he is "about to deliver from the judgment of the Master of the Rolls in "the present case."

Lord Uthwatt said it was not necessary for him to deal with the question of negligence as he agreed with the majority as regards liability under the Pedestrian Crossing Places (Traffic) Regulations, but he said [15]: "In the view that I have formed it "is not necessary for me to deal with the question of negligence. "I desire only to register my dissent from the view expressed by "the Master of the Rolls that drivers 'are entitled to drive on "'the assumption that other users of the road, whether drivers "'or pedestrians, will behave with reasonable care.' It is "common experience that many do not. A driver is not, of "course, bound to anticipate folly in all its forms, but he is not, "in my opinion, entitled to put out of consideration the teachings "of experience as to the form those follies commonly take."

[13] [1949] A.C. 155, 162.
[14] Ibid. 172.
[15] Ibid. 173.

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Lord du Parcq, in dealing with the question of negligence, said [16]: "My Lords, the learned Master of the Rolls has stated "with great clarity a view of the law of negligence which, in my "opinion, ought not to receive the approval of your Lordships' "House. 'The driver of the omnibus,' the Master of the Rolls "said, 'was entitled to assume that the plaintiff, like other "'pedestrians, would conform to common sense and ordinary "'care in the presence of an adverse signal, particularly in view "'of the provisions of the Highway Code.' The Master of the "Rolls then quoted the instruction to pedestrians in the Highway "Code. . . .

"My Lords, if the premises are granted this reasoning is "impeccable, but I do not accept the premises as sound," and then he explained his reasons.

Further on he said [17]: "Apart from this assumption, the "propositions advanced by the learned Master of the Rolls do not, "I think, accord with the law as it has been laid down in your "Lordships' House. The correct principle was stated by Lord "Dunedin when he said: 'If the possibility of the danger "'emerging is reasonably apparent, then to take no precautions "'is negligence; but if the possibility of danger emerging is only "'a mere possibility which would never occur to the mind of a "'reasonable man, then there is no negligence in not having "'taken extraordinary precautions.' (*Fardon* v. *Harcourt-"Rivington*.[18]). I regard this statement and that of Lord Mac-"millan in the same case, which was to the like effect, as applying "generally to actions in which the negligence alleged is an "omission to take due care for the safety of others. It must "follow that (if I may repeat what I said in the recent case of "*Grant* v. *Sun Shipping Co. Ltd.*[19] in this House), 'a prudent "'man will guard against the possible negligence of others when "'experience shows such negligence to be common.' The driver "of the appellants' omnibus agreed in cross-examination that he "knew 'that people in London have a habit of crossing a road "'when the lights are not in their favour.' Even apart from the "duty imposed on him by the regulations, he was therefore bound "to take precautions against the possibility that some person "was concealed from his view by the stationary cab and might "suddenly emerge from its protection. On this ground alone it "must at least be said that there was evidence to support the "conclusion that the driver had failed to take reasonable care "for the safety of others and was therefore negligent. A driver "is never entitled to assume that people will not do what his "experience and common sense teach him that they are in fact "likely to do. It is true that in some circumstances it is not "reasonably possible for a driver to do anything to save a "pedestrian from the consequences of the pedestrian's own act,

[16] [1949] A.C. 155, 175.
[17] Ibid. 176.
[18] (1932) 146 L.T. 391, 392.
[19] [1948] A.C. 549, 567.

"just as the pedestrian can sometimes truly say that, although he "knows that drivers are sometimes negligent, he could not "reasonably have been expected to avoid the particular act of "negligence which has caused him injury. These are questions "for a jury, but I must say, with all respect, that a direction to "a jury in the terms of the propositions enunciated by the learned "Master of the Rolls would be, in my opinion, unduly favourable "to a defendant driver."

Lord Morton of Henryton, as I said, found there was a breach of the regulations, and he found also there was negligence. He, too, criticised the judgment of the Master of the Rolls. He said [20]: "The learned Master of the Rolls said in the course of his "judgment: 'The true view, in my opinion, is that a driver "'approaching a controlled crossing, whether it be controlled by "'lights or by the police, with the light signal or the police signal "'in his favour, is entitled to proceed on the assumption that "'pedestrians will conform to the indications given to them as to "'what their behaviour should be when the signals are against "'them; and that he is under no duty to keep a look-out for the "'possibility of a pedestrian disobeying the signals or to drive on "'the assumption that a pedestrian may at any minute do so.' "The Master of the Rolls proceeded: 'But let me not be mis-"'understood. If a driver approaching such a crossing does in "'fact see that a pedestrian is crossing or apparently is intending "'to cross against the signals, it is the duty of the driver to do "'everything that he can reasonably do in the circumstances to "'avoid running the pedestrian down. Failure to take all reason-"'able steps to avoid injuring someone who is himself seen to be "'negligent is itself negligent.' With the later passage I entirely "agree, but I am unable to accept the earlier passage without "qualification."

In view of these dicta I do not think it is open to me to follow the reasoning in *Browne* v. *Central S.M.T. Co. Ltd.*[21] I feel bound to follow the principle enunciated by Lord Dunedin, and which was referred to by Lord du Parcq [22]: "If the possibility of the danger "emerging is reasonably apparent, then to take no precautions is "negligence; but if the possibility of danger emerging is only a "mere possibility which would never occur to the mind of a "reasonable man, then there is no negligence in not having taken "extraordinary precautions."

The question, therefore, I have to consider in this case is: Was the possibility of danger reasonably apparent? The defendant White said he had seen the movement of cyclists in South Lane, so that he knew there were some cylists approaching the main road from South Lane. He said, in cross-examination, that he was aware, from his experience, that sometimes persons would suddenly emerge from a side road even when it was not prudent

[20] [1949] A.C. 155, 181.
[21] 1949 S.C. 9.
[22] [1949] A.C. 155, 176.

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Havers J.

to do so, and sometimes children did the same thing. I think, therefore, that he was under a duty to take some precautions against that possibility. He ought, as he approached South Lane, to have looked at the traffic in South Lane to see whether the deceased was still moving at 20 miles an hour and obviously intending to cross, or whether he was slowing down and going to wait for the traffic in the major road. If he had looked, in my view, the possibility of danger occurring would have been reasonably apparent to him. If he had, he could have stopped in time to allow the motor-cyclist to cross in front of him. He did not do so, and never saw the motor-cyclist again until the two vehicles were on top of one another. In this respect, I find that he failed to take reasonable care for the safety of other traffic on the road, and was therefore negligent. He made a mistake in assuming that the motor-cyclist would not do what his experience should have taught him that persons in fact sometimes do.

I have come to this conclusion very reluctantly because he was on the major road and was driving at a moderate speed, and especially in view of his very fine record.

I find, however, that the deceased was far more to blame than the defendant driver, and that his share of responsibility and culpability was far greater. I find him two-thirds to blame and the defendant driver one-third to blame.

[His Lordship considered the question of damages and, having stated that at the time of his death the deceased was suffering from a suppurative broncho-pneumonia which could have affected his judgment while driving, continued:] The sum which I should have awarded, assuming the deceased to have been wholly free from blame, would have been £3,000. That I am apportioning as to £200 under the Law Reform (Miscellaneous Provisions) Act, 1934, and £2,800 under the Fatal Accidents Acts, 1846–1908, and the plaintiff, therefore, will recover one-third, namely £1,000 in all.

Judgment for the plaintiff with costs.

Solicitors: *Rowley Ashworth & Co.; M. H. B. Gilmour.*

[CHANCERY DIVISION.]

1959
Oct. 28, 29; *Nov.* 11.

Wynn-Parry J.

* IMPERIAL CHEMICAL INDUSTRIES LTD. *v.* CARO (INSPECTOR OF TAXES).

Revenue—Income tax—Double taxation relief—Double tax payable—New or additional source of income in Australia—Dividends liable to income tax in two years of assessment—Amount of credit allowed in respect of Australian tax—Whether credit available in each of the

[Reported by Miss V. A. Moxon, Barrister-at-Law.]

two years of assessment—Income Tax Act, 1952 (15 & 16 *Geo.* 6 & 1 *Eliz.* 2, *c.* 10), *Sch.* 16, *para.* 2—*Double Taxation Relief* (*Taxes on Income*) (*Australia*) *Order*, 1947 (*S.R. & O.* 1947, *No.* 806), *Sch.*, *art. XII* (1).

By article XII (1) of the Schedule to the Double Taxation Relief (Taxes of Income) (Australia) Order, 1947: "Subject to the pro-"visions of the law of the United Kingdom regarding the allowance "as a credit against United Kingdom tax of tax payable in a "territory outside the United Kingdom, Australian tax payable, "whether directly or by deduction, in respect of income derived "from sources in Australia shall be allowed as a credit against "any United Kingdom tax payable in respect of that income."

By paragraph 2 (2) of Schedule 16 to the Income Tax Act, 1952: "The credit to be allowed shall be first applied in reducing the "amount of any profits tax chargeable in respect of the income "and, so far as it cannot be so applied, in reducing the income "tax chargeable in respect thereof."

In 1952, a company subscribed for shares in an Australian company, which new holding of shares constituted either a new or an additional source of income under section 134 of the Income Tax Act, 1952. The company received dividends from the Australian company in September, 1954, and March, 1955. Under the rules applicable to Case V of Schedule D to the Income Tax Act, 1952, the company was assessable to income tax in respect of these dividends in both the year 1954–55 and the year 1955–56. The Australian tax in respect of which credit could be given amounted to £64,836. Of this amount £15,624 was first credited against the company's liability to profits tax attributable to the dividends, leaving an amount of £49,212 to be credited against income tax. The company claimed that it was entitled to a credit of the amount of £49,212 against the United Kingdom income tax payable in respect of the dividends in each of the years of assessment 1954–55 and 1955–56:—

Held, that the amount to be "allowed as a credit against any "United Kingdom tax" was £64,836; and that it was only that sum, and only that sum once, which could be used as a credit against the United Kingdom tax payable in respect of the dividends.

CASE STATED by the Commissioners for the Special Purposes of the Income Tax Act.

A company, Imperial Chemical Industries, Ltd., appealed against an objection to its claim for an allowance by way of credit against income tax for the years of assessment 1954–55 and 1955–56 for foreign tax under the provisions of paragraph 13 of the Sixteenth Schedule to the Income Tax Act, 1952, in respect of income from dividends received from an Australian company.

The following facts were admitted or proved before the commissioners: The company, a United Kingdom public company, had shares in overseas companies, among them Imperial Chemical Industries of Australia and New Zealand Ltd., which was incorporated and controlled in Australia. The dividends payable to the company by the Australian company constituted income arising from a possession out of the United Kingdom and were thus assessable to United Kingdom income tax on the company under Case V of Schedule D to the Income Tax Act, 1952, s. 123

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(1). The dividends also formed part of the profits of the company assessed to United Kingdom profits tax. The dividends therefore constituted income derived from a source in Australia on which Australian tax was payable, such Australian tax being allowable as a credit against any United Kingdom tax payable in respect of that income by virtue of the Income Tax Act, 1952, s. 347, and Schedule 16, and article XII (1) of the Schedule to the Double Taxation Relief (Taxes on Income) (Australia) Order, 1947 [S.R. & O., 1947, No. 806] (hereinafter called the "Order").

In 1952 the company subscribed for 1,805,468 ordinary £A1 shares in the Australian company. The company already held 5,158,481 fully paid ordinary shares.

The new holding constituted either a new source or an addition to a source of income within the meaning of the Income Tax Act, 1952, s. 134. Dividends on the new holding were first payable in the year ending April 5, 1954. The Case V assessment for the year of assessment 1954–55 fell to be computed on the actual income of that year; that is, the dividends payable in the year ended April 5, 1955 (Income Tax Act, 1952, s. 133 (1) (*b*)). As no notice was given pursuant to the Income Tax Act, 1952, s. 133 (1) (*c*), the Case V assessment for the year of assessment 1955–56 fell to be computed on the income arising in the year preceding the year of assessment (Income Tax Act, 1952, s. 132 (1)), i.e., also on the dividends payable in the year ending April 5, 1955.

The dividends paid on the new holding during the year ending April 5, 1955, were as follows:

		£A	£Sterling
September, 1954	3½ per cent.	51,343	40,911
March, 1955	4½ per cent.	66,012	52,600
		£A117,355	£93,511

The Australian tax in respect of which credit could be given under article XII (1) of the Schedule to the Order amounted to £64,836 and consisted of: (a) £16,307 charged directly on the dividends of £93,511 for the Australian fiscal year to June 30, 1956; (b) £48,529 not charged directly or by deduction, being the appropriate proportion under paragraph 9 of the Sixteenth Schedule to the Income Tax Act, 1952, of Australian tax paid by the Australian company. The United Kingdom profits tax attributable to the dividends on the new holding payable in the year ending April 5, 1955, was £15,624.

Under paragraph 2 of Schedule 16 to the Income Tax Act, 1952, credit in respect of Australian taxes must be given first against profits tax, with the result that the credit in this case against profits tax was a sum of £15,624. The sum in respect of the dividends on the new holding payable in the year ending April 5, 1955, to be included in the Case V assessment was £142,040, namely, £93,511 plus £48,529, the amount of the Australian tax not charged directly or by deduction (Income Tax

Act, 1952, Sched. 16, para. 8 (3) (*b*)). For the year of assessment 1954–55 United Kingdom income tax at 9s. in the pound on £142,040 amounted to a sum of £63,918; for the year of assessment 1955–56 United Kingdom income tax at 8s. 6d. in the pound on £142,040 amounted to a sum of £60,367. If in one of these two years of assessment credit for Australian tax did not, pursuant to the contention of the Crown, fall to be given it was conceded on behalf of the Crown that in that year a deduction from the sum assessed of the Australian tax less the amount credited against profits tax would be allowed whether or not such a deduction could be claimed as of right.

The company claimed credit in respect of the Australian taxes, so far as not allowed against profits tax, against United Kingdom income tax for both of the years of assessment 1954–55 and 1955–56. The Crown objected to this claim but was prepared to allow the balance of credit remaining, after the allowance of credit against profits tax, against United Kingdom income tax for the year of assessment 1954–55 or 1955–56, or up to the limit of £49,212 total for both years, at the option of the company.

It was contended on behalf of the company (i) that, income tax being an annual tax, it was proper to consider each of the years of assessment 1954–55 and 1955–56 separately for the purposes of claims under paragraph 13 of Schedule 16; (ii) that, on a proper construction of that schedule and of article XII (1) of the Order, the company was entitled to claim in respect of the income tax assessments for each of the years 1954–55 and 1955–56 that a sum of £64,836 Australian tax was payable directly and by deduction or under the relevant provisions of paragraph 9 of the Schedule, in respect of income derived from sources in Australia and assessed to income tax in each of those years; (iii) that, on a proper construction of these provisions, the company was entitled to a credit against United Kingdom income tax payable in respect of that income for each of the years 1954–55 and 1955–56; (iv) that the construction of Schedule 16 for which the company contended was consistent with the language of the Schedule and was the only construction which gave relief in respect of foreign tax for each year of assessment during which a foreign source of income was possessed and taxed both in the United Kingdom and in Australia; (v) that a consideration of the scheme of the Schedule showed the intention of the legislature to grant relief for every year of assessment in which income was taxed both in this country and elsewhere; and (vi) that, after deducting a sum of £15,624 from the sum of £64,836 which must under paragraph 2 of Schedule 16 be given against profits tax, there should be allowed as a credit a sum of £49,212 against United Kingdom income tax in each of the years 1954–55 and 1955–56.

It was contended on behalf of the Crown: (i) that on a proper construction of Schedule 16 and of article XII (1) of the Order the total sum allowable as a credit to the company was a sum of £64,836, that being the Australian tax payable whether directly

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or by deduction or under the relevant provisions of paragraph 9, in respect of the income derived from sources in Australia; (ii) that the sum of £15,624 of the said sum of £64,836 being first applied in accordance with the provisions of paragraph 2 of Schedule 16 in reducing the profits tax payable, a balance of £49,212 only remained and was applicable to the reduction of any United Kingdom income tax charged in respect of that income; and (iii) that United Kingdom income tax being chargeable in respect of that income both for the years of assessment 1954–55 and 1955–56, the balance of £49,212 was applicable to the reduction of the income tax so chargeable—i.e., either the tax for the year of assessment 1954–55 or that for the year of assessment 1955–56 or partly the tax for one year and partly that for the other year.

The commissioners, in their written decision, stated, inter alia: "It was contended on behalf of the company that, income "tax being an annual tax (section 1, Income Tax Act, 1952), it "was proper to take each of the years 1954–55 and 1955–56 "separately for the purpose of a claim under paragraph 13, "Schedule 16. So construing the relevant provisions it was said "that, under article XII (1) of the Order, the company could "establish in respect of each of the said years 1954–55 and "1955–56 that a sum of £64,836 Australian tax was payable "directly and by deduction and/or under the relevant provisions "of paragraph 9, Schedule 16, in respect of income derived from "sources in Australia and could, therefore, claim that the said "sum should be allowed as a credit against any United Kingdom "tax payable in respect of that income. It was common ground "that credit for a sum of £15,624 of the said sum of £64,836 "must, under paragraph 2 of Schedule 16, be first given against "profits tax, and it followed that the company was entitled, if "its claim was well founded, to a credit of £49,212 against United "Kingdom income tax both for the year 1954–55 and the year "1955–56 payable, as was contended, in respect of that income.

"We reject this contention which, as we hold, is not recon-"cilable with the provisions of Schedule 16 and in particular "paragraph 2 thereof. As we construe the said paragraph, and in "particular sub-paragraph (2), we must, when determining the "amount of the credit against United Kingdom tax, first ask "ourselves 'what is the Australian tax payable whether directly "'or by deduction in respect of the income, that is, in the present "'case, the dividends payable to the company on its holding of "'1,805,468 ordinary £A1 shares in the year ended April 5, "'1955?' The answer to that question being by common consent "a sum of £64,836, that sum, we hold, is the credit to be applied "first in reducing the amount of any profits tax chargeable in "respect of the income, namely, £15,624, and to the extent that "it cannot be so applied, namely, £49,212, in reducing the "income tax chargeable in respect thereof.

"If we are right in so construing the relevant provisions of the "Order and of the said paragraph 2, Schedule 16, a sum of

"£49,212 represents the maximum credit which the company can "claim against United Kingdom income tax assessments, and "we hold, as the Crown concedes, that as United Kingdom in-"come tax was chargeable in respect of the relevant income from "the said dividends both for the years 1954–55 and 1955–56 "(compare paragraph 11, Schedule 16), the company can elect to "claim the said sum either for the year 1954–55 or for the year "1955–56, or partly for one year and partly for the other.

"The appeal therefore fails, and our determination is that the "claim of the company for an allowance by way of credit for "Australian tax for the said years 1954–55 and 1955–56 is limited "to a sum of £49,212, after deducting the said sum of £15,624 "already properly given against profits tax."

The company appealed. On December 10, 1958, Harman J. remitted the case to the special commissioners to ascertain certain supplemental facts, and the special commissioners stated a supplemental case which is not relevant to this decision.

F. Heyworth Talbot Q.C. and *Philip Shelbourne* for the company.

Hilary Magnus Q.C. and *Alan S. Orr* for the Crown.

The following cases, not referred to in the judgment, were cited in argument: *Ostime* v. *Australian Mutual Provident Society* [1]; *Joshua Hoyle & Sons Ltd.* v. *Hawkins* [2]; *Barron* v. *Littman.* [3]

Cur. adv. vult.

November 11. WYNN-PARRY J. On the view which I have formed I can express my judgment in a very few words. The first step which I am directed to take under article XII (1) of the Schedule to the Double Taxation Relief (Taxes on Income) (Australia) Order, 1947 (to which I will refer as "the Order"), is to ascertain whether or not there was any "income derived from "sources in Australia." The answer to that question is Yes. From Imperial Chemical Industries of Australia and New Zealand Ltd., the company received two dividends, which are the only dividends in question; namely, £40,911 paid in September, 1954, and £52,600 paid in March, 1955, totalling £93,511, and both therefore received in the fiscal year ending April 5, 1955.

The next step which I have to take under the above article is to ascertain what Australian tax was payable directly or indirectly by way of deduction in respect of those dividends. The answer to that is clear. £64,836 was so payable. Having found that figure I have now, in my view, found the figure which is to be, quoting the relevant words of article XII, "allowed as a credit against "any United Kingdom tax payable in respect of that income."

It was argued on behalf of the company that the word "any"

[1] [1959] 3 W.L.R. 410; [1959] 3 All E.R. 245.
[2] (1956) 36 T.C. 247.
[3] [1953] A.C. 96; [1952] 2 T.L.R. 445; [1952] 2 All E.R. 548.

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raised an ambiguity. I am unable to discover any ambiguity. The direction is to turn from the agreement to the relevant United Kingdom tax legislation and discover whether there is any United Kingdom income tax payable in respect of that income. There is. Therefore, the £64,836 has to be set against that United Kingdom tax. Under the Income Tax Act, 1952, it is common ground that this credit has first to be set against the liability of the company to United Kingdom profits tax attributable to the dividends in question payable in the year ending April 5, 1955: see Schedule 16, para. 2, to the Income Tax Act, 1952. This total was £15,624.

There is thus left a credit balance of £49,212 to be set against United Kingdom income tax. This is a case in which Case V of Schedule D is applicable. Under the operation of the rules applicable to that case, the company is assessable to tax in respect of the dividends in question, both in respect of the year 1954–55 and of the year 1955–56. It is therefore argued that this credit balance is available to be set off against the United Kingdom income tax payable in respect of each of these years. I am unable to accept this argument.

It was urged that the contrary view failed to give effect to what was described as the manifest intention of the two Governments to prevent double taxation. Be that or not as it may, I cannot, by reference to the English taxing statute and a consideration of its effect, create a greater sum of Australian tax than is made the subject of the operation of article XII of the agreement. That sum is, as I have said, £64,836, and it is that sum, and only that sum, and only that sum once, which can be used as a credit against the United Kingdom tax payable in respect of the income in respect of which the Australian tax is payable.

With all respect to the elaborate, interesting and attractive argument of Mr. Heyworth Talbot, that reasoning appears to me to dispose of the case. The appeal will therefore be dismissed with costs.

Appeal dismissed with costs.

Solicitors: *J. W. Ridsdale; Solicitor of Inland Revenue.*

[CHANCERY DIVISION.]

1959
Nov. 10.

Wynn-Parry J.

* MORRIS MOTORS LTD. *v.* LILLEY.

[1959 M. No. 2524.]

Passing off—Goodwill, damage to—Sale of article as new—Motor-car—False implications that seller was authorised dealer and manufacturer was liable to service vehicle—Whether manufacturer entitled to injunction.

[Reported by Miss Philippa Price, Barrister-at-Law.]

Sale of Goods—Second-hand or new—"New"—Meaning—When new motor-car not "new."
Words and Phrases—"New"—Motor-car.

The plaintiffs were manufacturers of Morris cars, their scheme of trading being to appoint authorised distributors and dealers throughout the country to sell their cars to retail customers. When a car was sold either by a distributor or a dealer a certain warranty was given and the plaintiffs undertook to supply a certain amount of service to the new vehicle. On August 20, 1959, the plaintiffs supplied an unregistered Morris car to certain authorised distributors, who in turn sold it to an authorised dealer. On September 1, 1959, the dealer sold it retail to a Mrs. L., and on September 5 her husband, L., took delivery of the car at the dealer's premises and drove it away. Prior to delivery the dealer registered the car with the county council and affixed number plates. On the same day L. sold the car to the defendant for £10 over the list price and delivered it to the defendant's premises. The defendant, who was neither an authorised distributor nor an authorised dealer, proceeded to advertise the car for sale as a new car. He eventually sold it as a new car to B. On a motion by the plaintiffs to restrain the defendant from advertising for sale or selling any motor-car not being a new car of the plaintiffs' manufacture as and for a new motor-car of their manufacturing, and on a finding by the court that there was a completed retail sale to Mrs. L. on September 5:—

Held, (1) that after a car had left the manufacturers' hands it remained new until it was made the subject of a retail sale by a distributor or dealer, it was registered with the county council, number plates were affixed to it and it was driven away by the retail customer, and that, therefore, the car in question ceased to be a new car when L. drove it away from the dealer's premises on September 5, so that when it was sold by the defendant it was not a new car.

(2) That, in the circumstances, the sale by the defendant of a Morris car as new when it was not new, which carried with it a representation by him that he was an authorised dealer, was likely to injure the plaintiffs' goodwill. The plaintiffs, accordingly, were entitled to the injunction sought.

MOTION.

The plaintiffs were manufacturers of Morris motor-cars. Their scheme of trading was to appoint authorised distributors and dealers throughout the country to whom they would supply cars, and who would in turn sell them to retail customers. On August 20, 1959, the plaintiffs supplied a new Morris Minor 1000 to John C. Beadle & Co., one of their authorised distributors. John C. Beadle & Co. then sold the car to an authorised dealer, Broadwalk Engineering Co. On September 1, Broadwalk Engineering Co. sold the car retail to a Mrs. Lightstone, and on September 5, her husband went to the premises of Broadwalk Engineering Co., took delivery of the car and paid the balance of the purchase-money by banker's order. He then drove the car away from the dealer's premises. Prior to that delivery, the dealer had registered the car with the local county council, obtained the log book and affixed number plates. On the same day, September 5, Lightstone telephoned to the defendant, Leslie Wellstead Lilley, who

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traded as G. & L. Motors, and offered the car for sale at £10 over the list price. The defendant accepted the offer and the car was duly delivered to his premises.

Thereafter, the defendant inserted in the "Middlesex "Chronicle" for September 11, under the heading "New Cars," an advertisement for the car in question; he also exhibited it for sale on his premises, bearing on the windscreen the notice: "Immediate Delivery. New." The car was subsequently sold by him as a brand new car to one Berryman.

The plaintiffs, by this motion, asked for an interlocutory injunction to restrain the defendant from advertising, offering for sale or selling any motor-car, not being a new motor-car, of the plaintiffs' manufacture as and for a new motor-car of their manufacture, and from falsely representing that any motor-car of their manufacture was new when it was to the defendant's knowledge not new. They contended that the motor-car which was the subject-matter of the sale by the defendant to Berryman was not a new car, but that it had ceased to be new as soon as the retail sale to Mrs. Lightstone was completed.

K. E. Shelley Q.C. and *Christopher Mayson* for the plaintiffs.
F. E. Skone James for the defendant.

No cases were cited in argument.

Wynn-Parry J. This motion raises the not uninteresting question as to when a motor-car is new and when it is not new. The scheme under which the plaintiffs operate is that they appoint various firms as distributors in various areas. In the first place, they supply new unregistered cars to those distributors from their factory. The distributors are entitled to supply those cars still unregistered and completely new to authorised dealers, who again are chosen or approved by the plaintiffs. When a car is sold either by a distributor or by a dealer, a warranty, which, it is true, is in limitation of the common law liability, is given; but at the same time there is an undertaking to supply a certain amount of service to the new vehicle. The form of warranty contains, among others, these provisions: "The goods supplied by or for Morris Motors Limited "(hereinafter called 'the company') are supplied with the "following express warranty which excludes all warranties, con-"ditions, and liabilities whatsoever implied by common law, "statute, or otherwise. 1. For the purpose of this warranty the "term 'Goods' means and includes any new vehicle," and then follows a statement of various parts and the exclusion of certain parts for which the company does not accept any liability. "2. For a period of 12 months from the date on which goods are "delivered to the first owner-user thereof the company will "exchange or repair any part which needs replacing or repair by "reason of defective material or workmanship." It is to be

observed that the obligation is reserved to "the first owner-user." Then, by clause 5: "No claim for exchange or repair under the "terms of this warranty may be made in respect of: (f) Any "second-hand vehicle or part thereof." That document represents the plaintiffs' usual terms of business. It is a scheme which they are entitled to set up, and it may be said that, while they limit their common law liability, they do hold themselves out as willing to replace parts and provide, through their distributors, a certain amount of service to the car. That, to my mind, represents something which the plaintiffs are entitled to say is of some value to their customers, and it is something which the customers are entitled to expect if they buy what can properly be described as a new car.

[His Lordship stated the facts and continued:] The question arises whether, as the plaintiffs complain, the car, when it was eventually sold to Berryman, was a new car or not. Mr. Skone James has contended that the car was for all purposes a new car because it had only been driven to the defendant's premises for the purpose of enabling him to effect the sale to Berryman; but I am unable to accept that argument. There was a completed sale and purchase on September 5, 1959, to Mrs. Lightstone. What, in my opinion, was being dealt with after that completed sale was a car which (to use the words in the notice of motion) "was not a new "car." I was invited to say that the mere fact that by process of calculation the car had only been driven approximately 130 miles between leaving the factory at Cowley and its delivery to Berryman did not rob it of the characteristic of being a new car. It seems to me that that is a wholly unsafe test to make. It is perfectly clear from the plaintiffs' documents that they regard and hold out to their distributors and to the public that a car ceases to be a new car once it is sold retail. That is the only safe course to take. Once a car becomes the subject-matter of a sale and purchase, once it is registered with the local county council, once the number plates have been affixed and it has been driven out of the distributor's or the dealer's premises, that car, in my judgment, ceases to be a new car.

It was alleged that, on a motion such as this, no injury could be shown to the plaintiffs' goodwill. As I understand the law, it is not necessary, for the purposes of such a motion as this, to show actual injury; it is sufficient to show that injury is likely to occur. Under this form of trading I can well see the greatest likelihood of injury occurring. First of all, there is the obvious representation by the defendant that he is an authorised dealer, because he says the car is brand new. If a car is brand new it carries with it the plaintiffs' obligation under their warranty to service that car. Further, they have made a careful selection of firms throughout the country whom they are willing to appoint as either distributors or dealers, and it may well be very injurious to their goodwill if somebody who fulfils neither of those capacities is allowed to hold himself out in effect as being a distributor or a dealer.

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Wynn-Parry J.

I prefer to take as the simple test of when a car is new simply this: that it remains new even when it leaves the manufacturer's hands, until it is made the subject of a retail sale by a distributor or dealer, it is registered with the local county council, number plates are put upon it and it is driven away by the purchaser.

For those reasons I propose to grant the injunction as asked in the notice of motion.

Motion treated as trial of the action.
Judgment for the plaintiffs with costs.

Solicitors: *Osmond, Bard & Westbrook; Lucien Fior.*

[PROBATE, ETC., DIVISION.]

1959
Nov. 30.

* PRACTICE DIRECTION (CUSTODY).

Infant—Custody—Divorce Court—Judge not satisfied at hearing as to arrangements.

The President has directed that if on pronouncing a decree nisi in a divorce suit the judge is not satisfied with the arrangements for the children, and does not reserve the matter to himself by adjourning the case into chambers or otherwise, the party in whose favour the decree nisi is pronounced should issue a judge's summons, as if for a dispute about custody.

B. LONG,
Senior Registrar.

Nov. 30, 1959.

[COURT OF APPEAL.]

C. A.

1959
Nov. 13.

Hodson and Ormerod L.JJ.

* DEVENISH *v.* P.D.I. HOMES (HYTHE) LTD.

[Plaint No. P. 5887.]

County Court—New trial—Fresh evidence—Plaintiff represented by solicitor at trial before registrar—Witnesses available not called—Order by judge for new trial to admit such evidence—Whether proper exercise of discretion—County Court Rules, 1936 (*S.I.* 1936, *No.* 626), *Ord.* 37, *r.* 5 (1).

Evidence—Fresh evidence—County court—Application for new trial—Principles applicable—County Court Rules, 1936, *Ord.* 37, *r.* 5 (1).

The plaintiff, a builders' foreman, was summarily dismissed by his employers, the defendants, on the ground that he had failed to work on Saturdays as was required by the terms of his employment. The plaintiff's claim for damages for wrongful dismissal was heard, by consent, by the county court registrar. The plaintiff's contention was that his contract did not include Saturday work, and

at the time of the hearing he had available to support his case a number of witnesses who would depose that in the earlier months of his employment he never worked on Saturdays, but the solicitor who represented him did not call them. The registrar dismissed the claim.

The plaintiff applied to the judge under Order 37, rule 5 (1) of the County Court Rules[1] for a new trial. The judge granted the application on the ground that a body of evidence which might have materially affected the issue had, through no personal fault of the plaintiff, not been called. The defendants appealed from this decision on the grounds that the judge had misdirected himself in admitting evidence which was available at the trial and could with reasonable diligence have been called, and in allowing a new trial because the plaintiff was dissatisfied with his solicitor's conduct:—

Held, that it was contrary to principle to allow a new trial for the purpose of calling further evidence in a case where a plaintiff, when professionally represented, did not call that evidence when it was available; there being no difference in principle between the exercise of the discretion under the present rule and such exercise under the provisions of section 93 of the County Courts Act, 1893, under which *Brown* v. *Dean* (infra) was decided.

Brown v. *Dean* [1910] A.C. 373 applied.

Per curiam: There is nothing in Order 37, rule 5 (1) to suggest that it confers a wider discretion than Order 37, rule 1.

APPEAL from Judge Harrington, sitting at Southampton County Court.

The plaintiff made a claim against the defendants for breach of contract, alleging that he was wrongfully dismissed by the defendants from their employment. The issue in the case was what were the terms of the agreement of service which was entered into by the plaintiff with the defendants when they agreed to employ him as a foreman. The plaintiff claimed that he was not to work on Saturday and that that was a term of the employment. The defendants claimed that, on the contrary, his employment as a general foreman in the building trade was to be the normal employment, involving the normal working hours from eight to five, less one hour for lunch, Monday to Friday, and from eight to noon on Saturday.

There being a dispute between the parties as to whether the terms of employment involved Saturday working or not, it was material on the question whether or not the plaintiff had come to work on Saturday or not in the early stages of his employment. He said that he did not, and the defendants said that he did.

The action was tried, by consent of the parties, by the registrar, who, after hearing the evidence of both sides, dismissed the claim, the plaintiff having been previously peremptorily discharged by his

[1] County Court Rules, 1936, Ord. 37, r. 5 (1): "Any party affected by "a judgment or final order of the "registrar may, except where he has "consented to the terms thereof, "appeal therefrom to the judge who "may on such terms as he thinks "just—(*a*) set aside or vary the "judgment or order or any part "thereof, or (*b*) give any other judg-"ment or make any other order in "substitution therefor, or (*c*) remit "the action or matter or any ques-"tion therein to the registrar for "re-trial or further consideration, or "(*d*) order a new trial to take place "before the judge."

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employers because he did not obey their orders and had not worked on Saturdays. He had in court available witnesses to support his statement that he was not at work on Saturdays in the early months of the employment except on one occasion, but the solicitor representing him did not call them. The registrar said: "In the particular circumstances I took the view "that the plaintiff's refusal to attend went to the root of the "contract between the parties and, consequently that the defen-"dants were justified in dismissing the plaintiff."

The plaintiff, who was dissatisfied with the decision of the registrar, applied to the judge (from whom this appeal was brought) under Order 37, rule 5 (1) of the County Court Rules, 1936, for a new trial.

The judge, purporting to exercise the discretion given him by the rule, ordered a new trial. In his judgment, he set out the issues between the parties and pointed out that the plaintiff had informed his solicitor a fortnight before the trial of the existence of witnesses who were available to support his case, but that his solicitor had not called them. The judge considered in those circumstances that a body of evidence which might have affected the mind of the tribunal had, through no personal fault of the plaintiff, not been called, and therefore he thought that the plaintiff ought to have another opportunity of putting his case before the court.

The appeal was brought on the grounds: "That the said "evidence was available to the plaintiff at and before the date "of the hearing before the registrar and could with reasonable "diligence have then been adduced by him, and the judge mis-"directed himself in holding that such evidence ought thereafter "to be admitted. That the judge misdirected himself in holding "that the plaintiff ought to be granted a new trial because the "plaintiff was dissatisfied with his solicitor's conduct of his case "before the registrar."

D. H. Stansfield for the defendants.
Michael Turner for the plaintiff.

The following cases, which were cited in argument, are not referred to in the judgments: *Ladd* v. *Marshall*[2]; *Braddock* v. *Tillotson's Newspapers Ltd.*[3]; *Kirk* v. *Dale's Footwear Service*.[4]

Hodson L.J. stated the facts and continued: The principles upon which new evidence is admitted are well known and have often been discussed in proceedings before the High Court, where R.S.C., Ord. 58, r. 9, provides and limits to some extent the way in which this discretion is to be exercised. The position in the county courts is not the same. It depends upon rule 5 (1)

[2] [1954] 1 W.L.R. 1489; [1954] 3 All E.R. 745.

[3] [1950] 1 K.B. 47; 65 T.L.R. 553; [1949] 2 All E.R. 306.

[4] (1949) 99 L.J.Newsp. 723.

which contains no reference to special cases; but it is, I think, controlled by the rule that discretion of this kind must be judicially exercised. The question therefore arises whether a plaintiff, as in this case, who is advised by a solicitor and does not call available evidence at the hearing in the first instance before the registrar or another tribunal, can have a further opportunity of putting that evidence before the court. It is, on the face of it, contrary to principle, as was pointed out by Lord Loreburn in *Brown* v. *Dean*.[1] That was a case in which the wording that the courts were considering was the wording of section 93 of the County Courts Act, 1888, which gave power to the county court judge "if he shall think just to order a new "trial to be had upon such terms as he shall think reasonable." It is pointed out that the discretion is a judicial and not an arbitrary discretion. Lord Loreburn, in his judgment, referred to the judgment of Farwell L.J. in the Court of Appeal and quoted this passage[2]: "In the present case the county court "judge has disregarded those principles, and has granted a new "trial on affidavits which show at the outside that there will be "oath against oath on a new trial—and that is clearly not "enough—which show nothing in the nature of surprise, fraud, "or conspiracy, and which also state nothing to show that the "information alleged could not with reasonable diligence have "been obtained at the first trial." There is no question but that the evidence now available could not reasonably have been obtained at the first trial. The only question really is whether the county court judge today is in the same position as the county court judge was when he was acting under the powers conferred by section 93 of the County Courts Act, 1888, which is now replaced by Order 57, rule 5. It has been pointed out to us that Order 37, rule 5 (1), which I have read, is not in exactly the same terms as Order 37, rule 1 (1), which deals with the general powers of the county court judge to order a new trial. Rule 1 (1) reads: "The judge shall in every case have the power to order a new "trial to be had upon such terms as he thinks reasonable, and in "the meantime to stay the proceedings." It is conceded that a judge acting under that rule is under the same obligation as he was in the case of *Brown* v. *Dean*[3] under the County Courts Act, 1888, but it is contended that the wording under Order 37, rule 5 (1) is different. I have looked at the wording of that rule and I confess I cannot find anything which leads me to the view that there is any wider discretion to be exercised under rule 5 (1) than there is under rule 1. I cannot see that the words "affected "by a judgment or final order" can possibly make any difference. The words of the Act referred to in *Brown* v. *Dean*, "if he shall "think just," do not appear either in rule 1 or rule 5 or rule 6; but it seems to me it is plain on the wording of the rule that there is no difference in principle, and that the principle must be

[1] [1910] A.C. 373.
[2] Ibid. 375.
[3] Ibid.

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operated in these cases in the same way as it was directed to be used in the case of *Brown* v. *Dean*.

I have not referred to another part of that case where there was a slight difference of opinion between two members of their Lordships' House because I do not think it is material to the question we have now to consider.

Mr. Turner, for the plaintiff, referred us to various other rules, and to the section of the Act which regulates appeals to this court. Particularly, he referred us to Order 13, rule (1) (*h*), dealing with cases where a party has a right to appeal from the registrar's order and he has contrasted those words. Sub-rule (*h*) reads: "Where the registrar has made an order to which this "rule applies, any party who is dissatisfied therewith may apply "to the judge on notice to vary or rescind the order, and on the "hearing of the application the judge may vary or rescind the "order and may make such order as may be just." I myself do not gain any assistance from the wording of that Order, which simply gives any party who is dissatisfied a right of appeal.

For the reasons I have endeavoured to give, I think that this appeal should be allowed on the ground that the exercise of the discretion by the judge to order a new trial to the plaintiff was not a proper judicial exercise of his discretion. I would, therefore, allow the appeal.

ORMEROD L.J. I agree and I have nothing to add.

Appeal allowed with costs.

Solicitors: *Bartlett, West & McLoughlin for Stephens & Co., Southampton; Richard Newton.*

F. R. D.

[CHANCERY DIVISION.]

1959
Nov. 6, 12.
Vaisey J.

* *In re* KRAWITZ WILL TRUSTS. KRAWITZ *v.* CRAWFORD.

[1959 K. No. 433.]

Will—Construction—Uncertainty—Condition subsequent—Gift over on marriage with "a person who does not practise the Jewish religion."
Will—Construction—"Next-of-kin"—Gift over to testator's next-of-kin—Date when next-of-kin ascertained—Whether next-of-kin take equally as joint tenants—Administration of Estates Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 23), *s.* 50 (1).

By section 50 (1) of the Administration of Estates Act, 1925: ". . . references in . . . an instrument or will to statutory next of "kin shall be construed, unless the context otherwise requires, as

[Reported by Miss V. A. MOXON, Barrister-at-Law.]

"referring to the persons who would take beneficially on an intes-
"tacy under the foregoing provisions of this Part of this Act."

By his will a testator gave his residuary estate in trust for his wife during widowhood, and after her death or remarriage upon trust for his daughter absolutely, provided that the residuary trust fund should not vest in her absolutely but should be retained by his trustees on protective trusts for her during her life. After her death the residuary trust fund was to be held on certain trusts for her issue. Clause 7 (c) (iv) of the will provided that if the residuary trust fund did not vest in any person under the preceding trusts then, after his daughter's death, it should be held on trust for such of the testator's next-of-kin according to the Statutes of Distribution as should be living in the United Kingdom at the death of his daughter. Clause 7 (*c*) (v) provided that if his daughter married a person who did not practise the Jewish religion the trusts in favour of her and her issue should be void, and the residuary trust fund should be held upon trust for certain of the testator's next-of-kin, excluding his daughter and her issue.

The testator died on May 28, 1947. On December 9, 1948, his daughter married the second defendant, who was not a Jew by birth but who was received into the Jewish religion shortly after the marriage. The testator's daughter died on February 8, 1958, leaving no issue:—

Held, (1) that the expression "practise" the Jewish religion lacked the precision essential to a condition subsequent and that, therefore, the gift over in clause 7 (*c*) (v) was void for uncertainty.

(2) That, by virtue of section 50 (1) of the Administration of Estates Act, 1925, the testator's widow was included in the class of his statutory next-of-kin.

(3) That, the prima facie presumption that a person's next-of-kin must be ascertained as at the date of his own death, was easily displaced by a context and that, in the context of the will and in the circumstances the residuary trust fund was divisible between those persons who would have been the testator's statutory next-of-kin if he had died on the day of his daughter's death who were living in England on that day, such persons to take in equal shares, irrespective of what would have been their interest under an intestacy, and as joint tenants.

ADJOURNED SUMMONS.

By his will dated January 21, 1947, the testator, Eli Krawitz, appointed his wife, the plaintiff, and two other persons to be his executors and trustees. He gave his residuary estate to his trustees on trust for his wife during her widowhood, and from and after her death or remarriage on trust for his only daughter, Zena Krawitz, absolutely, provided that his residuary trust fund should not vest absolutely in his daughter but should be retained and invested by his trustees and held upon protective trusts for his daughter during her life, and from and after her death on certain trusts for the benefit of her issue. Clause 7 (c) (iv) of the will provided: "If my residuary trust fund or any part thereof shall not vest in "some person or persons under the preceding trusts then after "the death of my said daughter my residuary trust fund or the "part thereof which shall not so vest shall . . . be held in trust

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"for such of my next-of-kin according to the Statutes of Distribu-
"tion as shall be living in the United Kingdom at the decease of
"my said daughter." Clause 7 (c) (v) provided that "if my
"said daughter shall either during my lifetime or after my death
"marry a person who does not practise the Jewish religion then
"the trusts hereinbefore in this present clause contained in favour
"of my said daughter and her children and issue shall be void and
"of no effect and are hereby revoked and in such case I direct
"that my residuary trust fund shall be held by my trustees upon
"trust for such of my next-of-kin according to the Statutes of
"Distribution as shall then be living within the United Kingdom
"other than my said daughter or the child children or other issue
"of my said daughter . . ."

The testator died on May 28, 1947. His will was proved on March 11, 1948. On December 9, 1948, the testator's daughter married the second defendant, James O'Donnell, who was not a Jew by birth. For some time before the marriage he had participated in and observed the ritual of the Jewish religion which he saw in the home of the testator's widow and daughter, and had accompanied them to the synagogue on a number of occasions. Shortly after the marriage he was formally received into the Jewish religion; and on August 15, 1949, he and the testator's daughter went through a ceremony of marriage according to Jewish rites. The testator's daughter died on February 8, 1958, leaving no issue.

On May 27, 1959, the widow took out a summons for the determination (inter alia) of the following questions: Whether the gift contained in clause 7 (c) (v) of the will to take effect if the testator's daughter should marry a person who did not practise the Jewish religion was void for uncertainty or otherwise or was valid; if either of the gifts in clause 7 (c) (iv) or (v) took effect, whether the widow was solely entitled under such gift as the only person other than the testator's daughter who would have taken beneficially on an intestacy, or some and what other class of persons was entitled under such gift; and, if a class of persons were entitled under such gift, whether they took as joint tenants or in some other and what manner.

R. W. Goff Q.C. and *E. I. Goulding* for the widow.

J. A. Plowman Q.C. and *J. A. Wolfe* for the first and third defendants, brothers of the testator.

M. Miller for the second defendant, the personal representative of the testator's daughter.

John Bradburn for the fourth and sixth defendants, nieces of the testator.

G. T. Hesketh for the fifth and seventh defendants, nieces of the testator and personal representatives of one of the testator's sisters, who died after the marriage of the testator's daughter but before her death.

The following case, not referred to in the judgment, was cited in argument: *In re Hart's Will Trusts.**

Cur. adv. vult.

November 12. VAISEY J. read the following judgment, in which, having stated the facts and referred to clause 7 (c) (iv) and (v) of the will, he continued: The first question which arises for my decision is whether the gift of the testator's residuary trust fund contained in clause 7 (c) (v) of his will, which was intended to take effect (subject, of course, to the plaintiff's interest during widowhood) if his daughter should marry a person not practising the Jewish religion is void for uncertainty or is valid.

I think that I am constrained by authority to say that the gift is void. I do not know, except in the broadest and most indefinite sense, what is meant by "practising" the Jewish religion, or, indeed, any religion; and the expression seems to me to lack altogether that precision which is essential to the validity of a condition subsequent, which this one, of course, is.

The principal authorities on the point are well known and have become very familiar in recent years. The leading case is *Clavering* v. *Ellison*,[1] and this was followed by *Sifton* v. *Sifton*,[2] *In re Blaiberg*,[3] *Clayton* v. *Ramsden*,[4] *In re Donn*,[5] and *In re Moss*.[6] I do not propose to consider these cases in detail. The principle which they embody is well known and well established, and I think it clearly applies in the present case.

If that view of the matter is correct, clause 7 (c) (v) of the will is wholly inoperative; and has, I think, no bearing upon the construction of the clause which does take effect, which is clause 7 (c) (iv). Under the terms of that clause, subject, of course, to the plaintiff's interest during widowhood, the fund is to go to such of the testator's next-of-kin according to the Statutes of Distribution as should be living in the United Kingdom at the decease of his daughter, that is to say, on February 8, 1958.

The testator's next-of-kin at the date of his death was, in the strictest and narrowest sense, his daughter alone, or in the sense now usually attributed to such an expression as we have here, the testator's daughter and his widow, the plaintiff herself. I think, and I hold, that the testator's statutory next-of-kin at the date of his death were his daughter and the plaintiff, and not his daughter alone. Reference may be made to section 18 of the Wills Act, 1837, the Administration of Estates Act, 1925, s. 50 (1), and *In bonis Gilligan*.[7] But the daughter was not living at her own death and could not on any view participate in the gift, and I,

* [1950] Ch. 84; 65 T.L.R. 742; [1949] 2 All E.R. 898.

[1] (1859) 7 H.L.C. 707.

[2] [1938] A.C. 656; 54 T.L.R. 969; [1938] 3 All E.R. 435.

[3] [1940] 1 Ch. 385; 56 T.L.R. 487; [1940] 1 All E.R. 632.

[4] [1943] A.C. 320; 59 T.L.R. 75; [1943] 1 All E.R. 16.

[5] [1944] 1 Ch. 8; 60 T.L.R. 30; [1943] 2 All E.R. 564.

[6] (1945) 61 T.L.R. 147; [1945] 1 All E.R. 207.

[7] [1950] P. 32; (1949) 65 T.L.R. 651; [1949] 2 All E.R. 401.

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Vaisey J.

accordingly, think that I must hold that the plaintiff was the only next-of-kin of the testator living at the death of his daughter.

But that by no means concludes the matter, because "statutory next-of-kin" in this context may be considered as a description of an artificial, hypothetical class, consisting of the persons who, at the death of the daughter, would have been the testator's statutory next-of-kin if the testator himself had died on the day of his daughter's death. If that is how the words should be understood, the persons entitled at that date must be confined to those who were living in the United Kingdom at the date of the daughter's death, and according to the evidence those persons would appear to be the following, namely, (1) the plaintiff, (2) a brother, the first defendant, (3) another brother, the third defendant, (4) the daughter of a deceased brother, the fourth defendant, and (5), (6) and (7) the fifth, sixth, and seventh defendants, who were children of a deceased sister.

I have, I think, to decide between the claim of the plaintiff to be solely entitled and the claim of the seven persons whom I have just named. The widow's claim has apparently very sound foundations. Prima facie, a person's next-of-kin must be ascertained as at the date of his own death: see *In re Winn*,[8] but this presumption is easily displaced by a context: see *Hutchinson* v. *National Refuges for Homeless and Destitute Children*,[9] distinguishing the leading authority of *Bullock* v. *Downes*.[10]

It seems to me to be impossible to attribute an intention to the present testator which would, in quite likely events, that is to say those which have happened, give his estate to his widow absolutely on the termination of her own interest during widowhood. It seems much more reasonable to suppose that the testator was thinking of his near relatives (other than his daughter, and, of course, other than his widow) and the fact that many of such relatives were living abroad, that is to say, in South Africa, gives a special significance to the words "living in the United Kingdom" which might even be rephrased as meaning "other than those living in South Africa."

I decide in favour of the seven claimants. I think they take as personae designatae without regard to the quality and nature of the interests they would have taken under an actual intestacy; that is to say, I hold that the plaintiff takes her one-seventh share equally with the other six, the nieces each taking a full share equally with their uncles, the two brothers; and all these people, all the seven, take together as joint tenants.

The original gift to the testator's daughter absolutely might have given a title to her representative on the principle of *Hancock* v. *Watson*[11] but the right of that representative is, in my judgment, completely displaced by the claim which I have admitted of the seven persons as above-mentioned.

[8] [1910] 1 Ch. 278.
[9] [1920] A.C. 794.
[10] (1860) 9 H.L.C. 1.
[11] [1902] A.C. 14.

Except by the deduction of the costs which I am about to mention, the plaintiff's interest during her widowhood remains, of course, unaffected by anything in this judgment.

Declaration accordingly. Costs and expenses of the plaintiff and costs of the defendants as between solicitor and client to be raised, retained and paid out of the residuary trust fund.

Solicitors: *Brown, Turner, Compton Carr & Co.; Ward, Bowie & Co. for A. Conway, Leeds; Haslewoods for Griffith, Smith, Dodd & Riley, Brighton.*

[COURT OF APPEAL.]

* WORKING MEN'S CLUB AND INSTITUTE UNION LTD. *v.* SWANSEA CORPORATION.

C. A.

1959 *Oct.* 22, 26, 27; *Nov.* 11.

Morris, Romer and Willmer L.JJ.

Rates and Rating—"Social welfare"—Working men's clubs union—Convalescent home—Union formed to encourage working men to form clubs—Main objects of union—Whether established or conducted for profit—Whether concerned with the advancement of social welfare—Rating and Valuation (Miscellaneous Provisions) Act, 1955 (4 *&* 5 *Eliz.* 2, *c.* 9), *s.* 8 (1) (*a*).

Justices—Case stated—Quarter sessions—Fact found—No error in approach—Whether binding on higher court—Supreme Court of Judicature (Consolidation) Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 49), *s.* 25.

Fact or Law—Rating relief—Main object of body—Written constitution inconclusive—Rating and Valuation (Miscellaneous Provisions) Act, 1955, *s.* 8 (1) (*a*).

An organisation (the union) was formed in 1862 to encourage working men to band together and form working men's clubs and institutes. The members of the union were distinguished patrons whose aim was that working men should be raised by their own endeavours. In 1890, 384 clubs were members of the union; in 1925 the number had risen to 2,469 and in 1955 to 3,420. The objects of the union, as set out in rule 2 of its rules were: "To carry on "the business of general advisers, teachers of the doctrine of associa-"tion for social or ameliorative purposes. . . ." At the present time the main activity of the union consisted of helping clubs which had already been formed and become members. The union owned a number of convalescent homes used by the members of the member clubs. The union appealed against the rating assessment in respect of one of their convalescent homes claiming that they were entitled to relief under section 8 (1) (*a*) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, as "an organisation . . . "which is not established or conducted for profit and whose main "objects . . . are . . . concerned with the advancement of . . . social "welfare":—

Held, (1) that the union was not an organisation established or conducted for profit. If the union had made any profits from any selling activities such profits would not have been distributed to member clubs.

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Dictum of Lord Denning in *National Deposit Friendly Society Trustees* v. *Skegness Urban District Council* [1959] A.C. 293, 323; [1958] 3 W.L.R. 172, 187; [1958] 2 All E.R. 601 applied.

Per Romer L.J. In my opinion, the "profit" referred to in section 8 is distributable or divisible profit and not merely taxable profit. It appears to me that the union profit falls within the language of Pearce L.J. in *Guinness Trust (London Fund) Founded 1890, Registered 1902* v. *West Ham Borough Council* [1959] 1 W.L.R. 233, 243; [1959] 1 All E.R. 482.

(2) That the main objects of the union could not be determined merely by reading or construing rule 2 of the union rules, but must be ascertained by considering what were its main objects at the time when it claimed relief under section 8. The deputy recorder at quarter sessions, adopting that method of approach, had rightly found that at the relevant time the main object of the union was to give advice on legal and administrative matters to its club members; it was, therefore, not concerned with the advancement of social welfare.

(3) That that finding of the deputy recorder was one of fact, and, since he had not erred in his approach to it, was binding upon the Divisional Court and the Court of Appeal.

Chivers & Sons Ltd. v. *Cambridge County Council* [1957] 2 Q.B. 68; [1957] 2 W.L.R. 646; [1957] 1 All E.R. 882 applied.

Decision of Divisional Court [1958] 1 W.L.R. 1135; [1958] 3 All E.R. 414 reversed.

Appeal from the majority decision of the Divisional Court [1] (Lord Parker C.J. and Streatfeild J., Cassels J. dissenting), on a case stated, reversing the decision of quarter sessions.

The following facts were stated in his judgment by Morris L.J. In July, 1956, the Working Men's Club and Institute Union Ltd. appealed to quarter sessions for the County Borough of Swansea against the rate charged in respect of a convalescent home at Langland Bay which they owned and occupied. They claimed that section 8 (1) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, applied to the property, and that in consequence the amount of rates chargeable should be reduced.

At the hearing before the deputy recorder on November 12 and 13, 1956, the evidence of several witnesses was heard and the contents of documents were examined. Judgment was given on December 19, 1956, when the appeal was dismissed. The deputy recorder held that the Working Men's Club and Institute Union Ltd., hereinafter called the union, was not established nor conducted for profit. He held that the union had only one main object, which was the carrying on of the first of several activities in which the union was engaged. That activity was described in the case stated as follows: "The first activity consists in giving "advice and guidance to members of the organisation, that is to "say, the 3,420 clubs which are within the organisation; advice "on legal matters, advice on administrative matters; guidance as "to how members should conduct their clubs, so that they are "carried on according to the law and give the best possible "service to their members. The organisation sees that the

[1] [1958] 1 W.L.R. 1135.

"member clubs are fully acquainted with their rights and with "their duties in relation to the usual social activities associated "with clubs of this kind."

The deputy recorder held that the main object of the union as found was not charitable, and was not otherwise concerned with the advancement of education or of social welfare. Consequently he held that section 8 (1) (*a*) [2] of the Act did not apply to the convalescent home.

On the application of the union a case was stated in which certain facts as proved or admitted were recorded, and the question for the opinion of the court was whether upon the facts as stated the deputy recorder came to a correct decision in point of law. The Divisional Court, by a majority (Cassels J. dissenting), reversed the decision of the deputy recorder and allowed the union's appeal in respect of the rate.

Appeal is now brought to this court by the borough council.

G. D. Squibb Q.C. and *Breuan Rees* for the Swansea Borough Council.

J. T. Molony Q.C., *J. Malcolm Milne* and *D. Walder* for the union.

The following cases, in addition to those mentioned in the judgments, were cited in argument: *Berry* v. *St. Marylebone Borough Council* [3]; *Skegness Urban District Council* v. *Derbyshire Miners' Welfare Committee* [4]; and *Waterson* v. *Hendon Borough Council*.[5]

Cur. adv. vult.

November 14. The following judgments were read:

MORRIS L.J., having stated the above facts, continued: Rule 2 of the current rules of the union is in these terms: "Objects. "The objects of the union are: To carry on the business of "general advisers, teachers of the doctrine of association for "social or ameliorative purposes, publishers, stationers and book-"sellers, general traders, agents and manufacturers, both "wholesale and retail, of any article which may assist the "development of clubs or their members. To provide and "maintain convalescent homes, or other institutions for the "benefit of the members or wives or children or dependants of "the members of clubs which are members of the union. The "union shall have full power to do all things necessary, expedient,

[2] Rating and Valuation (Miscellaneous Provisions) Act, 1955, s. 8 (1): "This section applies to the "following hereditaments, that is to "say—(*a*) any hereditament occupied "for the purposes of an organisation "(whether corporate or unincorporate) "which is not established or con-"ducted for profit and whose main "objects are charitable or are other-"wise concerned with the advance-"ment of religion, education or social "welfare."

[3] [1958] Ch. 406; [1957] 3 W.L.R. 1029; [1957] 3 All E.R. 677.

[4] [1959] 2 W.L.R. 711.

[5] [1959] 1 W.L.R. 985; [1959] 2 All E.R. 760.

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"or considered by it desirable for the welfare and protection or "assistance of, or helpful in any manner to its members, and for "the accomplishment of all objects specified in its rules."

The view of Lord Parker C.J. and of Streatfeild J. in the Divisional Court was that, upon a reading of that rule, it could be seen that the union had one main object, namely, as the Lord Chief Justice expressed it, "to carry on the business of general "advisers *and* teachers of the doctrine of association for social or "ameliorative purposes," or, as Streatfeild J. expressed it, "to "carry on the business of general advisers,"—*comma*—"teachers "of the doctrine of association for social or ameliorative pur-"poses," and that that object was for the advancement of social welfare.

The union was incorporated in 1889, but prior to incorporation there was in existence the organisation which was called the Working Men's Club and Institute Union, which had been founded in 1862. The majority view in the Divisional Court was that though the union was only incorporated in 1889, there was no reason why regard should not be paid to the objects of the organisation both after incorporation and prior thereto, and that from 1862 onwards the main object of the organisation, both the original object and the still persisting object, has been, not to benefit such clubs as became members but to encourage working men to band together to form clubs and to encourage working men to form further clubs, and that the giving of assistance to clubs when formed, or which have been formed, is only incidental to such main object. It was held that such main object was concerned with the advancement of social welfare. Cassels J. held that the union served the most useful purpose of giving advice and help to the member clubs and exercised some control over those clubs, but that the main object of the organisation, though social in character and directed towards providing pleasure and comfort for the members of the member clubs, was not concerned with the advancement of social welfare. All members of the Divisional Court agreed that the union was not established or conducted for profit.

The first submission made by Mr. Squibb for the borough council was that the union is established for profit. He pointed to the circumstance that it is registered under the provisions of the Industrial and Provident Societies Acts, 1893–1954. It is, he submitted, a society which is registered because it is a society for carrying on the "businesses" specified in or authorised by its rules, and that, pursuant to statute, its rules are required to contain provisions in respect of many matters including the mode of application of profits: he submitted that the union is or may be supported not only by the fees paid by member clubs but by any profits arising from the sale of books or publications or club requisites, and that the circumstance that these sales in fact resulted in losses rather than profits is immaterial.

The mere fact that an organisation makes profits or may make

profits does not show that it is "established or conducted for "profit." Had the union made any profits from any selling activity, such profits would not have been distributed to member clubs. Rule 27 * provides for the method of application of profits. The making of any profits would have been merely incidental and subsidiary to the achieving of the main object of the society. The deputy recorder found that there was no profit motive. In my judgment, the words used by Lord Denning in his speech in *National Deposit Friendly Society Trustees* v. *Skegness Urban District Council* [1] are applicable. Lord Denning said: "But the "fact that the society has made profits does not mean that it is "'conducted for profit,' which I take to mean 'conducted for the "'purpose of making profit.' Many charitable bodies, such as "colleges and religious foundations, have large funds which they "invest at interest in stocks and shares, or purchase land which "they let at a profit. Yet they are not established or conducted "for profit. The reason is because their objects are to advance "education or religion, as the case may be. The investing of "funds is not one of their objects properly so called, but only a "means of achieving those objects." Following the guidance there given, I consider, in agreement with the Divisional Court, that the union was not established or conducted for profit. See also *Guinness Trust (London Fund) Founded 1890, Registered 1902* v. *West Ham Borough Council*.[2]

The second and main submission made by Mr. Squibb was that the union cannot claim that section 8 (1) of the Act of 1955 applies, because it is not an organisation "whose main objects "are charitable or are otherwise concerned with the advancement "of religion, education or social welfare."

The objects of the union are set out in rule 2, which I have read. Those objects are numerous and diverse. In considering the applicability of section 8 it becomes necessary to ascertain which are the "main objects." In my judgment, this cannot be discovered merely by reading rule 2 or by construing rule 2. It was legitimate, therefore, to consider the way in which the union has conducted its affairs. It may be that an organisation will have numerous declared objects which over many years will remain its objects, but that in one period one or more of such objects will be the "main" ones, while in another period other objects will be the "main" ones.

* Rule 27 provides that any profit which might accrue should be applied, inter alia, to a general fund to be used, (a) in providing mutual intercourse between members and others interested in improving the conditions of the people of the British Commonwealth; (b) in providing and defending the interests of clubs; (c) in promoting education and in assisting any associations providing educational facilities for working class men and women; (d) in maintaining circulating and reference libraries; (e) in promoting such social, provident and recreative objects as might from time to time be deemed desirable; (f) in the provision and maintenance of convalescent homes; (g) in contributing to any superannuation or pension fund established for the staff of the union; (h) any other lawful purpose determined on by the executive.

[1] [1959] A.C. 293, 319; [1958] 3 W.L.R. 172; [1958] 2 All E.R. 601.

[2] [1959] 1 W.L.R. 233.

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What, then, were the "main objects" of the union? The deputy recorder heard much evidence and was directed to the conclusion that the union has only one main object. That main object is the carrying on of the activity of giving advice and guidance to members. That object appears to correspond with or to reflect the practical application of the first of the declared objects in rule 2, videlicet: to carry on the business of general advisers. Those words may, however, be so wide and general as to be ambiguous. The main object as found by the deputy recorder is to give advice on legal matters and on administrative matters to the 3,420 clubs which are members of the union, and to give guidance as to how they should conduct their clubs so that they may be fully acquainted with their rights and with their duties in relation to their usual social activities.

It seems to me that there is no warrant for departing from the conclusion reached and recorded by the deputy recorder. I do not consider that we are entitled, in view of the facts recorded in the case stated, to say that the main object of the union is to encourage working men to band together to form clubs and only incidentally to assist clubs which have been formed. Lord Parker C.J. said [3]: "From the very beginning the object here "has not been to benefit the members; the main object has not "been to benefit such clubs as become members but to encourage "the working men to band together to form clubs and then "incidentally to assist those clubs which are formed and which "do become members and if only by example to encourage the "working men to form further clubs." He considered that that original object still persisted. I find myself, with diffidence and with every respect, differing from this view, for the reason that I consider that this view is contrary to the findings of the deputy recorder and because, in my judgment, the objects of the union which must be regarded as the main objects cannot be ascertained merely by studying rule 2. The founders of the body that came into existence in 1862 were doubtless inspired by the laudable purpose of encouraging working men to band together to form clubs. But at the time of the hearings before the deputy recorder the union, which had been in existence since 1889, had 3,420 members. The members of the union consist of such clubs as are admitted to the union in manner provided by the rules. The clubs are social working men's clubs and none are proprietary clubs. It was not suggested that the member clubs could claim the relief granted in section 8. The member clubs have themselves a total membership of approximately 2,000,000. The union has many declared objects as recorded in its rules. For the purposes of section 8 it is, however, necessary to ascertain the main object or objects.

The deputy recorder considered all the oral evidence and the documentary evidence in order to decide that which he could not

[3] [1958] 1 W.L.R. 1135, 1145; [1958] 3 All E.R. 414.

otherwise decide, id est, which of the declared objects is the main object or which are the main objects. He knew of the ideals which, in the year 1862, inspired the Rev. Henry Solly, a man "keenly conscious of the low level of working-class life, keen "and eager to raise its habit and character, who saw in the "establishment of Working Men's Clubs an instrument to his "purpose." While conscious of the ideals of the founders, the deputy recorder came to the conclusion that for many years past the object of the organisation has been to help its members.

I cannot see that the deputy recorder erred in his approach, and his decision was clear as to what is the main object of the society. I see no occasion or necessity to draw any inference of fact in this case (see Judicature Act, 1925, s. 25, and *Chivers & Sons Ltd.* v. *Cambridge County Council*[4]); nor do I see any reason to send the case back to the deputy recorder, or for acceding to any application, if made, so to do.

On an acceptance of the conclusion of the deputy recorder as to what is the main object of the union, it seems to me that such main object is not within section 8. In effect, the main object of the union is to assist its members by advising and guiding them. Commendable as this object is, it is not, in my judgment, within section 8. The main object of the union is to benefit and assist its own members. Even if it can be said that there is as a consequence the object of assisting the members of the member clubs, even so the elements of altruism or public benefit are lacking.

It is doubtless true that the result of achieving the main object of giving advice and guidance to member clubs is that the interests and the social pleasures of the members of the member clubs are cared for and promoted. But this does not reflect any specific humanitarian or altruistic purpose. It only shows the reason why the member clubs wish to enjoy the benefits for which they pay when they become subscribing members of the union. The speeches delivered in the House of Lords in *National Deposit Friendly Society Trustees* v. *Skegness Urban District Council*[5] point irresistibly to the conclusion that that object which has been found to be the sole main object of the union is not one which is concerned with the advancement of social welfare within the meaning of section 8.

I would therefore allow the appeal.

ROMER L.J. I agree. The first question for consideration in this appeal is whether it can properly be said that in the relevant rating year (1956–57) the respondent union was, in the words of section 8 of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, "established or conducted for profit." Mr. Squibb, for the borough council, contended before us that it was. I understood him to submit that the union was "established" rather than "conducted" for profit, on the ground that as the

[4] [1957] 2 Q.B. 68; [1957] 2 W.L.R. 646; [1957] 1 All E.R. 882.

[5] [1959] A.C. 293; [1958] 3 W.L.R. 172.

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union's trading account had showed a loss there was a difficulty in adopting the view that it was "conducted for profit." For myself, I rather doubt the validity of this distinction, as I should imagine that a commercial concern is being conducted for profit, in the sense of being conducted with a view to making profit, even though its business is for any given period carried on at a loss. Be that as it may, I am quite satisfied that at no relevant time was the union either established or conducted for profit, and upon this question I respectfully adopt the reasoning and conclusions of the Lord Chief Justice as expressed in his judgment in the Divisional Court. In my opinion, the "profit" referred to in section 8 is distributable or divisible profit and not merely taxable profit.

The reference in rule 2 of the union's rules to "publishers, "stationers and booksellers, general traders, agents and manu-"facturers, both wholesale and retail" (whatever that may have been intended to mean) is quite insufficient, in my opinion, to indicate that the union was established with a profit motive in any relevant sense. Obviously some income or profit would or might accrue to the union in various ways, and the destination of this is provided for by rule 27—a rule which, in fact, had to be included in the union's constitution by reason of the Second Schedule, paragraph 10, of the Industrial and Provident Societies Act, 1893; but it is clear that under the "Application of profits," as prescribed by that rule, none of the profit of the union could find its way into the pockets of the members. It appears to me that the union's profit falls within the language of Pearce L.J. in the *Guinness Trust* case [6]: "The making of profit by the appellant "trust was part of the machinery by which it achieved charitable "purposes. The making of that profit, which could never be "distributed, was not the object or purpose of the trust. It was "the means for the expansion of the sphere of the charity, it was "not an end in itself. Though deliberate, it was incidental and "subsidiary to the purpose of the trust." The union is not a charity, but save in that respect I think that Pearce L.J.'s words precisely apply. Accordingly, I agree with the deputy recorder and with the Divisional Court that the union is not excluded from section 8 on the ground that it is "established or conducted for "profit."

The question next arises whether the main object of the union in the year 1956–57 was "concerned with the advancement of "social welfare." In the Divisional Court the Lord Chief Justice and Streatfeild J., differing from the deputy recorder, held that it was; Cassels J., on the other hand, agreed with the deputy recorder that it was not. The majority of the court reached their conclusion, as it seems to me, in the following way. They read rule 2 as formulating the one main object, namely, to carry on the business of general advisers and teachers of the doctrine of association for social or ameliorative purposes. That object, in

[6] [1959] 1 W.L.R. 233, 243.

their view, was unambiguous and came within the description of "social welfare." Accordingly, they were doubtful whether it was permissible to proceed further with an inquiry as to the union's actual activities. On the assumption, however, that this was legitimate, they held on the documentary evidence that the original object of the union in the 1860s was the philanthropic purpose of encouraging the promotion of working men's clubs, that that purpose constituted social welfare, and that it still subsisted as the main object, to which the assistance of clubs already formed was no more than incidental.

It is not without diffidence, I need hardly say, that I am for my part unable to accept the conclusion of the majority of the Divisional Court upon this question or the process of reasoning which led them to it. On the construction of rule 2, I would be disposed to agree (as also, I understood, would Mr. Squibb) that if the rule disclosed as its main object the carrying on of "the "business of general advisers and teachers of the doctrine of "association for social or ameliorative purposes," then that object could properly be described as "social welfare." There are, however, to my mind, two objections to this solution of the problem. The first objection is that one cannot tell, merely by construction, which of the various activities described in rule 2 was its main object in the relevant rating year. The second objection is that the reading of the first two and a half lines of rule 2 so as to produce the one object already mentioned can only be achieved, in my opinion, by disregarding the comma after the word "advisers" and substituting the word "and" in its place. I see no sufficient warrant for this substitution, and having regard to the comma which does in fact appear it seems reasonably clear to me, as a question of construction, that the first two and a half lines of rule 2 comprise two objects and not one, namely, to carry on the business of general advisers, and to teach the doctrine of association for social or ameliorative purposes.

In addition to these two objects, rule 2 proceeds to specify others as well—publishers, stationers and booksellers, and so on. Now it may very well be a fair, though not inevitable, assumption that the two objects, or one or other of them, stated in the first two and a half lines of rule 2 were or was contemplated as being the union's main objects. It by no means, however, follows that either of them was the main object in the year in which the union claimed relief under section 8. Nor, as I think, is one assisted in the quest for what that object was by inquiring what the purposes of the union were when it was first established. The activities of an organisation may change with the passage of time, and the changes may well affect the operation of the section. This was pointed out by Lord Denning in his speech in *National Deposit Friendly Society Trustees* v. *Skegness Urban District Council*,[7] where he said: "In order to ascertain the 'main "'objects' of an organisation you are entitled, I think, to look

[7] [1959] A.C. 293, 320.

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"not only at its rules but also to consider the way in which it "has conducted its affairs. If you should find, for instance, that "a scientific institute—which was formed primarily for the pro-"motion of science—has been so conducted that the advancement "of the interests of its members has become one of its main "purposes—as distinct from being merely subsidiary to the "advancement of education—then it would cease to qualify for "the benefits of the section—see *Royal College of Surgeons of "England* v. *National Provincial Bank Ltd.*,[8] by Lord Reid."

Two things seem clear. The first is that the only relevant time for ascertaining what are the main objects of an organisation is when it claims relief under the section. The second is that where the organisation has, under its constitution, several objects, the question what were its main objects at the relevant time is entirely a question of fact. In the present case that question was decided by the deputy recorder after hearing and considering a body of oral and documentary evidence. His decision was that in 1956–57 the union had only one main object, namely, the carrying on of the first activity referred to in paragraph 8 of the case. That activity has been described by my Lord in his judgment, and I do not repeat it; but it is quite different from the union's main object as found by the majority decision in the Divisional Court. In my judgment, that finding of fact was binding upon the Divisional Court and is equally binding upon us. (Compare *Chivers & Sons Ltd.* v. *Cambridge County Council.*[9]) It follows that in so far as the union's main object as found by the Divisional Court is irreconcilable (as, in fact, it is) with the deputy recorder's finding, it must be rejected. Mr. Molony and Mr. Milne invited us to review and overrule the deputy recorder's finding, but there are two decisive reasons why we should not do so. The first is that we have no power to overrule the finding, and the second is that only a part of the evidence (namely, the documentary evidence) upon which the finding was based is before us.

The only question left, then, is whether the main object of the union as found by the deputy recorder comes within the description of "social welfare," and I am amply satisfied that (for the reasons which the deputy recorder gave) it does not. The truth is that the organisation's activities at the relevant time were (and probably still are) far removed from what they used to be. The union is mainly concerned now with protecting and improving the interests of its member clubs rather than with the altruistic motive of encouraging and helping (as formerly) working men to form new clubs. I was attracted by, and accept, the way in which Mr. Squibb presented the position in his reply. He said, in effect, that the union now is a club of clubs, and that the position is quite different from that which existed in early days, when the promoters or organisers were philanthropists. Then, he said, it

[8] [1952] A.C. 631; [1952] 1 T.L.R. 978; [1952] 1 All E.R. 984.

[9] [1957] 2 Q.B. 69.

was an outward-looking concern, and it is now an inward-looking one—and that is not social welfare.

I agree that the appeal must be allowed.

WILLMER L.J. (read by Morris L.J.). The questions which arise on this appeal are: (1) Is the respondent union an organisation which is not established or conducted for profit? (2) Is it an organisation whose main objects are concerned with the advancement of social welfare? As to the first point, the deputy recorder and all the members of the Divisional Court were unanimously in favour of the respondent union. Like my brethren, I take the same view, and it would therefore be a work of supererogation to set out the arguments at length. I can state my reasons quite briefly.

Clearly the mere fact that the union receives an income from its substantial investments is not enough to show that it is established or conducted for profit. Having regard to the decision of the House of Lords in *National Deposit Friendly Society Trustees* v. *Skegness Urban District Council*,[10] the contrary has not been argued. But reliance has been placed on certain trading activities carried on by the union. These are in accordance with the objects declared in rule 2 of the union's rules, which include carrying on "the business of . . . publishers, stationers and booksellers, "general traders, agents and manufacturers, both wholesale and "retail, of any article which may assist the development of clubs "or their members." We were also referred to rule 27, which deals specifically with the application of profits, indicating, it was contended, an intention that profits shall be made. Reliance was further placed on the fact of the union being registered under the provisions of the Industrial and Provident Societies Acts, as a further indication that it was established for profit. It appears, however, that the so-called trading activities amount to no more than the sale to member clubs of equipment designed to assist in the running of the clubs, such as stationery, account books, sports equipment and the like. The deputy recorder found that this is merely part of, that is ancillary to, what he regarded as the main activity of the union, namely, the giving of advice and guidance to the member clubs, more particularly in relation to how the clubs should be conducted; and he further found that these trading activities are not conducted with a profit motive. In reaching that conclusion the deputy recorder had the advantage, denied to the Divisional Court and to this court, of hearing evidence from witnesses holding positions of authority in the union. That circumstance alone would, in my judgment, render it impossible for us to say that he arrived at a wrong conclusion. But quite apart from what the effect of the evidence may have been, it seems to me that the deputy recorder's conclusion is in accordance with the objects declared in rule 2, the true construction of which, to my mind, indicates quite clearly that the trading

[10] [1959] A.C. 293; [1958] 3 W.L.R. 172.

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activities were intended to be ancillary to the objects previously specified.

Further support for this view is to be gained from the significant fact that rule 27 makes no provision for the distribution of profits, and severely limits the objects to which they can be applied. Lastly, it is not, I think, without significance that for the only two years for which figures are available, namely 1954 and 1955, the accounts show that the trading activities have in fact been conducted at a substantial loss—a fact which, so far as it goes, tends to support the view that they are not carried on for the purpose of making a profit. In all the circumstances I am satisfied that the deputy recorder came to a correct conclusion when he decided that the union was not an organisation established or conducted for profit.

I pass, therefore, to the second and much more serious question, whether it is an organisation whose main objects are concerned with the advancement of social welfare. The deputy recorder held that it was not, but upon this point the majority of the Divisional Court took the opposite view. I think it is vitally important to approach this question with a correct appreciation of the functions of the Divisional Court and of this court. Neither the Divisional Court nor this court is the judge of fact. The matter comes before us, and came before the Divisional Court, upon a case stated by the deputy recorder, and as I see it our sole function, as was that of the Divisional Court, is to answer the question posed in sub-paragraph 16 of the case, namely, whether on the preceding statement of facts the deputy recorder came to a correct decision in point of law, and, if not, what should be done in the premises. As has been already stated, the deputy recorder heard a considerable volume of oral evidence. We know nothing of what was said in the course of that evidence. The only evidence that is before us consists of certain documents that were exhibited to the case. It was for the deputy recorder to find the facts sufficiently to enable the court to answer the question which was posed. This is exactly what the deputy recorder has at least purported to do. As I read the case, paragraph 3, sub-paragraphs 1 to 14 are intended to set out the facts as he found them, and sub-paragraph 15 is intended to set out the contentions of the parties and the deputy recorder's conclusions of law thereon.

It is true that this is a proceeding to which section 25 of the Supreme Court of Judicature (Consolidation) Act, 1925, applies. That section provides as follows: "(1) Every case stated by a "court of quarter sessions otherwise than under the Crown Cases "Act, 1848, or the Quarter Sessions Act, 1849, for the considera- "tion of the High Court shall be deemed to be an appeal, and "shall be heard and determined accordingly. (2) On the hearing "of an appeal from a court of quarter sessions the appellate court "may draw any inference of fact which might have been drawn "in the court of quarter sessions, and may give any judgment or

"make any order which ought to have been given or made by that "court, or may remit the order, and in criminal matters the "conviction with the order, and the case stated on it, with the "opinion or direction of the appellate court, for re-hearing and "determination by the court of quarter sessions, or may remit "the case for re-statement."

Those words were considered by this court in *Chivers & Sons Ltd.* v. *Cambridge County Council*,[11] where it was contended that under the section the court had power to draw inferences of fact different from those drawn by quarter sessions. It was held, however, that only if quarter sessions had been shown to have misdirected itself so as to disable the conclusion which it had reached could the High Court (including the Court of Appeal) draw any inference of fact necessary to reach the proper conclusion by virtue of section 25. In the course of delivering the judgment of the court, the Master of the Rolls cited with approval of what was said by Avory J. in *Hickton* v. *Hodgson*[12] in relation to the corresponding section of the Act of 1894, as follows: "I do not at all accept the contention that "the provision that this court may draw any necessary "inference entitles this court to reverse the findings of the quarter "sessions upon questions of fact. I think it only means that "upon the facts which are either proved or admitted the court "may draw any inference necessary to enable it to determine the "question of law which arises upon it." This view was expressly followed and adopted by Scrutton L.J. in *Bailey* v. *Potteries Electric Traction Co. Ltd.*,[13] where the Lord Justice, after quoting the words of Avory J., went on: "The court can set aside a "finding of fact on the ground that there is no evidence on "which such a finding can be made, or on the ground that the "tribunal has proceeded on a wrong principle of law in the con-"sideration or exclusion of evidence. It cannot alter a finding of "fact found below except on these grounds."

In the present case there can be no doubt that in searching for the objects of the union one must begin with rule 2, where the objects are set out. The proper construction of the rule is, of course, a question of law for the court. But the rule sets out a number of objects, and under section 8 of the Act we are only concerned with the main objects. Which of the many objects set out are main objects is a question of fact properly to be determined on the evidence, including evidence as to the actual activities in practice of the organisation concerned. Here the deputy recorder heard a great deal of oral evidence, as well as having a certain amount of documentary evidence placed before him, and upon that evidence arrived at his finding of fact that the union had one main object, namely, the carrying on of the advisory activities more fully set out in sub-paragraph 8 (a) of the case. We are not in a position to say that there was no

[11] [1957] 2 Q.B. 68; [1957] 2 W.L.R. 646.

[12] (1914) 78 J.P. 93, 95.

[13] [1931] 1 K.B. 385, 481.

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Willmer L.J.

evidence on which such a finding could be made. Nor has it been argued before us that the deputy recorder misdirected himself. What we are in effect invited to do is to say that he came to a wrongful decision on the facts, and that he ought to have found (to quote my note of the submission made by Mr. Molony) "that "the real main object of the union was to better the lot of the "working classes, materially and morally, by fostering the growth "and sound conduct of member clubs." It seems to me that if we were to accept this invitation we should be going behind the deputy recorder's finding of fact, which is the very thing that, on the authorities, we are enjoined not to do. This alone would, in my judgment, be a sufficient reason for rejecting the argument addressed to us by Mr. Molony.

If the finding of the deputy recorder as to the main object of the union stands, it was agreed by all the members of the Divisional Court that that sole main object would not be one concerned with the advancement of social welfare, so as to bring the union within section 8. I am of the same view, and the contrary has not been strenuously argued. The majority of the Divisional Court, however, refused to accept the deputy recorder's finding as to the main object of the union, and founded their judgments on the view that the main object, in the words of the Lord Chief Justice, "has not been to benefit such clubs as become "members, but to encourage the working men to band together "to form clubs, and then, incidentally, to assist those clubs which "are formed and which do become members and, if only by "example, to encourage the working men to form further clubs." In reaching this conclusion, both the Lord Chief Justice and Streatfeild J. based themselves on the early history of the union, as more particularly set out in the small red booklet (Exhibit 5). It may well be that in the early days of the union the objects which it pursued contained a substantial element of altruism and solicitude for the welfare of working men generally, so as to justify the view that, at any rate, at that time its main objects were concerned with the advancement of social welfare. Be that as it may, I find it impossible to accept the conclusion of the majority of the Divisional Court, for two reasons: first, because, as already stated, I do not think it was open to the Divisional Court, any more than it is open to us, to disregard the finding of fact by the deputy recorder as to the one main object of the union; secondly, because I think that the reasoning of the majority was in any event fallacious. We are concerned in this case, as appears from the original notice of appeal to quarter sessions, with the rate made by the borough council on March 8, 1956. The question to be determined, pursuant to that notice of appeal, was whether the union was entitled to relief under the section in 1956, having regard to what were then its main objects. For the purpose of deciding this question it is, in my judgment, permissible to look only to the objects as stated in 1956, that is, in the print of the 1956 rules before us, and to pay regard to the evidence given

with regard to the actual activities of the union in 1956. The fact, if it be the fact, that 60 years ago or more different or additional objects may have been pursued appears to me to be quite immaterial, and to allow them to be taken into consideration in ascertaining what are now the union's main objects is to set a dangerous precedent. Numerous examples come to mind of organisations and institutions carrying on activities today whose main objects may be quite different now from those with which they were founded, in some cases centuries ago.

I venture further to criticise that part of the judgment of the Lord Chief Justice where he says that upon a reading of rule 2 "one arrives at one main object, namely, to carry on the business "of general advisers and teachers of the doctine of association "for social or ameliorative purposes." With the greatest respect, it appears to me that that construction of the rule does violence to the language used, and can only be arrived at by ignoring the comma which appears in the rule after the word "advisers" and inserting an "and" which is not there. The activities carried on by the union in pursuit of their object of carrying on "the "business of general advisers" are set out in detail by the deputy recorder in sub-paragraph 8 (a) of the case. In brief, those activities involve advice and guidance to the member clubs, mainly in relation to how they should conduct their clubs. This is something quite different from acting as "teachers of the doctrine "of association for social or ameliorative purposes." In fact, so little does the union appear to pursue the latter object today that the deputy recorder does not even mention this amongst the numerous activities now carried on, as set out in sub-paragraph 8 (a) of the case.

In these circumstances, even if it were open to the Divisional Court—which I do not think it was—to disregard the finding of the deputy recorder as set out in sub-paragraph 12 of the case, and to substitute their own finding as to what is the main object of the union, I should not be prepared, on the material which is before us, and which was before them, to assent to the conclusion at which the majority arrived. But, in my judgment, there is no ground for interfering with the deputy recorder's findings of fact, and on those findings I think he came to a correct decision in point of law. I, therefore, agree that the appeal should be allowed.

Appeal allowed with costs.
Leave to appeal to House of Lords.

Solicitors: *Kenneth Brown, Baker, Baker for T. B. Bowen, Town Clerk, Swansea; Morgan Lloyd & Evans for Edward T. Davies & Son, Pontyclun, Glamorganshire.*

A. W. G.

[COURT OF APPEAL.]

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1959
Nov. 9.

Lord Evershed M.R., Sellers and Harman L.JJ.

* *In re* DOUGLAS' WILL TRUSTS. LLOYDS BANK LTD. *v.* NELSON AND OTHERS.

[1958 D. 1281.]

Will—Construction—Survivorship, words of—Gift of income to wife for life—Gift of estate after death of wife to "my sisters . . . or the "survivors or survivor of them"—Wife predeceased by testator's sisters—Devolution of estate.

By his will a testator provided: "I direct my trustees to pay "the income from my [residual] estate to my said wife [naming "her] for her use during her life provided she so long remain my "widow and from and after her decease or second marriage which-"ever shall first happen then I give my estate and effects to my "sisters [naming them] or the survivors or survivor of them. . . ."

The sisters, three in number, all survived the testator but predeceased the wife, who had not remarried:—

Held, that on the language used, the words referable to survivorship (admittedly relating to the date when the widow should die) were merely expository of the previous words, and made the right to obtain anything under the residual gift contingent on surviving the widow. Accordingly, the gift to the sisters failed, and the residual estate would devolve as on a partial intestacy.

The rule in *Browne* v. *Lord Kenyon* (infra) can only apply where the language of the initial gift renders the reference to survivors inconsistent with what precedes unless the latter is to be regarded as a divesting provision.

Harrison v. *Foreman* (1800) 5 Ves.Jun. 207; *Browne* v. *Lord Kenyon* (1818) 3 Madd. 410; *Sturgess* v. *Pearson* (1819) 4 Madd. 411; and *Penny* v. *Commissioner for Railways* [1900] A.C. 628 distinguished.

Observation of Lord Lindley in *Penny* v. *Commissioner for Railways,* at p. 634, not followed.

Decision of Vaisey J. [1959] 1 W.L.R. 744; [1959] 2 All E.R. 620 affirmed.

APPEAL from Vaisey J.[1]

By his will dated August 29, 1933, a testator, James Wightman Douglas, provided: " . . . I appoint my sisters Jane "Catherine Douglas and Sarah Scott Douglas executrices and "trustees of this my will and also trustees for the purposes of "the Settled Land Act, 1925, I direct my trustees to allow my "wife Gertrude Douglas to have the use and enjoyment of my "household furniture and household effects plate linen china "bedding books and jewellery for her use during her life if she "so long remain my widow I give and devise my real estate "together with the residue of my personal estate and effects to "my trustees upon trust in the first instance to pay my just "debts funeral and testamentary expenses and subject thereto "I direct my trustees to pay the income from my estate to my

[1] [1959] 1 W.L.R. 744; [1959] 2 All E.R. 620.

" said wife Gertrude Douglas for her use during her life provided " she so long remain my widow and from and after her decease " or second marriage whichever shall first happen then I give my " estate and effects to my sisters Jane Catherine Douglas " Elizabeth Grace Douglas and Sarah Scott Douglas or the " survivors or survivor of them. . . ."

The testator died on January 1, 1937. The testator's three sisters predeceased his widow, who was still alive and had not remarried. Elizabeth Grace Douglas and Jane Catherine Douglas died in 1940 and Sarah Scott Douglas died in 1957.

On September 26, 1958, Lloyds Bank Ltd., the sole trustee of the will under a deed of appointment dated January 6, 1940, took out a summons. The defendants to the summons were: the three executors of Sarah Scott Douglas, the third defendant being also a trustee of the will of Jane Catherine Douglas and the sole residuary legatee under the will of Elizabeth Grace Douglas; the two other trustees of the will of Jane Catherine Douglas; the testator's widow; and a defendant representing next-of-kin. By the summons the bank asked, inter alia: Whether, on the true construction of the will and in the events which had happened, the trusts of the residuary estate declared to operate from and after the widow's death or second marriage (*a*) operated in favour of the personal representatives of Sarah Scott Douglas (being the personal representatives of the survivor of Jane Catherine, Elizabeth Grace and Sarah Scott Douglas); or (*b*) operated in favour of the personal representatives of all three sisters in equal one-third shares; or (*c*) failed to take effect so that, from and after the widow's death or second marriage, the residuary estate would be undisposed of by the will and would devolve as on a partial intestacy.

Vaisey J. declared that the words " survivors or survivor of " them " referred to survivors of the wife, and that, as the sisters had all predeceased the widow, there could be no such survivorship, and on her death the residual estate would devolve as on a partial intestacy. The personal representatives of Sarah Scott Douglas appealed, accepting the decision that the words referable to survivorship related to the period of distribution, that is, the death of the widow, but submitting that the gift to the sisters was, initially, an absolute gift to them as joint tenants with a gift over to the survivors or survivor of them at the end of the period of distribution if one or more should die during that period. As they all died the gift over had failed, the original gift still held good, and, accordingly, the last surviving sister's estate took.

B. S. Tatham for two executors of Sarah Scott Douglas, the first two defendants.

P. S. A. Rossdale for the plaintiff bank.

Oliver Lodge for the third to seventh defendants, the persons interested in the event of an intestacy.

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In addition to the cases referred to in the judgments the following were cited in argument: *In re Poultney* *; *In re Legh's Settlement Trusts.*†

Lord Evershed M.R. stated the facts and continued: If I had to express a view of the meaning of the testator's directions without reference to any authorities I might have concluded that since Sarah Scott Douglas was the survivor of the three sisters the argument on behalf of her estate is well founded; but the solution to the problem is, to say the least, considerably affected by several decisions of Sir John Leach V.-C. The first of those decisions is *Cripps* v. *Wolcott.*[1] That was, in fact, a case where there was a gift, subject to a life interest, in favour of named persons in equal shares, and the survivor or survivors of them to share and share alike. It was the view of Sir John Leach that in such a context, and in the absence of some countervailing effect elsewhere in the will, the survivorship which is mentioned must relate to the period of distribution. The result has become known as "the rule in *Cripps* v. *Wolcott,*[1]" and is stated as a rule, thus, by Hawkins on Wills, 3rd ed. (1925), p. 310: "In "bequests of personal estate, words of survivorship are prima "facie to be referred to the period of payment or distribution, and "not to the death of the testator."

In light of that rule Vaisey J. held that the words "or the "survivors or survivor of them" were related to the period of distribution, namely, the death of the testator's widow, or her remarriage.

From that part of the judge's decision Mr. Tatham, for the two personal representatives of Sarah Scott Douglas, has not appealed; he accepts it. I, therefore, say no more on that topic. But he has contended further that the effect of the provision—and I will just read the substance of it again, "I give my estate "to my sisters A, B and C or the survivors or survivor of them" —is that it contains two independent gifts: first, an absolute gift to the three sisters A, B and C as joint tenants; and then, secondly, a divesting provision which would operate provided, but provided only, that at any rate one sister survived the period of distribution so as to divest the previous gift and confer a substituted gift to the survivors or survivor.

Vaisey J. rejected that view of the case, and I will say at once that, in my judgment, on the proper construction of this will I agree with Vaisey J.

The proposition for which Mr. Tatham has contended is founded on another so-called "rule" enshrined in another case decided by Sir John Leach V.-C., namely, *Browne* v. *Lord Kenyon,*[2] in which the gift in question was: "from and after "the death of the survivor of them the said Elizabeth Chetwode "and Mrs. Davison, upon further trust . . . to pay the principal

* [1912] 2 Ch. 541.
† [1938] Ch. 39; 53 T.L.R. 1036.
[1] (1819) 4 Madd. 11.
[2] (1818) 3 Madd. 410, 416.

"sum of £1,000 to my cousin, Sir John Chetwode, Bart.; but "if he be then dead, then and in such case I will and direct that "the said trustees shall pay the said sum of £1,000 to his two "brothers in equal shares, or the whole to the survivor of them."

Sir John Chetwode, having predeceased the relevant date, the question arose as to the effect of the last words which I have read; and the answer given was thus: after speaking of the word "then," Sir John Leach V.-C., went on: "The only question "arises, in the bequest to the two brothers, on the words, 'or the "'whole to the survivor.' To what period is the survivorship "to be applied? It is said to be meant that if both died during "the life of the tenant for life, and one only the day before the "other, the survivor was to take the whole, but it is difficult to "believe that such could be the meaning of the testatrix, there "being no motive for such a preference. Sir John Chetwode is "expressly to take only if he survives the last tenant for life; "and, if he dies before, then she gives the sum of £1,000 to his "two brothers, in equal shares, or the whole to the survivor of "them. The obvious meaning is that, if one only survived the "tenant for life, he should take the whole. It is in expression, "therefore, a vested gift to the two as tenants in common, "subject to be divested if one alone should survive the tenant "for life, but which never was divested because that event did "not happen. The two brothers, therefore, took vested interests "as tenants in common, and the money is now divisible between "their representatives. It may be well doubted whether this "was the real intention, and whether the testatrix did mean that "either brother should take any interest without surviving the "tenant for life, but the force of the expression is otherwise."

So again in Hawkins on Wills, 3rd ed., p. 316, it is stated: "A "bequest to several, or to a class, '*or*' to such of them as shall "be living at a given period, is construed as a vested gift to all, "subject to be divested in favour of those living at that period, "if there be such; and if none are then living, all are held to "take."

Although the rule is associated with *Browne* v. *Lord Kenyon*,[3] it appears in fact to be somewhat older, and we were referred to *Harrison* v. *Foreman*,[4] a decision of Sir Richard Pepper Arden, which was to the same effect.

It is, therefore, true to say that the rule or canon of construction has been regarded as one to be applied in cases of this kind for not less than 160 years, and it is sanctioned further by references in the textbooks like Theobald and Jarman; but it is, after all, a rule of construction.

I have read at length Sir John Leach V.-C.'s judgment, and it will be recalled that he said that the words there used, whatever may have been in the testator's mind, forced upon the court the conclusion at which he arrived.

[3] 3 Madd. 410.

[4] (1800) 5 Ves.Jun. 206.

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It will be noted, however, that in *Browne* v. *Lord Kenyon*[5] (and the same is true of the earlier decision of Sir Richard Peppes Arden and of a later decision also of Sir John Leach V.-C., *Sturgess* v. *Pearson*[6]) that the first gift, which is said to be divested by the alternative gift to the survivors or survivor, was to the persons named as tenants in common.

If, therefore, in the present case the estate had been given to the three sisters A, B and C in equal shares it would, I think, have been necessary to apply the rule, and right to apply it, on the ground that such direction is, according to the language, effective to confer an immediate vested interest as tenants in common in the fund in question; so that, if the words "survivors "or survivor" should refer to the period of distribution, then they must operate and can only operate as a divesting provision; but in this case there are no words of severance. The language is simply "to the three sisters." If, therefore, it takes effect, it takes effect as a gift to them as joint tenants, and, incidentally, of course, as such (unless they sever their joint tenancy) the result would be that the survivors or survivor would in due course take.

Construing this will according to its language, I cannot indeed think it really possible to treat this first part of the phrase as conferring, and intended to confer, a joint interest absolutely in the three with a divesting provision added on. The divergence which arises where the first gift is to persons as tenants in common does not arise, and the most striking result of accepting Mr. Tatham's view, as Mr. Lodge pointed out, is this: in 1940 the second sister died, so that thereafter Sarah Scott Douglas, according to the contention of the appellants, was necessarily entitled whether or not she survived the widow. That seems to me to be an absurd result to introduce into the interpretation of these words. It seems, therefore, to me that, without paying any disregard or disrespect to the effect of *Browne* v. *Lord Kenyon*[7] and the other cases, they can only apply where the language of the first gift—and prima facie it would be because it is a gift to persons in undivided shares—renders the reference to survivors inconsistent with what precedes, unless the latter be regarded as a divesting provision.

One case was cited, namely, that in the Privy Council of *Penny* v. *Commissioner for Railways*,[8] which, it was suggested, might be in conflict with what I have said. I do not read the will. The language was complicated and in more than one respect obscure; but it is not in doubt that the result in the end was that the four stepsons and the son in whose favour a first gift in remainder was made, took not as joint tenants but as tenants in common. However, in the course of delivering the judgment of the Privy Council, Lord Lindley used this language[9]: "The

[5] 3 Madd. 410.
[6] (1819) 4 Madd. 411.
[7] 3 Madd. 410.
[8] [1900] A.C. 628.
[9] Ibid. 634.

"form in which the first devise to the stepsons and son is "expressed is a very common form, and its effect is well estab-"lished. It is not equivalent to a simple devise to such of the "devisees as shall survive the widow and attain 21. The effect "of the clause is to give to all the devisees vested interests in "fee subject to be divested as regards each devisee, in the event "of his death in the lifetime of the testator's widow, in favour of "those devisees (if any) who survive her and attain 21. If there "are none such the divesting clause fails, the original vested gifts "remain, and all the devisees take absolutely." He then referred to *Sturgess* v. *Pearson.*[10]

In the circumstances of *Penny* v. *Commissioner for Railways*,[11] it was not necessary to decide the broad question which is presented for us in this appeal. Therefore, in any case, the language, if it was thought to extend to the present case, would be obiter; but it is plain, as I have indicated, that Lord Lindley was not considering this particular type of case. The case before him was a case in which, as a result of a rather obscure provision of the will, the stepsons and son took originally not a joint interest in the estate but severed interests.

It seems to me, therefore, that *Penny* v. *Commissioner for Railways* [11] cannot be treated as an authority compelling us to construe this will, and the particular language of this will as conferring an absolute vested interest in the three sisters as joint tenants only to be divested if one or more of them survived the widow.

For the reasons which I have tried to state, therefore, I conclude, as did Vaisey J., that here the words referable to survivorship, which it is now conceded relate to the widow's death, are merely expansive or expository of the previous words so as to make the right to obtain anything under the gift contingent upon survivorship of the widow. As no sister survived the widow the gift, therefore, fails altogether and the property will be distributed as upon an intestacy. I think this appeal must be dismissed.

SELLERS L.J. I agree, and there is nothing I wish to add.

HARMAN L.J. I also agree, and there is nothing I feel necessary to add to anything which has been said.

Appeal dismissed with costs.
No order as to the trustees' costs.

Solicitors: *Crossman, Block & Co. for Adam, Douglas & Son, Alnwick; Bolton, Jobson & Martyn.*

E. D.

[10] 4 Madd. 411.

[11] [1900] A.C. 628.

[CHANCERY DIVISION.]

1959
Nov. 17.

Roxburgh J.

* *In re* J. S. (An Infant).

[1959 No. 2801.]

Justices—Juvenile court—Constitution—Member unable to sit—Adoption application heard by two male justices—Woman justice given notice to attend—No evidence whether absence of woman justice unforeseen—Whether court properly constituted—Juvenile Court (Constitution) Rules, 1954 (*S.I.* 1954, *No.* 1711), *rr.* 11, 12 (1) (3).

Adoption—Appeal to High Court—Documents necessary—Reasons for decision and confidential reports—Adoption Act, 1958 (7 *&* 8 *Eliz.* 2, *c.* 5), *s.* 10—*R.S.C., Ord.* 55A, *r.* 6.

Adoption—Juvenile court—Note of evidence—Necessity for.

On August 26, 1959, a juvenile court heard an application for an adoption order under the Adoption Act, 1958. A woman justice had been given notice to attend but did not do so, and the court consisted of two male justices. The two justices thought it inexpedient to adjourn the case, and decided to hear it without a woman justice pursuant to rule 12 (3) of the Juvenile Court (Constitution) Rules, 1954.[1] Some oral evidence was given but no note of it was taken. The justices dismissed the application.

The applicants, being desirous of appealing, applied to the clerk to the justices for (1) a copy of the justices' reasons for dismissing the application; (2) a copy of the notes of evidence taken at the hearing; (3) copies of the reports of the guardian ad litem and the local welfare officer, and (4) the names of the justices. The clerk replied, giving the names of the justices; he refused to supply copies of the reports on the ground that they were confidential reports for the use of the court, and said that no note of the evidence had been taken. Subsequently, he supplied a copy of the justices' reasons. No evidence was given why the woman justice did not attend. On appeal:—

Held, that merely to give a woman justice notice to attend was not "to ensure," within the meaning of rule 11 of the Juvenile Court (Constitution) Rules, 1954, that the court should include a man and a woman as provided by rule 12 (1), and that, as there was no evidence whether the absence of the woman justice was unforeseen when the justices to sit were chosen, the condition precedent which had to be fulfilled before the justices could decide under rule 12 (3) that an adjournment was inexpedient was not

[Reported by Miss V. A. Moxon, Barrister-at-Law.]

[1] Juvenile Court (Constitution) Rules, 1954, r. 11: "The justices to "sit in each juvenile court shall be "chosen from the panel, in such "manner as the panel determine, so "as to ensure that paragraph (1) of "rule 12 . . . can be complied with."

R. 12: "(1) Each juvenile court "shall be constituted of not more "than three justices and, subject to "the following provisions of this "rule, shall include a man and a "woman. . . . (3) If at any "sitting of a juvenile court no man "or no woman is available owing to "circumstances unforeseen when the "justices to sit were chosen under "rule 11 of these rules, or if the "only man or woman present cannot "properly sit as a member of the "court, and in any such case the "other members of the panel present "think it inexpedient in the interests "of justice for there to be an "adjournment, the court may be constituted without a man or, as the "case may be, without a woman."

fulfilled. The juvenile court, therefore, was not properly constituted, and on that ground the proceedings were null and void.

Held, further, that in applications for adoption orders it was the duty of justices to have a note taken of the evidence, if any, given before them, for in the case of an appeal all the material upon which the justices acted must be before the appellate court, and an affidavit by the justices' clerk would not be sufficient for that purpose; and that, as there was no such note of the evidence, the court could not hear the appeal, and on that ground, also, a new trial must be ordered.

Reg. v. *Liverpool Justices, Ex parte W.* [1959] 1 W.L.R. 149; [1959] 1 All E.R. 337 distinguished.

Per curiam: The parties have no right to see the confidential reports made pursuant to the Adoption (Juvenile Court) Rules, 1959, r. 9 (2), but it is the duty of the justices in the case of an appeal to forward them direct to the judge's clerk. A note of the oral evidence, if any, a statement of the justices' reasons for their order, and the confidential reports, must be lodged with the judge's clerk before the judge can give a preliminary appointment pursuant to R.S.C., Ord. 55a, r. 6.

Appeal from Gloucestershire justices sitting at Lawford's Gate.

On August 26, 1959, applicants, a husband and wife, applied to the justices' court for an adoption order. The juvenile court which heard the application consisted of two male justices only; a woman justice had been given notice to attend but did not do so. Some oral evidence was given at the hearing but no note was taken. The justices refused to make the adoption order.

On August 29, 1959, the applicants applied to the clerk to the justices in the following terms: "As I intend forthwith to chal-"lenge this decision in the High Court I shall be glad if you will "send me the following documents: (1) Copy of the reasons of "your justices for dismissing the application. (2) Copy notes "of evidence taken at the hearing. (3) Copy report of the "guardian ad litem and of the report of the Gloucestershire "welfare officer handed to the justices. (So far I have had no "opportunity of seeing or hearing what was contained in these "documents.) (4) The names of the two justices who constituted "the court, they were both male, you will remember." The clerk replied on August, 31, 1959, as follows: "The justices who "heard the application were [two named gentlemen] and a "woman justice of the peace was given notice to attend but did "not do so. The justices present considered it expedient in the "interests of justice to hear the application. As regards the "copies of the reports you require, these were confidential reports "for the use of the court. (See rule 9 (2) of the Adoption "(Juvenile Court) Rules, 1959.) The justices questioned you on "certain portions of the report. I am consulting the two justices "and will obtain from them their reasons for dismissing your "application. Notes were not taken on behalf of the justices at "the hearing. I will write you again when I have seen and

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"consulted the justices but in the meantime no doubt you will "serve your notices of intention to appeal."

On September 4, 1959, the clerk supplied to the solicitors acting for the applicants the justices' reasons, which were stated as follows: "The court was not satisfied that the order, if made, "would be for the welfare of the infant. In coming to this "conclusion the court considered the confidential reports of the "guardian ad litem and of the senior child care welfare officer "of the children's department of the local authority, and also "questioned the applicants upon certain portions of such "reports." The justices then summarised the reports, and having commented on the attitude of the applicants ended: "Taking "all facts into consideration the court concluded that there were "good and sufficient reasons for refusing to make the order "applied for, and to make the order would not be for the welfare "of the infant."

On September 8, 1959, the applicants issued an originating notice of motion by way of appeal from the justices' refusal to make the adoption order. Roxburgh J. adjourned the case into open court for argument.

R. C. Thompson for the applicants.
Stephen R. Benson for the justices.
T. A. C. Burgess for the guardian ad litem.

No cases other than that referred to in the judgment were cited in argument.

Roxburgh J. This is an appeal from a refusal by the Lawford's Gate, Gloucestershire, justices to make an adoption order, and I adjourned it into court because it raises important questions of practice and procedure in relation to appeals under the Adoption Act, 1958. In fact, this is the first of such appeals.

[His Lordship referred to the facts set out above and continued:] Four matters of importance arise on the correspondence which I have read. I will deal first of all with the constitution of the court because, though of lesser importance, it is a matter of some public interest. May I say, before I go further, how much I am indebted to all three counsel for the assistance which they have given me. The provisions that regulate the juvenile courts are to be found in the Juvenile Court (Constitution) Rules, 1954, the relevant rules of which are rules 11 and 12, and it is clear that it is quite proper for justices to hear adoption applications in a juvenile court. There is no doubt about that.

[His Lordship read rules 11 and 12 (1) and (3), and continued:] It is, of course, conceded that no woman sat on the hearing of this case. The word "ensure" is imported in rule 11. We are not told whether the woman justice in question was unable to attend because of ill-health or anything about her, but merely to give a woman justice notice to attend without

making any inquiry whether she is able to attend is not "ensuring" and cannot be within the meaning of rule 11. Before justices can exercise the powers conferred upon them under rule 12 (3) they have to be satisfied that the absence of any woman is owing to circumstances unforeseen when the justices to sit were chosen. There is no evidence as to what the circumstances were, and, a fortiori, no evidence as to whether they were unforeseen. Therefore, the condition precedent which has to be fulfilled before the justices are given the option to say it is inexpedient that there should be an adjournment was not fulfilled. Therefore, on that ground the proceedings in that court were null and void.

There is another and much more serious difficulty in the present case. The outstanding matters are the reports, the notes of evidence and the justices' reasons. So far as the reports are concerned, it is necessary to have regard to the Adoption (Juvenile Court) Rules, 1958. Rule 8 provides for the appointment of a guardian ad litem of the infant, and rule 9 that the guardian ad litem on completing his investigation shall make a confidential report in writing to the court. It seems to me quite plain that the parties have no right to see the reports except in so far as the justices or the judge think fit to disclose their contents at the hearing. On the other hand, it must be the duty of the justices in a case of an appeal to forward to the judge's clerk the confidential reports for the information of the statutory court of appeal which exists for the hearing of these cases. Especially must that be so when, as in the present case, the justices' reasons are based mainly upon those reports. The justices, in my judgment, were quite correct in refusing to forward copies to the appellants but they must send copies to the judge's clerk.

The next matter is the notes of the evidence taken at the hearing. Under section 10 of the Adoption Act, 1958, "Where, "on an application made in England to a magistrates' court, the "court makes or refuses to make an adoption order, an appeal "shall lie to the High Court." The rule has recently been made, in fact it is R.S.C. (No. 1), 1959, rule 1, which is as follows: "In "Order 55A (which relates to proceedings under the Guardianship "of Infants Acts, 1886 and 1925), after rule 8 there shall be "added the following . . . new rule . . . 9. An appeal under "section 10 of the Adoption Act, 1958, from the making or refusal "of an adoption order by a magistrates' court shall lie to a single "judge of the Chancery Division and the provisions of rules 4 "and 6 of this order shall apply to the appeal as they apply to an "appeal under the Act of 1886 or the Act of 1925."

It is plain that the justices asked some questions, at any rate of the male applicant, and possibly of the female applicant; and I have been told that the applicant or applicants were sworn before they answered the questions. I do not think this makes any difference; but, as it was material on which the justices

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proceeded it is essential that they should have had a note made of the questions and answers in order that the appellate court should have before it the whole of the material upon which the justices acted. As regards notes of evidence there is not, so far as I know, any statute or rule which requires a note of evidence to be made. On the other hand, it is not right to say that juvenile courts have some special dispensation. In fact, rule 33 of the Adoption (Juvenile Court) Rules, 1959, provides that "Save in so far as special provision is made by these rules, "proceedings on an application shall be regulated in the same "manner as proceedings on complaint, and accordingly for the "purpose of this rule the application shall be deemed to be a "complaint. . . ." It is plain on the rules that no differentiation may be drawn between proceedings on complaint and proceedings before juvenile courts under this Act. The question is: what is the procedure on complaint? So far as I know, there is no statutory rule that on a complaint a note of the evidence should be taken. On the other hand, during the many years in which I have exercised jurisdiction in appeals under the Guardianship of Infants Acts I have never hitherto met a case where a note was not made and supplied to me. It is beyond my understanding how any appeal court can deal with any question which is not purely a question of law—and most of the cases which come before appeal tribunals are questions of law or questions of mixed fact and law—unless some record be kept of the evidence given. It is true that by the combined operation of R.S.C., Ord. 55A, r. 6 (6), and Ord. 59, r. 36, I have to apply to this type of appeal the rules not of procedure in the Chancery Division but the rules of procedure in the Court of Appeal; and under Order 59, r. 35 (*c*) "if the notes of the judge of the inferior court are not produced, "the appeal may be heard and determined upon such other "evidence of what occurred in the inferior court as the High "Court may deem sufficient." But there is only one other possible source of evidence in a case such as this, because there was no counsel and the applicants had no solicitor; and that is an affidavit by the clerk to the justices. If the clerk had made a note, I should not need the affidavit because I should have the note. If he did not make a note, how could I possibly accept his evidence of what happened? If that were the right way to do it he would be subject to cross-examination. My duties here are governed by the rules applicable to the Court of Appeal. I have to consider, supposing there were a case in which there were no shorthand writer and questions arose in the Court of Appeal as to what evidence was given before me, whether it is conceivable that the Court of Appeal would order me to make an affidavit as to what took place and then allow counsel to cross-examine me before it. I leave the Court of Appeal to supply the answer; but I suspect it would be in the negative. If that is so, I should answer in the negative in this case. The analogy is complete. It is quite clear that, in proceedings for certiorari

evidence of what happened in the inferior court can be given by affidavit of the clerk: *Reg.* v. *Liverpool Justices, Ex parte W.*[1] But these proceedings are not for certiorari. They are appeals governed by quite a different set of rules; and, in my judgment, it would be a disaster if a practice were to be introduced under which a clerk was not bound to keep any note of the evidence but could make an affidavit as to what evidence was given. Therefore, I say without hesitation, I should not deem an affidavit by the clerk sufficient under R.S.C., Ord. 59, r. 35 (*c*). What then can I do? It seems to me that I can do nothing except to order a retrial.

It is sufficient to dispose of this part of the case by saying it is the duty of the justices to have a note taken of the evidence in adoption cases, just as much as it is in guardianship of infant cases. As at present advised, and subject to any over-ruling by the Court of Appeal, I shall decline to hear appeals in adoption order cases in which there is no note of the evidence if, of course, evidence has been given. I want to make it quite plain that I can think of cases in which no evidence would be given, and I will deal with a case of that sort when it first arises. But in this case evidence was given and, in any case in which evidence is given, I shall decline to entertain the appeal except for the purpose of ordering a new trial as here.

There is one further matter, and that is the question of the reasons for the decision. I have the reasons for the justices' decision and, therefore, nothing turns on that in the present case, but in order to keep the picture in proper perspective I desire to refer to the Practice Direction[2] I have given in relation to appeals under the Guardianship of Infants Acts. Although, so far as I know, there is no statutory requirement that the "reasons" should be supplied to me either under this Act or under the Guardianship of Infants Acts, this question was raised some time ago under the latter Act and, after appropriate consultation, I gave a practice direction, and I shall continue to act upon it in relation to both Acts unless and until it is over-ruled or discharged.

Therefore, the position is this. Before I can give the preliminary appointment referred to in R.S.C., Ord. 55A, it is necessary for the justices to supply to my clerk a note of the evidence, if there was only oral evidence, a statement of the justices' reasons for the decision, and the confidential report or reports. When I refer to my clerk, the normal method of supplying everything except the report is by the appellant's solicitors in due course sending those documents to my clerk. I do not mean to alter that practice by what I have just said, but so far as the confidential reports are concerned, they should not be supplied to the appellant or to his solicitor but should be transmitted direct to my clerk. They must be transmitted before I can give a preliminary

[1] [1959] 1 W.L.R. 149; [1959] 1 All E.R. 337.

[2] [1955] 1 W.L.R. 335; [1955] 1 All E.R. 784.

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appointment. I say that in this case not merely as a formal gesture, but because I think it is desirable to make public something which in the nature of these cases seldom gets into the Law Reports. The only other thing, apart from the merely ministerial function of fixing a day, which is dealt with at the preliminary appointment, is the question of adducing further evidence. It has become the habit for everybody to apply for leave to adduce further evidence, but no special costs have hitherto been awarded in respect of those applications which normally are declined. But it is to be remembered that my duty in connection with any further evidence is similar to the duty of the Court of Appeal in cases of appeals from the High Court, and my practice does not differ in any way from that of the Court of Appeal. The practice is invariably to allow further evidence to be adduced in regard to material matters which have occurred since the hearing before the justices, unless it is so fundamental that it seems to me on the face of it to be a case for a new trial. For the purposes of arriving at that sort of conclusion I read the justices' reasons and the notes of the evidence at or before the preliminary appointment. That is why I have to have these documents before I can give the preliminary appointment, and I may add the confidential reports if there is any question of that kind. Apart from subsequently occurring facts, special grounds for adducing further evidence have to be shown. That is clear from the rules. The special reasons which have to be adduced in order to justify the further evidence almost invariably point to the desirability of a new trial. Therefore, the matter necessarily goes over until the appeal is heard in court. I mention that in order to show how essential it is that I should have all the necessary documents before the preliminary appointment takes place.

I have strayed rather outside the ambit of the present case because this is the first appeal under this Act. So far as the present case is concerned, while it would be quite unfair to criticise the justices who were confronted with a novel situation, because this Act has only been in force for a short time, I feel that I must order a new trial on the two grounds I have already stated. One is that the court was not properly constituted, and the second is that there is no note whatever of the evidence, and I do not know how in the absence of that I could hear the appeal. The new trial will be before a proper bench of justices—I do not mind the two who sat before sitting again, providing that there is a lady in attendance.

I think that covers the whole of the ground. The appeal is accordingly allowed.

Appeal allowed.
No order as to costs.

Solicitors: *Rider, Heaton, Meredith & Mills for Bobbett Brothers, Bristol; Ridsdale & Sons for Latchams & Montague, Chipping Sodbury; Field, Roscoe & Co. for Guy H. Davis, Gloucester.*

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